

**THE FATE OF INVESTMENT DISPUTE RESOLUTION AFTER THE ACHMEA
DECISION OF THE EUROPEAN COURT OF JUSTICE¹⁻²**

***O DESTINO DA SOLUÇÃO DE LITÍGIOS DE INVESTIMENTO APÓS A DECISÃO
ACHMEA DA CORTE EUROPEIA DE JUSTIÇA***

Burkhard Hess

Founder and executive director of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. Guest professor in Beijing, in Paris (Sorbonne) and in Georgetown, and a scholar-in-residence at the Center for Transnational Law at the New York University. Expert and advisor to the European Commission, the European Parliament, the Council of Europe and national governments. Chairman of the ILA Committee on the Protection of Privacy in Private International and Procedural Law. *Doctor honoris causa* in the University of Ghent. E-mail: burkhard.hess@mpi.lu

ABSTRACT: This article explores the contents and consequences of the *Achmea* judgment recently given by the European Court of Justice (6 March 2018, case C-284/16). In its first part, the article analyses the judgment from a European point of view. It notes that *Achmea* is primarily concerned with the autonomy of the EU legal order in international dispute resolution and only secondarily with investment arbitration. The judgment seamlessly ties in with the Court's Opinion 2/13 on the Accession of the EU to the European Convention of Human Rights. In its second part, the article assesses the consequences of the judgment for current and future investment dispute resolution. It argues that (i) investment arbitration is over for intra-EU Bilateral Investment Treaties and

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(ii) most likely also for intra-EU disputes under the Energy Charter Treaty; (iii) the European Commission must be careful not to jeopardise the supremacy of the ECJ in interpreting the EU law when concluding future international dispute resolution agreements; (iv) the same holds true regarding dispute resolution under the UK Withdrawal Agreement when negotiating the Brexit.

KEYWORDS: Achmea; autonomy of the EU legal order; investment arbitration; intra-EU BIT; Energy Charter Treaty; Investment Court system; Brexit dispute resolution.

RESUMO: O presente Artigo explora o conteúdo e as consequências do julgamento Achmea recentemente realizado pela Corte Europeia de Justiça em 06 de março de 2018 (Caso C-284/16). Na primeira parte, o artigo analisa o julgamento sob a perspectiva europeia. Ressalta-se que Achmea está prioritariamente preocupada com a autonomia do sistema legal da União Europeia na solução de litígios internacionais e apenas indiretamente com a arbitragem de litígios de investimento. O julgado se adequa perfeitamente à Opinião da Corte 2/13 em relação à adesão da União Europeia à Convenção Europeia de Direitos Humanos. Na segunda parte, o artigo examina as consequências do julgado para a solução de litígios de investimento atuais e futuros. Discute-se se (i) a arbitragem de litígios de investimento terminou para Tratados de investimentos bilaterais intra-União Europeia e (ii) também para litígios intra-União Europeia segundo o Tratado de Energia; (iii) a Comissão Europeia deve ter cautela para que não vulnere a supremacia da Corte Europeia de Justiça na interpretação do direito da União Europeia ao celebrar futuros acordos de solução de litígios internacionais; (iv) o mesmo é verdade no que concerne a solução de litígios sob a égide do Acordo de Retirada do Reino Unido ao negociar o Brexit.

PALAVRAS-CHAVE: Achmea, autonomia do sistema jurídico da União Europeia; arbitragem em litígios de investimento; BIT intra-União Europeia; Tratado de Energia; Sistema da Corte de Investimento, solução de litígios do Brexit.

**1. Drawing the Red Line: the ECJ's Central Arguments in the Achmea Judgment.
Achmea: a Landmark Decision of the ECJ**

On 6 March 2018, the Grand Chamber of the ECJ, composed of its president, its vice-president and the presiding judges of five chambers gave its long-expected judgment in the *Achmea* case³. In the proceedings, 16 governments of European Union Member States and the European Commission actively participated, advancing different observations. The *Achmea* judgment is formulated as a landmark decision on the relationship between the EU judicial system and self-standing investment arbitration. As I will explain in this paper, the consequences of the ECJ's judgment are not confined to the single case at hand⁴. In its 12 pages judgment, the Grand Chamber bluntly rejected the arbitration- friendly conclusions of AG Wathelet (amounting to 38 pages), and drew a dividing line between investment arbitration and the fundamental competence of the ECJ as the ultimate arbiter in the Internal Market for disputes related to the fundamental freedoms of establishment, cross-border services and the free movement of capital. The judgment largely builds on the 2014 Opinion of the Court regarding the Draft Agreement on the Accession of the EU to the European Convention of Human Rights (Opinion 2/13).⁵ In this decision the ECJ precluded the transfer of any competences on the interpretation of issues subject to EU law to any adjudicatory body operating outside of the Union.⁶ By taking up this line of argument again in *Achmea*, the Court clearly demonstrated that there is a red line which neither the EU lawmaker itself (as in Opinion 2/13) nor the Member States (as in *Achmea*) can breach. Ultimately, *Achmea* is a political judgment, which must be read from the perspective of European Union law.⁷

In the following article, I will firstly present my own reading of the decision before I address its main consequences on intra-EU Bilateral Investment Treaties (BIT); and – especially – the consequences for pending and future arbitrations against EU Member

³ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158 (ECJ, 6 March 2018). The case has been exhaustively discussed in the legal literature, cf Jan Kleinheisterkamp, 'Investment Protection and EU Law: the Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 *Journal of International Economic Law* 85; Maciej Szpunar, 'Referrals of Preliminary Questions by Arbitral tribunals to the ECJ' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (JURIS 2017) 85; Konstanze von Papp, 'Clash of Autonomous Legal Orders' (2013) 50 *Common Market Law Review* 1039.

⁴ This was the overwhelming opinion in the first statements on the decision, most of them were published in blogs.

⁵ Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014).

⁶ In the case at hand: the European Court of Human Rights.

⁷ For a preliminary assessment cf Burkhard Hess, 'A European law reading of the Achmea judgment' (*Conflict of Laws .net*, 8 March 2018) <<http://conflictoflaws.net/2018/a-european-law-reading-of-achmea/>> accessed 29 March 2018.

States under intra-EU BITs and for the Energy Charter Treaty (ECT). Finally, I will address the issue of whether the *Achmea* decision may also have an impact on dispute settlement regimes in future International Investment Agreements concluded by the EU under Article 207 TFEU (i.e. in the extra-EU context) and with regard to the future Withdrawal Agreement after Brexit.

2. The Arbitration Proceedings and the Challenges of the Award in the German Courts

Firstly, I will briefly summarise the facts of the case and its procedural history.⁸ In 2004, the Slovak government opened up its national market to operators offering private sickness insurances. Achmea, an undertaking of a Dutch insurance group, established a subsidiary in Slovakia through which it contributed capital and offered private insurance services on the Slovak market, concluding contracts with clients. In the course of 2006 and 2007, the Slovak government partially reversed its earlier liberalization of the insurance market, ultimately prohibiting the distribution of profits made through private sickness insurances. This ban was successfully challenged in the Slovak Constitutional Court, which held in January 2011 that the prohibition was incompatible with the constitution. In August 2011, a new law permitted again the distribution of profits made from private sickness insurances offered on the Slovak market.

In the meantime (in 2008), Achmea had initiated arbitration proceedings against Slovakia under Article 8 of the Dutch-Czech-Slovakian BIT of 1992.⁹ This article provided for the parties to establish the arbitral tribunal within a particular time period, in the absence of which the appointments were to be administered by the Stockholm Chamber of Commerce. Furthermore, it provided that the arbitral tribunal was to determine its own procedure, applying the UNCITRAL arbitration rules. Article 8 further made reference to the applicable law. The arbitral tribunal chose Frankfurt as the place of arbitration and therefore German law applied as the *lex arbitri*. Slovakia initially objected to the jurisdiction of the arbitral tribunal, arguing that, following its accession to the EU, Article

⁸ For a broader description of the arbitration proceedings and the line of arguments developed by the arbitral tribunal (AT) see Kleinheisterkamp (n 1), 95 ff.

⁹ BIT, signed on 29 April 1991, in force since 10 January 1992; after the dissolution of the Czech and Slovakian Republic it remained binding on both successor states.

8, providing for recourse to arbitration, was incompatible with EU law, which was applicable to the dispute at hand. By an interlocutory award of October 2010, the arbitral tribunal rejected these arguments¹⁰ and, in December 2012, finally condemned Slovakia to pay damages of EUR 22.1 million to Achmea.¹¹ On the merits, the arbitral tribunal did not address European Union law.¹²

Slovakia subsequently tried to set aside the award under Section 1059 of the German Code of Civil Procedure (ZPO) and filed – unsuccessfully – an action for annulment with the Higher Regional Court of Frankfurt.¹³ Again, Slovakia argued that the arbitration under the BIT was incompatible with EU law. On appeal, the *Bundesgerichtshof* (BGH, Federal Supreme Court of Germany) indicated that it would not endorse the argument on the incompatibility of the BIT and particularly, the recourse to investment arbitration, with Union law, but nevertheless referred the issue under Article 267(3) TFEU to the ECJ.¹⁴ Being aware of the political implications of the preliminary reference the ECJ allocated the case to a Grand Chamber. In September 2017, AG Wathelet gave his Conclusions, in which he argued that the current intra-EU BITs were generally compatible with Union law.¹⁵ However, the Court of Justice saw the issue differently. Without making any reference to the Conclusions in its judgment, the Grand Chamber held that the investment arbitration clause under the Dutch-Czech-Slovakian BIT was incompatible with Articles 344 and 267 TFEU and that the arbitration agreement under Article 8 of the BIT was contrary to EU law.¹⁶

¹⁰ PCA Case No 2008-13 *Achmea/Eureko*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010). The arbitral tribunal was composed of V Lowe (QC), A van den Berg and V V v Veeder (QC) – all are experienced and well-regarded arbitrators in international commercial and investment disputes.

¹¹ PCA Case No 2008-13 *Achmea/Eureko*, Final Award (12 December 2012).

¹² PCA Case No 2008-13 *Achmea/Eureko*, Final Award (12 December 2012), para 276 where the AT held: ‘This award has no bearing upon any question of EU law.’

¹³ Oberlandesgericht Frankfurt 18 December 2014 DE:OLGHE:2014:1218.26SCH3.13.0A.

¹⁴ BGH 3 March 2016 DE:BGH:2016:030316BIZB2.15.0. Per para 14, the request for a preliminary reference was made in light of the long-standing controversy surrounding the compatibility issue (and the fact that the ECJ had not yet rendered a judgment on it) and the large number of intra-EU BITs that included a similar arbitration clause.

¹⁵ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2017:699, Opinion of AG Wathelet (19 September 2017).

¹⁶ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158 (ECJ, 6 March 2018), para 60. The Court held: ‘Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.’

It is now up to the *Bundesgerichtshof* to decide whether the award must be set aside in the ongoing annulment proceedings. Under Section 1059 ZPO, there are two alternatives that would allow the court to endorse the ECJ's decision. The award may either be set aside on the basis that there was no valid arbitration agreement between the parties (Section 1059(2) No 1(a) ZPO and/or on the basis that the recognition or enforcement of the award is incompatible with German public policy (Section 1059(2) No 2(b) ZPO).

3. A European Law Reading of the Achmea Judgment:

In the (investment) arbitration world, the judgment of the Grand Chamber continues to generate shock waves. From the perspective of international law, it seems to be difficult to integrate the judgment into the existing system of investment arbitration, especially in the context of the Vienna Convention on the Law of Treaties (VCLT) and the (potentially) applicable international instruments like the ICSID and the New York Conventions, the Energy Charter Treaty and the various regimes of BITs concluded within the EU, and between the EU and its Member States and third states. Where do we stand now? Before trying to provide some cautious answers this question, I would like to invite the reader to look at the judgment of the ECJ through the lenses of European Union law. In this respect, several issues arising in the judgment should be highlighted here.

First, the judgment does not directly respond to the arguments set out in the request for a preliminary reference. As mentioned above, the BGH had expected that the ECJ would state that intra- EU investment arbitration was compatible with Union law. Consequently, the reference had argued in favor of the compatibility.¹⁷ In this respect, the *Achmea* judgment is unusual, as the ECJ normally takes up at least some parts of the arguments supporting the questions referred to it.

Second, the Court did not follow the conclusions of Advocate General Wathelet.¹⁸ As the AG had pushed his arguments very much unilaterally in a (pro-arbitration) direction, he obviously provoked a firm resistance on the side of the Grand Chamber. In the judgment, not a single reference to the conclusions of the AG can be identified¹⁹ – this

¹⁸ BGH 3 March 2016 DE:BGH:2016:030316BIZB2.15.0.

¹⁹ The Court only addresses the issue whether the hearing should be reopened because some Member States had officially expressed their discomfort with the AG's Conclusions, Case C-284/16 *Slovak Republic v*

is unusual and telling, too.

Third, the basic line of argument developed by the ECJ is to be mainly found in paras 31–37 of its judgment. Here, the Court sets the tone in terms of foundational concepts of EU law. The Grand Chamber refers to basic constitutional principles of the Union (primacy of Union law, effective implementation of EU law by the courts of the Member States, and in particular, the notion of EU law as an autonomous legal order based on mutual trust and shared values). With particular consideration of the autonomy of EU law (as regards the law of the Member States and international law), it is telling that each paragraph quotes Opinion 2/13,²⁰ which is one of the most important (and most political) decisions of the Court on the autonomy of the EU legal order and the role of the Court itself being the last and final instance for the interpretation of EU law.²¹ One can legitimately conclude that also *Achmea* is primarily about the autonomy of the EU legal order in international dispute settlement and only in the second place about investment arbitration. *Mox Plant*²² has been reinforced and a dividing line (regarding concurrent dispute settlement mechanisms) has been drawn.²³

That is to say, *Achmea* is not only about investment arbitration: Its ambition goes further. If one looks at para 57 of the judgment, the Grand Chamber addresses also future dispute settlement regimes under public international law and their relationship to the adjudicative function of the ECJ. One has to be aware that Brexit and the future dispute resolution regime regarding the Withdrawal Agreement are likely to be in the mindset of the Court. In this respect, the wording of paragraph 57 is telling. It states:

It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or

Achmea BV EU:C:2018:158 (ECJ, 6 March 2018), paras 24–30.

²⁰ Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014).

²¹ For the political connotations of Opinion 2/13, cf Daniel Halberstam, “‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward” (2015) 16 *German Law Journal* 105.

²² Case C-459/03 *Commission v Ireland* EU:C:2006:345 (ECJ, 30 May 2015).

²³ This is the reason why the ECJ highlights art 344 TFEU, see *infra* text at n 55.

designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*.²⁴

Against the background of European Union law, the *Achmea* judgment appears to be less surprising than the first reactions of the ‘arbitration world’ would otherwise lead one to believe.²⁵ Furthermore, the (contradictory)²⁶ statement in paragraphs 54 and 55 on the distinction to be drawn between investment and commercial arbitration should be read as a signal of the Grand Chamber that the far-reaching consequences of the judgment with regard to investment arbitration do not apply equally to commercial arbitration (*Eco Swiss*²⁷ and *Mostaza Claro*²⁸ are explicitly maintained).²⁹ According to *Eco Swiss* and to *Achmea*, arbitral tribunals are not permitted to file preliminary references to the ECJ but Member State courts must verify whether the arbitral award sufficiently respects mandatory EU law (and if necessary itself make a reference to the ECJ for a preliminary ruling).³⁰ In this respect, *Achmea* does not change the present situation.

4. Assessing the Consequences. The Future of Intra-EU BIT

Achmea sets several limits for investment arbitration. The most striking consequences relate to intra- EU BITs. After *Achmea*, there is no future for BITs concluded between EU Member States. The judgment dictates that within the Internal Market, EU Member States are no longer permitted to conclude BITs in order to set up a

²⁴ Highlighted by B Hess.

²⁵ Cf the reaction of German lawyers in Marc Chmielewski, ‘Nach dem EuGH-Urteil: Investitionsschutzverträge sind noch nicht tot’ (*Juve/nachrichten*, 7 March 2018) <<https://www.juve.de/nachrichten/verfahren/2018/03/nach-dem-eugh-urteil-investitionsschutzvertraege-in-der-eu-sind-noch-nicht-tot>> accessed 29 March 2018; Steffen Hindelang, ‘The Limited Immediate Effects of CJEU’s *Achmea* Judgement’ (*VerfBlog*, 9 March 2018) <<https://verfassungsblog.de/the-limited-immediate-effects-of-cjeu-achmea-judgement/>> accessed 29 March 2018.

²⁶ Both, commercial and investment arbitration are primarily based on the consent of the litigants, see Burkhard Hess, ‘The Private Public Divide in International Dispute Settlement’ (2018) 388 *Recueil des Cours de l’Académie de Droit International de la Haye*, para 121 – in print.

²⁷ Case C-126/97 *Eco Swiss* EU:C:1999:269 (ECJ, 1 June 1999).

²⁸ Case C-168/05 *Mostaza Claro* EU:C:2006:675 (ECJ, 26 October 2006).

²⁹ It is interesting to note that the concerns of the ECJ (paras 50 ff) regarding the intervention of investment arbitration by courts of EU Member States did not apply to the case at hand as German arbitration law permits a review of the award (s 1059 ZPO). The concerns expressed relate to investment arbitration which operates outside of the NYC without any review of the award by state court, especially in the context of art 54 and 55 ICSID Convention.

³⁰ Burkhard Hess, *Europäisches Zivilprozessrecht* (CF Müller 2010) § 12 para 23.

second layer of economic relations based on international law.³¹ Accordingly, intra- EU investors, as a matter of principle, cannot expect to establish themselves in a better legal position than that which their respective home State would obtain in the context of EU law. Furthermore, in this respect, investment arbitration cannot and does not change their legal status and protection within the Internal Market. Here, *Achmea* is simply clarifying a truism of EU law.³² As already requested by the European Commission (under Article 351 TFEU)³³, Member States must now terminate the existing 196 intra-EU BITs by mutual consent (Article 54 VCLT).³⁴

Following *Achmea*, some authors³⁵ have raised the question as to whether the judgment also applies to intra-EU BITs which do not refer to EU law as the applicable law³⁶, but only generally to the BIT and international law.³⁷ Indeed, here there would literally be no direct conflict, as these BITs simply carve out any reference to EU law.³⁸ However, this formalistic approach does not correspond to the concerns the ECJ expressed in *Achmea*. The respect for the autonomy of EU law in the legal relationships between EU Member States and within the Internal Market requires its application to a given case whenever EU law is applicable. Or to phrase it differently: EU Member States cannot derogate from mandatory Union law by simply agreeing to an international investment treaty without referring to EU law, which is largely applicable to cross-border investments in the Internal Market. As a result, the considerations of the *Achmea* judgment apply to all

³¹ George A Berman, 'EU Law as a Jurisdictional and Substantive Defense in Investor State Arbitration' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (JURIS 2017) 649, 650 f, correctly states that EU Member States never concluded BITs alongside the guarantees afforded by the Internal Market in order to open up to their citizens an additional layer of protection. All intra-EU BITs are BITs which were concluded between Member States and third States *before* the accession of the latter to the European Union.

³² Different Opinion: Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2017:699, Opinion of AG Wathelet (19 September 2017), paras 49 ff and 183 ff, who did not see any violation of art 18 TFEU by the BITs. The ECJ did not address the issue.

³³ Cf European Commission, 'Press Release: Commission asks Member States to terminate their intra-EU bilateral investment treaties' (Brussels, 18 June 2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm> accessed 29 March 2018.

³⁴ Kleinheisterkamp (n 1), 100 ff.

³⁵ This issue was raised by Holger Hestermeyer in OGEMID on 8 March 2018

³⁶ In *Achmea*, the Dutch-Czech-Slovakian BIT referred to national law as applicable law (which the AT interpreted as in a way that domestic law also included EU law). However, this approach does not sufficiently respect the autonomy and prevalence of EU law.

³⁷ In this context, art 30(3) VCLT would nevertheless permit to consider EU law as applicable international law between the parties, cf Berman (n 29), 653 ff. See *infra* text at n 51.

³⁸ This is ie the case of art 8(3) of the Hungary-Croatia BIT, signed on 15 May 1996, which reads as follows: 'The arbitration award shall be base [sic] on: (1) The provisions of this agreement [the BIT]; (2) The rules and the universally accepted principles of international law.'

intra-EU BITs regardless of whether they explicitly refer to EU law or not.

5. Article 267 TFEU in the Context of Investment Arbitration:

Before *Achmea*, many attempts had been made in the legal literature to reconcile investment arbitration and EU law at a procedural level. Several authors tried to argue that Investment Tribunals should be considered as ‘courts of a Member State’ in the sense of Article 267 TFEU in order to permit them to send preliminary references to the ECJ concerning the impact of EU law on the interpretation of the BIT.³⁹ This was also the line of argument adopted by AG *Wathelet* in his Conclusions in *Achmea*.⁴⁰

However, the ECJ dismissed this approach by stressing the ‘exceptional character of the arbitral tribunal’ operating outside of the Dutch and Slovakian court systems (paras 43–45). Here, the Grand Chamber did not endorse the argument that the BIT integrated the investment dispute resolution mechanism into the dispute resolution framework of the two Member States with the consequence that the arbitral tribunal could be considered ‘a court of a Member State’ in the sense of Article 267 TFEU. As a result, any direct dialogue between a BIT arbitral tribunal and the ECJ in preliminary reference proceedings was excluded.

One might ask whether *Achmea* is, in this respect, a missed opportunity. On the one hand, the ECJ clearly stated that under Article 8(6) of the BIT, the task of the arbitral tribunal was also to apply EU law when interpreting and resolving disputes arising under the BIT.⁴¹ However, the Court saw a procedural deficiency in ensuring the effective application of EU law, as the arbitral tribunal was not sufficiently integrated in the judicial system of the Member States concerned, so as to allow its decisions to be ‘subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU’⁴² (Article

³⁹ Jürgen Basedow, ‘The Transformation of the European Court of Justice and Arbitration Referrals’ in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (JURIS 2017) 125, 135 ff; Szpunar (n 1), 108 ff.

⁴⁰ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2017:699, Opinion of AG *Wathelet* (19 September 2017), paras 84–131.

⁴¹ However, the award on the merits in the *Achmea* case solely applied the BIT, PCA Case No 2008-13 *Achmea/Eureko*, Final Award (12 December 2012), para 276.

⁴² Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158 (ECJ, 6 March 2018), para 43; Opinion 1/09 *Agreement creating a unified patent litigation system* EU:C:2011:123 (ECJ, 8 March 2011), para 82.

19(1) TEU).⁴³ Furthermore, the ECJ also considered the review by German Courts in the present case as insufficient. In this respect, the ECJ highlighted that the arbitral tribunal (on its own motion) had chosen Frankfurt as the seat of arbitration (paras 52 and 53). It was because of this choice that German and EU law applied as the *lex arbitri* and that annulment proceedings could be brought before German courts. However, the procedural framework of Article 8 of the Dutch-Czech-Slovakian BIT did not provide for any safeguard that the investment arbitration would take place in an EU Member State (and would be under the residual control of the courts of this Member State). Therefore, the ECJ concluded that the procedural safeguard for the efficient application of EU law was insufficient (para 53).⁴⁴

In this respect, the judgment of the ECJ seems to be contradictory: Due to the review proceedings in the German Courts, the ECJ had been invoked under Article 267 TFEU and was able to implement the precedence of EU law in the case at hand. Therefore, the effectiveness of EU law was indeed guaranteed and implemented by the review proceedings under Section 1059(2) ZPO.⁴⁵ It appears that the Grand Chamber mainly considered the more problematic constellations where any review of the arbitral award by the Courts of Member States is excluded, either because of the structure of the arbitration dispute settlement framework (ICSID) or because the arbitral tribunal has its seat in a third state.⁴⁶

The ECJ's concerns about the insufficient control of the arbitral award by courts of EU Member States were not justified in the case under consideration. As a consequence of the ECJ's decision, the BGH must annul the arbitral award because the underlying dispute resolution system generally does not sufficiently ensure the effectiveness and autonomy of EU law.⁴⁷ The issue of whether the arbitral award sufficiently respected the autonomy of EU law (in my opinion: it did not) does not play any role. This is to be regretted. The better

⁴³ This corresponds to the self-understanding of investment AT which consider themselves as 'international courts', see PCA Case No 2008-13 *Achmea/Eureko*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), paras 228–9 (where the arbitral tribunal considered itself as an international tribunal).

⁴⁴ In his Opinion, Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2017:699, Opinion of AG Wathelet (19 September 2017), paras 252 f, AG Wathelet considered this risk as 'hypothetical'.

⁴⁵ The procedural situation in *Achmea* corresponded to the constellation in *Eco Swiss*. In both cases, the ECJ was asked in the context of annulment proceedings about the effectiveness of EU law.

⁴⁶ In this constellation, annulment proceedings cannot directly be based on EU law, but the recognition of the award in the EU might be barred by art V(1)(a) and (2)(b) NYC because mandatory EU law was not respected.

⁴⁷ The pertinent provision in this respect is art 344 TFEU, cf Bernhard W Wegener, 'art 344 AEUV' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV Kommentar* (5th edn, BECK 2016), paras 2 f.

approach would have been to strengthen the role of the courts of EU Member States in the annulment and recognition proceedings of investment awards: Here, the insufficient respect for EU law might entail the setting aside or the non-recognition of the award. In these proceedings, the courts of the EU Member States can refer preliminary questions to the ECJ under Article 267 TFEU. However, with regard to intra-EU BITs, the ECJ went further and held that investment arbitration in this constellation is generally incompatible with the autonomy of EU law.]

6. Achmea and Pending Arbitration Proceedings. UNCITRAL and Similar Proceedings:

How shall arbitral tribunals constituted under existing intra-EU BITs and dealing with pending disputes react to the *Achmea* judgment? Does the decision of the ECJ entail that they have to abstain from any further proceedings and thus terminate the case? In this respect, the perspective of an arbitral tribunal will be different from the perspective of the ECJ. An arbitral tribunal addresses the jurisdictional relationship between the BIT and EU law from the perspective of Articles 59 and 30 VCLT. According to Article 59⁴⁸, a treaty is considered to be terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears that the parties intended that the subject matter should be governed by the later treaty and both treaties are not capable of being applied at the same time.⁴⁹ The accession of the parties of the intra-EU BIT to the EU Treaties could be considered to give rise to such a situation. Until now, arbitral tribunals have however decided that the conditions of Article 59 VCLT were not fulfilled.⁵⁰ They reached this conclusion by comparing the guarantees of the TFEU with the general guarantees of the respective BIT and held that the guarantees of the BIT went (much) further than those in

⁴⁸ Berman (n 29), 653 ff. In PCA case No 2008-13 *Achmea/Eureko*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), paras 188–93, the AT addressed art 59 VCLT only in a comparison between the substantive guarantees and not with regard to the agreed dispute resolution mechanism. In the award on the merits, EU law was not applied, see supra n 10.

⁴⁹ Art 59 VCLT reads as follows: ‘(1) A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.’

⁵⁰ PCA Case No 2008-13 *Achmea/Eureko*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), paras 233–64.

the TFEU. Based on this rather formalistic approach, usually the objection to jurisdiction has been rejected.⁵¹ *Achmea* might change the present state of affairs: What counts with regard to jurisdiction are no longer the substantive guarantees for the investor, but the prohibition of Article 344 TFEU to agree on any dispute resolution mechanism outside of the EU as long as EU law is applicable to the dispute. In this respect, arbitral tribunals should consider a different, more functional approach which targets the dispute resolution clause in the BIT. The issue here is whether this clause as agreed between the contracting states has been overridden by Article 344 TFEU. However, it must be mentioned that Article 59 VCLT does not entail an automatic termination of the treaty but triggers the termination procedure of Article 65 VCLT.⁵² This is why the conflicting regimes should be addressed by Article 30 VCLT.

In the past, some arbitral tribunals addressed the issue under Article 30(3) VCLT.⁵³ Pursuant to this article, when the earlier treaty is not terminated, its provisions only apply to the extent that they are compatible with those of the later treaty.⁵⁴ The arbitral tribunal's line of argument in the *Achmea/Eureko* Award against Article 344 TFEU was to distinguish *Mox Plant*⁵⁵, a dispute involving two states but not a state and a private investor.⁵⁶ The position of the ECJ in *Achmea* is, however, quite clear: Article 344 TFEU is applicable to intra-EU investment arbitration and it prevails over the dispute resolution

⁵¹ The same argument was raised in the Conclusions of AG Wathelet, Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2017:699, Opinion of AG Wathelet (19 September 2017), paras 180–222.

⁵² Thomas Giegerich, 'art 65 VCLT' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary* (2nd edn, Springer 2018), para 37.

⁵³ In PCA case No 2008-13 *Achmea/Eureko*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), paras 274, 276, the arbitral tribunal held that there is no rule of EU law prohibiting investor-State arbitration and that art 344 TFEU does not concern these disputes. 'There is no suggestion here that every dispute that arises between a Member State and an individual must be put before the ECJ; nor would the ECJ have the jurisdiction (let alone the capacity) to decide all such cases.' (para 276); SCC No 088/2004 *Eastern Sugar v Czech Republic*, Partial Award (27 March 2007), para 180 – without mentioning art 344 TFEU; *Binder v Czech Republic* Award on Jurisdiction (6 June 2007), para 65 – rejecting in substance without mentioning either art 30(3) VCLT or art 344 TFEU: 'The fact that, when there is a BIT, [a legal action before the national courts] is replaced or supplemented by an international arbitration mechanism does not, in the arbitral tribunal's view, involve any discrimination and is not otherwise incompatible with EC rules and principles.'

⁵⁴ Art 30(3) VCLT reads as follows: 'When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.'

⁵⁵ See supra n. 22.

⁵⁶ PCA case No 2008-13 *Achmea/Eureko*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), para 276. The arbitral tribunal in *Electrabel v Republic of Hungary* applied the same reasoning, ICSID Case No ARB/07/19, Decision on Jurisdiction (30 November 2012), para 4.150 f.

clause in Article 8 of the Dutch-Czech-Slovakian BIT.⁵⁷

It remains to be seen to what extent arbitral tribunals will be willing to adopt this different approach to pending arbitrations. One crucial element in this context might be the procedural and institutional setting of the respective arbitration proceedings. In this respect arbitrations conducted under the UNCITRAL rules which are administered by the PCA or by other arbitration institutions (e.g. SCC, ICC, LCIA) are much more dependent on the support of national courts than arbitrations held under ICSID. The latter are fully detached from the national court systems as they do not require any recognition by state courts: They are immediately enforceable.⁵⁸ The situation is different for other BIT arbitrations: Here, the award might be challenged in state courts either in annulment proceedings at the seat of the tribunal or in recognition proceedings under Article V NYC.⁵⁹

Against this background, arbitral tribunals in intra-EU BIT proceedings will be confronted with a reinforced defence on jurisdiction mainly based on Article 344 TFEU as interpreted by the ECJ in *Achmea*.⁶⁰ Of course, arbitral tribunals might simply ignore this argument by declaring a defence based on EU law to be as unimportant as a defence based on domestic law of the defendant state.⁶¹ However, the *lex posterior* clause in Article 30(3) VCLT provides the hinge to reconsider Article 344 TFEU even from the public international law perspective. Further, arbitrators are not only expected, but also under the legal obligation, to render an award which is capable of being recognised and enforced. As long as arbitral awards need recognition in order to be enforced, arbitrators cannot simply disregard the changed situation following *Achmea*.

⁵⁷ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158 (ECJ, 6 March 2018), para 60.

⁵⁸ Art 54 and 55 ICSID-Convention provide for the direct enforcement of the award without any recognition procedure (where the award might be reviewed for major procedural and substantial shortcomings), von Papp (n 1), 1058 ff.

⁵⁹ In this constellation a ‘bypassing’ of the residual control of EU Member States’ courts is more difficult, von Papp (n 1), 1061 f.

⁶⁰ The different legal situation results from the finding of the ECJ that the application of art 344 TFEU on Intra-EU investment arbitrations cannot be longer denied.

⁶¹ An argument quoted in this context might be art 27 VCLT, see Robert Volterra, ‘Le point de vue des Etats tiers’ in Catherine Kessedjian & Charles Leben (eds), *Le droit européen et l’investissement* (Panthéon-Assas 2009) 41, 43. However, the assimilation to domestic law ignores the international law character of EU law in the context of the VCLT, see Kirsten Schmalenbach, ‘art 27 VCLT’ in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary* (2nd edn, Springer 2018), para 11, stressing the ‘concurring character’ of the TFEU qualifying as a treaty in the sense of article 2 VCLT and as internal law.

7. The Situation of ICSID Proceedings:

The procedural situation is different in the context of ICSID arbitration. However, simply deciding on the merits without considering the impact of Article 344 TFEU on Article 30 VCLT might be dangerous for an arbitral tribunal and open up an avenue for annulment proceedings under Article 52 ICSID Convention. Against this background, it is at least to be expected that pending ICSID arbitrations will open up hearings again in order to address the changed legal situation post-*Achmea*. In addition, arbitral tribunals and parties (including third party funders) will be well aware that the ordering of payment from the defendant EU Member State might be considered as (unlawful) state aid (Article 107 TFEU) and that, eventually, the enforcement of the award might fail.⁶²

Finally, the situation of ICSID awards which have already been rendered is more complex. In this respect, enforcement is not regulated by the BIT, but by Article 54 of the ICSID Convention, which does not provide for any ground of refusal.⁶³ This is a multilateral agreement, binding all EU Member States (apart from Poland) but also more than 100 non-EU Member States. Within the EU, the present situation is highlighted by the current state of affairs in the *Micula* cases. Here, the arbitral tribunal had decided in favour of the Swedish/Romanian investors, but the EU Commission has initiated proceedings under Article 107 AEFU which are currently being challenged by the investors in the General Court.⁶⁴

8. The Energy Charter Treaty:

The consequences of the *Achmea* judgment for the ECT⁶⁵ are most problematic. The ECT was concluded as a mixed agreement by the EU and the EU Member States with third states (mainly states belonging to the former Soviet Union and its former allies). Its

⁶² It might also be possible that the Commission directly requests the investor to repay the sum recovered in a third state. This is already the setting in the *Micula* case, now pending in the General Court, Case T-704/15 *Micula et al v Commission*.

⁶³ Art 54(3) ICSID-Convention does not open up (limited) review proceedings with regard to the ICSID award as it only refers to the enforcement laws of the requested state, von Papp (n 1), 1058 ff.

⁶⁴ Case T-704/15 *Micula et al v Commission*. These proceedings demonstrate the underlying political stakes: The last word lies with state courts (including the CJEU), not with arbitral tribunals.

⁶⁵ Energy Charter Treaty of December 1994, OJ 1998 L 69/1 ff, available at <https://energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf>.

aim is to guarantee a free market and free access to energy in Europe and Central Asia by creating a kind of European Energy Community.⁶⁶ The ECT provides for a Chapter on Investment Protection in the energy sector which largely provides for the typical guarantees in BITs.⁶⁷ However, it does not contain a disconnection clause for intra-EU disputes.⁶⁸ Despite the Commission's efforts to argue in favor of the existence of an 'implicit disconnection clause', it is hard to deny that the ECT does create an intra-EU framework for the protection of investments in the energy sectors.

The dispute settlement clause is found in Article 26 of the ECT. Article 26(4) gives investors the possibility to pursue, at their choice, claims against contracting states in the context of ICSID, ICSID Additional Facility, UNCITRAL or SCC arbitration. Article 26(6) of the ECT provides that the applicable law are the ECT and 'applicable rules and principles of international law'.⁶⁹ The basic scenario, therefore, is largely the same as the one of intra-EU BITs in the *Achmea* case. However, recent arbitral awards given under the ECT have usually rejected the argument of the European Commission that intra-EU disputes are excluded from its dispute settlement regime.⁷⁰

Yet, Article 30(4)(a) VCLT⁷¹ might provide a line of argument under public

⁶⁶ Kleinheisterkamp (n 1), 86 ff. 'The Treaty's provisions focus on four broad areas: (1) the protection of foreign investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable) and protection against key non-commercial risks; (2) non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on WTO rules, and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation; (3) the resolution of disputes between participating states, and - in the case of investments - between investors and host states; (4) the promotion of energy efficiency, and attempts to minimise the environmental impact of energy production and use.' <<https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>> accessed 29 March 2018.

⁶⁷ Kleinheisterkamp (n 1), 89 ff (listing 'examples of conflicts between EU law and BIT provisions').

⁶⁸ By such a clause, intra-EU investment disputes are excluded from the scope of the dispute clause of the international convention.

⁶⁹ Art 26 ECT reads as follows: '(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (a) The International Centre for Settlement of Investment Disputes (...), if the Contracting Party of the Investor and the Contracting Party to the dispute are both parties to the ICSID Convention; (...) (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.'

⁷⁰ SCC Case No V062/2012 *Charanne v Spain*, Final Award (21 January 2016), paras 440–45; ICSID Case No ARB/13/30 *RREEF v Spain*, Decision on Jurisdiction (6 June 2016), para 79 f; SCC Case V2013/153 *Isolux v Spain*, Award (17 July 2016), paras 641–60; ICSID Case No ARB/14/3 *Blusun v Italy*, Award (27 December 2016), paras 277–91; ICSID Case No ARB/13/36 *Eiser Infrastructure v Spain*, Award (4 May 2017), paras 179–207, see Eric Leikin and Martina Maniarelli, 'The Future of Intra-EU ECT Claims in the Face of EC Opposition: Boom or Bust?' (*Kluwer Arbitration Blog*, 15 September 2017), <<http://arbitrationblog.kluwerarbitration.com/2017/09/15/icca-2/>> accessed 29 March 2018.

⁷¹ Art 30(4)(a) VCLT reads as follows: 'When the parties to the later treaty do not include all the parties to

international law to integrate the *Achmea* judgment into the framework of the ECT. According to this provision, a later treaty provision prevails between those parties who ratified both the earlier and later treaty. In *Blusun v Italy*, the European Commission had argued as *amicus curiae* that the EU Treaties of Amsterdam (1998), Nice (2003), and Lisbon (2009), had repealed the dispute resolution clause of Article 26 of the preceding ECT for intra-EU disputes through Article 344 TFEU.⁷² However, several arbitral tribunals held that this provision at most applied to inter-State disputes.⁷³ In *Achmea*, the ECJ put an end to this narrow construction of Article 344 TFEU. The new reading of Article 344 TFEU might entail that this provision is considered as an overriding *lex posterior* (Art. 30(4)(a) VCLT) which (partly) derogates Article 26 ECT.⁷⁴ Considering this argument, the arbitral tribunal in *Blusun v Italy* would have denied its jurisdiction.⁷⁵

Does the fact that the EU itself is a party to the ECT change the legal situation? In this respect, some arbitral tribunals have argued that the EU accepted the possibility of arbitration between investors and EU Member States because it signed the ECT.⁷⁶ However, not only from the public international law perspective under Article 30 VCLT, but also from the European law perspective this argument is not convincing. According to the longstanding case-law of the ECJ, the Union of course remains bound by EU primary law when ratifying an international agreement and the organs of the Union have no power to change the supremacy of EU primary law by concluding international treaties.⁷⁷ This is the very reason why Article 218(11) TFEU provides for the possibility of a review of an

the earlier one: (a) As between States parties to both treaties the same rule applies as in paragraph 3...'

⁷² ICSID Case No ARB/14/3 *Blusun v Italy*, Award (27 December 2016), summarised by the arbitral tribunal in para 285.

⁷³ ICSID Case No ARB/14/3 *Blusun v Italy*, Award (27 December 2016), para 289. Without the EC's interference, the AT in ICSID Case No ARB/13/36 *Eiser Infrastructure v Spain*, Award (4 May 2017), paras 203 f, followed the same argument. The reasoning runs parallel to the one of the AT in *Achmea*, see above note 54.

⁷⁴ On the temporal effects of interpretation of treaty provisions cf Oliver Dörr, 'art 31 VCLT' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary* (2nd edn, Springer 2018), paras 22 ff.

⁷⁵ The AT did not deny the applicability of the EC's argument under art 30 VCLT but only the scope assigned to art 344 TFEU. In para 289 it held: 'Article 344 of the TFEU. Even if there were such an inconsistency [between Article 27 ECT and Article 344 TFEU], this would not also void Article 26 [ECT], since the later Treaty will supersede the earlier one only to the extent of any incompatibility.' Highlighted by B Hess.

⁷⁶ SCC Case No V062/2012 *Charanne v Spain*, Final Award (21 January 2016), para 445; *Electrabel v Republic of Hungary* applied the same reasoning, ICSID Case No ARB/07/19, Decision on Jurisdiction (30 November 2012), para 4.158.

⁷⁷ Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECHR* [1996] ECR I-1759, paras 30–5; Kleinheisterkamp (n 1), 105–6 with additional references.

international treaty by the ECJ before its ratification.⁷⁸ However, arbitral tribunals might refer to Article 27 VCLT which prohibits states from invoking domestic law to escape from their international law obligations.⁷⁹

After *Achmea*, the Union must consider changing the broad dispute resolution clause of Article 26 ECT. One possible – political – solution might be a renegotiation of the ECT itself. However, one might wonder whether non-EU contracting parties will be willing to renegotiate the whole framework. A more realistic solution might be to conclude a special agreement among the EU Member States and the Union providing for a dispute settlement framework which refers investors coming from EU Member States to the courts of EU Member States⁸⁰, or providing for arbitration excluding ICSID rules and with the seat of arbitration only within EU Member States.⁸¹ This solution would preserve the observance of EU law in the established framework of *Nordsee* and *Eco Swiss* at the annulment and recognition stages of arbitration.⁸² It might also be compatible with the standards of *Achmea* where the Grand Chamber clearly stated that the conclusion of international treaties by the Union (including dispute resolution clauses) is still possible as long as the autonomy and full observation of EU law are preserved (para 57). This solution would correspond to the dispute resolution mechanism providing for .eu-domain names under Regulation (EU) 874/2004: Here, Article 5 (1) of Regulation (EU) 874/2004 provides that disputes regarding .eu domains can only be brought before courts in EU Member States or before arbitral tribunals having their seat in an EU Member State.⁸³

Under international law (and before investment arbitral tribunals), EU Member States and the European Union (acting as an *amicus curiae*) could invoke Article 30(4)(a)

⁷⁸ Recent Example: Opinion 2/15 *On the EU IIA with Singapore* ECLI:EU:C:2017:376 (ECJ, 16 May 2017), paras 285 ff (on ISDS) where the Court expressly stated that it did not address the compatibility of the regime with art 344 TFEU (para 302).

⁷⁹ It is controversial to what extent art 27 VCLT applies to Regional Economic Organizations being contracting parties to an international treaty, see *supra* at n 59.

⁸⁰ As investment arbitration originates in the international agreement concluded between the home state of the investor and the host state, both states are free (under international law) to change the dispute settlement framework with regard to their nationals. The legal position of other contracting parties remains unaffected.

⁸¹ This solution would guarantee that annulment proceedings against the award (based on Union law) can be brought before court of the Member States and that these courts may make preliminary references to the ECJ. This solution would correspond to the case-law of the ECJ in 102/81 *Nordsee* (ECJ, 23 March 1982).

⁸² See *supra* text at n 30.

⁸³ Regulation (EU) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration. OJ 2004 L L 162/40 ff.

VCLT in order to justify possible changes of Article 26 ECT after *Achmea*.⁸⁴ However, in the specific situation of the ECT, it might not be possible for the EU and its Member States alone to amend the ECT and to exclude the application of its ISDS provision *inter se*. The legal impediment is found in Article 42 ECT which states that any amendment to the ECT requires the consent of three quarter of the contracting parties (Article 36 ECT). However, EU Member States make up only 54% of the contracting parties.⁸⁵ The issue here is whether and to what extent Article 42 ECT prevails over the general provisions of Article 30 VCLT.⁸⁶

9. The New Investment Court System:

On 20 March 2018, the Council of the European Union adopted Negotiation Directives authorizing the European Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes.⁸⁷ No 7 of the Directives defines the personal scope of the future system in the following terms: ‘The Convention should also allow the Member States of the Union and third countries to bring agreements to which they are or will be Parties to under the jurisdiction of the multilateral court.’⁸⁸ The corresponding footnote provides an explicit exception for intra-EU disputes under BITs and the ECT. It states: ‘Without prejudice to the question of their validity or applicability under EU law, bilateral investment treaties concluded among Member States (i.e. intra-EU BITs), as well as the intra- EU application of the Energy Charter Treaty shall not fall within the scope of these directives.’

From a public international law perspective, this disconnection clause is necessary because the arguments under Article 30 VCLT developed in this paper are not applicable to ISDS provisions to be incorporated into international investment agreements that the European Union concludes under Article 207 TFEU as these agreements are subsequent to

⁸⁴ See *supra* text at n 69.

⁸⁵ Leikin and Maniarelli (n 68).

⁸⁶ In the context of the VCLT, the *lex specialis* rule is applicable, see eg art 54 VCLT.

⁸⁷ Council of the EU, ‘Multilateral investment court: Council gives mandate to the Commission to open negotiations’ Press Release 144/18 (20 March 2018), <<http://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/pdf>> accessed 29 March 2018.

⁸⁸ Council of the EU, ‘Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes’ (1 March 2018) 3, <<http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> accessed 29 March 2018.

the TFEU. However, the conflicts of norms cannot be solved by simply relying on rules on intertemporal conflicts. Concerning the disconnection clause, the *Achmea* judgment is an implicit warning to the Commission (and the Member States) from the European law perspective, reaching much further than the exception for which the negotiation directives provide:⁸⁹

Para 57 of the *Achmea* judgment says that a system establishing a court which renders decisions binding on the European institutions, including the ECJ, is not in principle incompatible with EU law, as demonstrated by the fact itself that the EU has competence to conclude agreements of this type.⁹⁰ However, there is a fundamental boundary: The autonomy of the legal order of the Union must be respected. The reference to Opinion 2/13 here looks like a caveat: There is margin for dispute settlement, but it seems to be quite narrow, given the primary objective of preserving the autonomy of EU law. As concluded by the ECJ in Opinion 2/13, an international agreement comes to constitute part of EU primary law as a result of accession.⁹¹ Hence, its dispute resolution system violates Article 344 TFEU if any matter of EU law arises in relation to which there is the possibility that another dispute resolution body can provide for a binding interpretation of EU law without being subject to the ECJ's scrutiny.⁹²

As a way out of this predicament, *Achmea* might also be read as a roadmap for the integration of an international investment court (as foreseen by the CETA and the TTIP⁹³) into the framework of Article 19 TEU and 267 TFEU.⁹⁴ Both proposals provide for the establishment of a permanent court of arbitration. Eventually, such a permanent court might qualify as a court in the sense of these provisions and the international investment agreement (IIA) might even clarify the point. The ECJ would therefore take supremacy in interpreting the IIA with regard to EU law. However, the inclusion of such a provision in the IIA does not only depend on the willingness of the EU, but also on the consent of the other contracting party.

⁸⁹ See Steffen Hindelang, 'Repellent Forces: the CJEU and Investor-State Dispute Settlement' [2015] *Archiv des Völkerrechts* 68. ⁸⁸ See supra text before n 87; cf Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014), para 182.

⁹⁰ See supra text before n 87; cf Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014), para 182

⁹¹ Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014), para 204.

⁹² Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014), para 205 f.

⁹³ This issue will be addressed by the ECJ in the pending Opinion 1/17.

⁹⁴ *Szpunar* (n 1), 85 ff.

10. Brexit: Dispute Settlement Provisions in the Withdrawal Agreement

Finally, the *Achmea* judgment is also relevant for the Brexit negotiations, and in particular for the dispute settlement mechanism to be included in the future Withdrawal Agreement with the UK. As a starting point, there is no doubt that EU law will be potentially applicable here, so in this sense the Brexit scenario is even less dubious than the one of intra-EU BITs. Notoriously, the UK wants to escape the jurisdiction of the ECJ. However, from the perspective of EU law, excluding the ECJ seems to be impossible.

Against this background, the EU Commission's proposal for a Withdrawal Agreement goes in a very different direction.⁹⁵ Under Article 162(3) of the Draft Agreement, the Joint Committee 'may, at any point, decide to submit the dispute brought before it to the Court of Justice of the European Union for a ruling. The Court of Justice of the European Union shall have jurisdiction over such cases and its rulings shall be binding on the Union and the United Kingdom.' Furthermore, under Article 163(1), Where the Union or the United Kingdom consider that the other has not taken the necessary measures to comply with the judgment of the Court of Justice of the European Union resulting from proceedings referred to in Article 162, either the Union or the United Kingdom may bring the case before the Court of Justice of the European Union. The Court of Justice of the European Union shall have jurisdiction over such cases and its rulings shall be binding on the Union and the United Kingdom.

Finally, the European Council noted in its Guidelines for negotiating the Withdrawal Agreement:⁹⁶

7. ... The European Council further reiterates that the Union will preserve its autonomy as regards its decision-making, which excludes participation of the United Kingdom as a third-country in the Union Institutions and participation in the decision-making of the Union bodies, offices and agencies. The role of the Court of Justice

⁹⁵ European Commission, 'Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' TF50 (2018) 33/2 (15 March 2018), <https://ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar_en.pdf> accessed 29 March 2018.

⁹⁶ European Council, 'Guidelines of 23 March 2018' EUCO XT 20001/18, <<http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf>> accessed 29 March 2018.

of the European Union will also be fully respected. ...

And No 15 states:

Designing the overall governance of the future relationship [including dispute settlement] will require to take into account: ... iii) the requirements of the autonomy of the EU legal order, including the role of the Court of Justice of the European Union, notably as developed in the jurisprudence.⁹⁷

The mechanism proposed by the Commission seems to be in line with the *Achmea* judgment, preserving the supervisory role of the ECJ. However, it seems to be of course very unlikely that the UK would accept it. In this sense, the *Achmea* judgment sets again a red line which the European Council has taken up: Before the text of the draft Withdrawal Agreement is tweaked and modified in the negotiations, the Court warns that its marginalisation may be not only undesirable, but also unlawful. Moreover, it is to be expected that the ECJ will be asked under Article 218(11) TFEU about the compatibility of the Withdrawal Agreement with Union law before the Agreement enters into force.

11. Concluding Remark:

The ECJ is and remains the guardian of the autonomy of European Union law – not only within the EU, but also with regard to third states. The *Achmea* judgment does not leave any doubts on the role and the self-understanding of the Court in this respect. Therefore, *Achmea* must be read through the lenses of European law – as a clear statement that the ECJ does not tolerate any deviation from its role as the final arbiter on matters of EU law.

The consequences for a couple of questions that arise under BITs, the ECT and future investment agreements are clear: EU Member States are not permitted to conclude investment treaties among themselves. Only a court that is sufficiently integrated in the judicial system of the EU Member States, for which Article 8 of the Dutch-Czech-Slovakian BIT was deemed not to provide, may reference a preliminary question to the ECJ. This will be a crucial aspect for future international investment agreements as well as

⁹⁷ The passages were identified by Marta Requejo, ‘European Council (Art. 50) (23 March 2018) – Guidelines’ (*Conflict of Laws .net*, 23 March 2018), <<http://conflictoflaws.net/2018/european-council-art-50-23-march-2018-guidelines/>> accessed 29 March 2018.

an international investment court system.

From the ECJ's perspective, international investment law must respect the autonomy of Union law. In this respect, it is expected that the case law of investment arbitral tribunals will change to some extent. Frankly spoken, one has to go one step further – international arbitral tribunals should reconsider their attitude to European law. This is a battle they cannot win – and if they try to circumvent the political and legal realities, investment arbitration as a whole might be ruptured.

BIBLIOGRAPHY/REFERÊNCIAS BIBLIOGRÁFICAS:

Burkhard Hess, 'A European law reading of the Achmea judgment' (*Conflict of Laws .net*, 8 March 2018) <<http://conflictoflaws.net/2018/a-european-law-reading-of-achmea/>> accessed 29 March 2018.

_____, 'The Private Public Divide in International Dispute Settlement' (2018) 388 *Recueil des Cours de l'Académie de Droit International de la Haye*, para 121 – in print.

_____, *Europäisches Zivilprozessrecht* (CF Müller 2010) § 12 para 23.

Daniel Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward' (2015) 16 *German Law Journal* 105.

Eric Leikin and Martina Maniarelli, 'The Future of Intra-EU ECT Claims in the Face of EC Opposition: Boom or Bust?' (*Kluwer Arbitration Blog*, 15 September 2017), <<http://arbitrationblog.kluwerarbitration.com/2017/09/15/icca-2/>> accessed 29 March 2018.

European Commission, 'Press Release: Commission asks Member States to terminate their intra-EU bilateral investment treaties' (Brussels, 18 June 2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm> accessed 29 March 2018.

George A Berman, 'EU Law as a Jurisdictional and Substantive Defense in Investor State Arbitration' in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (JURIS 2017) 649, 650 f

Jan Kleinheisterkamp, 'Investment Protection and EU Law: the Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 *Journal of International Economic Law* 85.

Jürgen Basedow, 'The Transformation of the European Court of Justice and Arbitration

Referrals’ in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (JURIS 2017) 125, 135 ff; Szpunar (n 1), 108 ff.

Kirsten Schmalenbach, ‘art 27 VCLT’ in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary* (2nd edn, Springer 2018)

Konstanze von Papp, ‘Clash of Autonomous Legal Orders’ (2013) 50 *Common Market Law Review* 1039.

Maciej Szpunar, ‘Referrals of Preliminary Questions by Arbitral tribunals to the ECJ’ in Franco Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (JURIS 2017) 85.

Marc Chmielewski, ‘Nach dem EuGH-Urteil: Investitionsschutzverträge sind noch nicht tot’ (*juve/nachrichten*, 7 March 2018) <<https://www.juve.de/nachrichten/verfahren/2018/03/nach-dem-eugh-urteil-investitionsschutzvertraege-in-der-eu-sind-noch-nicht-tot>> accessed 29 March 2018

Marta Requejo, ‘European Council (Art. 50) (23 March 2018) – Guidelines’ (*Conflict of Laws .net*, 23 March 2018), <<http://conflictoflaws.net/2018/european-council-art-50-23-march-2018-guidelines/>> accessed 29 March 2018.

Opinion 2/13 *Accession of the EU to the ECHR* EU:C:2014:2454 (ECJ, 18 December 2014).

Robert Volterra, ‘Le point de vue des Etats tiers’ in Catherine Kessedijan & Charles Leben (eds), *Le droit européen et l’investissement* (Panthéon-Assas 2009) 41, 43.

Steffen Hindelang, ‘Repellent Forces: the CJEU and Investor-State Dispute Settlement’ [2015] *Archiv des Völkerrechts* 68.

_____, ‘The Limited Immediate Effects of CJEU’s Achmea Judgement’ (*VerfBlog*, 9 March 2018) <<https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/>> accessed 29 March 2018

TFEU, cf Bernhard W Wegener, ‘art 344 AEUV’ in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV Kommentar* (5th edn, BECK 2016).

Thomas Giegerich, ‘art 65 VCLT’ in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties A Commentary* (2nd edn, Springer 2018).