Achmea and its Implications for Investor Dispute Settlement

Carola Glinski*

Table of Contents

A. Introduction

Arbitration in disputes between investors and States has been discussed most controversially in recent years, with the discussions culminating in the context of CETA and the proposed TTIP but also in relation, for example, to cases such as the *Moorburg*

* Dr. Carola Glinski is Senior Researcher at the Centre of Enterprise Liability (CEVIA) at the Faculty of Law, University of Copenhagen.

case or the *Vattenfall* case turning on the German nuclear phase-out.[1] The case of *Achmea* was far less well known in public but it offered the Court of Justice of the European Union (CJEU) the opportunity to rule on arbitration under a specific type of investment agreements, the so-called 'intra-EU BITs'. Intra-EU BITs are bilateral investment treaties between EU Member States that foresee, in one way or the other, investment arbitration to be brought by investors from one EU Member State against another EU Member State. These treaties have come under fire in recent years and the European Commission has urged Member States to abolish them. Academics have also debated the viability of intra-EU BITs.

The Court of Justice handed down its judgment on 6 March 2018, causing a shock to the investment lawyers' community. The exact meaning and effect of the judgment, including its impact on extra-EU BITs, however, has been subject to most diverse interpretations in academic writing.

After a short introduction of the *Achmea* case, this article presents the background of the various conflict lines between EU law and intra-EU BITs and then discusses the (potential) implications of the judgment for these conflict lines as well as for the various types of investor protection agreements.

B. The *Achmea* case and judgment (in brief)

The decision of the Court of Justice in *Achmea*[2] concerned Art. 8 of the bilateral investment treaty (BIT) between the Netherlands and Czechoslovakia from 1992 (in which Slovakia succeeded in 1993), which codified the consent of the parties to submit an investment dispute to an arbitral tribunal. In particular, Art. 8 allowed the arbitral tribunal to take into account 'the law in force of the Contracting Party concerned' as well as 'other relevant agreements between the Contracting Parties', Art. 8(6) BIT. In 2004, Slovakia acceded to the EU.

Achmea (formerly Eureko) is a Dutch insurance company, which invested into the Slovak health insurance sector after it was privatised in 2004. In 2006, Slovakia partly reversed the privatisation and prohibited distribution of profits generated by private sickness insurance activities. Therefore, Achmea initiated arbitration proceedings in Frankfurt am Main against Slovakia, claiming that these legislative measures constituted an infringement of the BIT and caused Achmea considerable financial damage. In 2012, the arbitration tribunal ordered the Slovak Republic to pay 22.1 million Euros in compensation to Achmea.[3]

1 On which, see for example *Glinski*, 'Regulatory Expropriation' under German Constitutional Law and International Investment Law – The Case of Vattenfall, in: Hoops et al. (eds), Rethinking Expropriation Law: Context, Criteria and Consequences of Expropriation Law, Vol. II., 2015, pp. 193 ff.

2 CJEU, case C-284/16, *Achmea*, ECLI:EU:C:2018:158.

3 PCA, case No. 2008-13, *Eureko v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension of 26/10/2010, https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf (14/05/2018).

Slovakia challenged the arbitral award, claiming that the BIT was not compatible with EU law and in particular infringed Arts 18, 267 and 344 TFEU. As Frankfurt was chosen as the place of arbitration, German civil procedure law applied. § 1059 para. 2 of the German Civil Procedural Code (*Zivilprozessordnung*; ZPO) provides for the possibility to set aside an arbitral award only if one of the grounds listed in that provision is present, which include the arbitration agreement being invalid under the law to which the parties have subjected it, and the recognition or enforcement of the arbitral award being contrary to public policy.

The competent Higher Regional Court (*Oberlandesgericht*; OLG) of Frankfurt declined the request to set aside the award.[4] On appeal, the Federal Supreme Court (Bundesgerichtshof; BGH) did not see any inconsistencies of the BIT or the arbitration clause with EU law either.[5] However, in order to give the CJEU the opportunity to rule upon the highly controversial question of the compatibility with EU law of intra-EU BITs in general and investor arbitration in particular, it asked the CJEU for a preliminary ruling on the following questions (summary):

1. Does Art. 344 TFEU preclude the application of an arbitration clause in an intra-EU BIT that had been concluded before one of the Contracting States acceded to the EU?
2. Does Art. 267 TFEU preclude the application of such a provision?
3. Does Art. 18(1) TFEU preclude the application of such a provision?

In the Grand Chamber, the Court of Justice ruled – in stark contrast to the opinion of Advocate General Wathelet[6] – that '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 later Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.'

The Court based its decision on rather short (as compared to the considerations of AG Wathelet) and straightforward reasoning, which strongly emphasised the 'autonomy of EU law' which is ensured by the EU judicial system, and the principles of mutual trust and sincere cooperation enshrined in Art. 4(3) TFEU. In accordance with Art. 19 TFEU it is for the Court and for the Member States to ensure the full application of EU law and the system of judicial remedies provided for in fields covered by EU law. With a treaty such as the BIT between the Netherlands and Slovakia, Member States undertook to remove disputes, which may concern the application or

4 OLG Frankfurt, decision of 18/12/2014, Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 2015, p. 408.

5 See BGH, decision of 03/03/2016, EuZW 2016, p. 512.

6 Advocate General Wathelet, case C-284/16, *Achmea*, ECLI:EU:C:2017:699 [hereinafter: *Wathelet Opinion*].

interpretation of EU law, from the jurisdiction of their own courts, and therefore also from the system of judicial remedies that Art. 19(1) TFEU envisages.[7]

Hereby, the Court was neither particularly detailed concerning the facts of the case at hand, nor distinguishing this case from (more or less) comparable situations. Having established the incompatibility of provisions such as Art. 8 of the Dutch-Slovakian BIT already, the Court did not see the need to answer the third question on whether investment arbitration infringed the non-discrimination clause of Art. 18(1) TFEU.

Thus, although at first glance the *Achmea* decision seems to be pretty straight-forward, at second glance it leaves much room for interpretation as to the meaning and coverage of the ruling, and previous arguments concerning the compatibility of intra-EU BITs with EU law, or investor arbitration, reappear in comments on the decision. In particular, it is now controversially discussed whether the decision concerns all arbitration clauses in intra-EU BITs, whether it extends to the Energy Charta Treaty (ECT) and to what extend 'extra-EU BITs' (investment agreements between Member States (and the EU) and third States) like CETA might be concerned.

C. Background: Tensions and controversially discussed issues

The compatibility of intra-EU BITs with EU law has been disputed for a long time, both from a substantive law and from a procedural law perspective. The European Commission, in particular, has always been of the opinion that with the accession to the EU of the Central and Eastern European States, their BITs, that are now intra-EU BITs, have become obsolete as most of their regulatory content has been replaced by EU law. Actually, the Commission regarded them as an 'anomaly within the EU internal market',[8] which – due to their bilateral protection standards – leads to its fragmentation as well as to discrimination on the basis of nationality, and thus an infringement of Art. 18 TFEU. Also, arbitration clauses would interfere with the exclusive jurisdiction of the CJEU enshrined in Arts 267 and 344 TFEU. Therefore, the Commission has long since tried to convince Member States to set them aside and finally initiated a number of infringement procedures against Member States that refused to do so.[9]

I. Different concepts of investor protection within the internal market

In fact, EU law provides for comprehensive protection of investors, namely through the prohibition of discrimination on grounds of nationality (Art. 18 TFEU), the freedom of establishment (Art. 49 TFEU), and the free movement of capital (Art. 63 TFEU). Since *Francovich*, liability of Member States for damages resulting from in-

7 CJEU, *Achmea,* (fn. 2), paras 32-37.
8 See the Commission's *amicus curiae* submission to the *Eureko* tribunal, (fn. 3), at para. 177.
9 In particular, Austria, the Netherlands, Romania, Slovakia and Sweden, see the European Commission' press release, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', IP/15/5198 of 18/06/2015.

fringements of EU law has been established. EU internal market law is accompanied by human rights protection. In particular, Art. 1.1. of the Protocol to the ECHR provides for compensation for expropriation; and the Charter of Fundamental Rights of the European Union provides for the right to property and to fair compensation in case of expropriation in the public interest (Art. 17), the right to good administration (Art. 41), and the right to effective remedies and a fair trial (Art. 47).

At the same time, the EU provides for a specific balance between the fundamental freedoms and investor protection on the one hand and other (codified and uncodified) public interests on the other, including a huge body of secondary law.

In contrast, investor protection standards in investment agreements, such as the full protection and security of property, compensation for expropriation and measures having equivalent effect, or the 'fair and equitable' treatment clause, have traditionally been interpreted (by arbitration tribunals) with a strong focus on the protection of investors, including 'regulatory expropriation' and including a strong protection of investors' 'legitimate expectations'.[10] The latter differs from EU law in that, as a principle, investors cannot trust in measures of EU Member States, such as subsidies, that are in breach of EU law.

Moreover, the wide and vague wording of investor protection standards traditionally gave a wide discretion to arbitration panels on how to define these standards, and no criteria comparable to those of EU law have been developed to balance investor protection with other public policy goals. Although more recent investment agreements have introduced a 'right to regulate',[11] doctrinal differences between the protection regimes remain. Indeed, investment lawyers argue, that this additional protection of investors was necessary to create the incentive for investment in the first place.

The legal relevance of potentially differing investor protection standards within the internal market has, however, been disputed. Investment lawyers, in particular, have argued that a higher level of investor protection in BITs is not a legal problem, as EU law only provides for minimum standards and Member States are free to provide for additional protection via investment treaties.[12] In fact, conflicts between BITs and EU law are less likely to arise in direct relation to the fundamental freedoms (as, for ex-

10 For an encompassing comparison of the scope of BITs and EU law, see *Wathelet Opinion*, (fn. 6), paras 179 ff.

11 See e.g. Art. 8.9.1. CETA.

12 See e.g. *Wehland*, Schiedsverfahren auf der Grundlage bilateraler Investitionsschutzabkommen zwischen EU-Mitgliedstaaten und die Einwendung des entgegenstehenden Gemeinschaftsrechts, Zeitschrift für Schiedsverfahren (SchiedsVZ) 2008, p. 229. The arbitration panel in *Eastern Sugar* argued that 'the fact that these rights are unequal does not make them incompatible', see SCC, case No. 088/2004, *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial Award of 27/03/2007, https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf (14/05/2018). As opposed to that, *Kleinheisterkamp*, Investment Protection and EU Law: The Intra- and Extra-EU Dimension of The Energy Charter Treaty, Journal of International Economic Law (JIEL) 15 (2012), pp. 98 ff., has argued that the fact, that BITs and investor arbitration reduce the regulatory leeway of the Member State provided by EU law and thus indirectly delimit EU law, lead to their incompatibility with EU law.

ample, enshrined in Arts 49, 63 TFEU) than in relation to (other) EU regulatory goals, in particular to the competition and subsidies framework of Arts 101 ff. and Arts 107 ff. TFEU and to EU secondary law, in particular EU environmental law.[13]

These potential conflicts can be nicely illustrated with the examples of the *Moorburg* coal power plant of the Swedish investor *Vattenfall* in Hamburg and the Romanian *Micula* case.

Vattenfall was granted preliminary approval for the *Moorburg* power plant in 2007. However, in 2008, the political situation in Hamburg changed, and the administration was concerned that the approval would infringe EU environmental and water law and imposed additional obligations and constraints concerning water use to the final approval. In 2009, *Vattenfall* initiated an ICSID arbitration procedure on the basis of the Energy Charter Treaty,[14] demanding 1.4 billion Euros in compensation for damages resulting from Hamburg's infringement of its legitimate expectations. The case was settled, and Hamburg withdrew most of the additional obligations and constraints concerning water use.[15] The resulting (potential) infringement of EU environmental and water law on its side led to lawsuits of environmental NGOs in Germany against the approval and to an infringement procedure of the Commission against Germany. The infringement of EU environmental law was confirmed by the Court of Justice in April 2017.[16]

In 1999, the *Micula* brothers, Swedish nationals of Romanian origin, invested into a bottling plant in Romania and were granted considerable subsidies, tax and customs reductions. In 2007, after Romania's accession to the EU, Romania had to reduce or repeal the advantages granted in order to implement EU subsidies law. The brothers initiated an ICSID arbitration procedure on the basis of a BIT between Sweden and Romania and were awarded 250 million Euros in compensation.[17] In its reasoning, the arbitration panel argued that contracting States could not rely on EU law in order to justify an infringement of the BIT. The European Commission ordered Romania not to pay the compensation award and to reclaim already remitted payments because compensation payments on their part would constitute unlawful subsidies.[18] The

13 See, for example, *Kokott/Sobotta*, Investment Arbitration and EU Law, Cambridge Yearbook of European Legal Studies 18 (2016), pp. 3 ff.; *Eilmannsberger*, Bilateral Investment Treaties and EU Law, Common Market Law Review 46 (2009), pp. 414 ff.

14 https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf (14/05/2018).

15 ICSID, case No. ARB/09/6, *Vattenfall AB u.a. v. Federal Republic of Germany*, Award of 11/03/2011, www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/Vattenfall-Germany_Award.pdf. See also *Tams*, Internationales Wirtschaftsrecht als Grenze deutscher Umweltpolitik?, Zeitschrift für öffentliches Recht in Norddeutschland 2010, pp. 329 ff.

16 CJEU, case C-142/16, *Commission v. Germany*, ECLI:EU:C:2017:301.

17 ICSID, case No ARB/05/20, *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania*, Final Award of 11/12/2013.

18 *European Commission*, (EU) 2015/1470 on State Aid SA.38517 (2014/C) (ex2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11/12/2013, OJ 2015 L 232 of 04/09/2015, p. 43.

brothers filed a suit against the Commission decision to the General Court[19] (but withdrew from the proceedings in December 2015).[20]

Both cases illustrate the risk that Member States might face opposing obligations from BITs and from EU law. Again, proponents of intra-EU BITs deny any incompatibility between them, as arbitration panels only decide upon compensation, but not upon the lawfulness of the regulatory measure as such. However, the risk of – often very high – compensation payments for the Member States in case they implement EU law at least poses a risk to the effectiveness of EU law.[21]

II. Non-discrimination

Clearly, preferential treatment of nationals of certain Member States constitutes an infringement of Art. 18 TFEU.[22] Equally undisputedly, BITs provide for a preferential treatment of investors from contracting States in a procedural regard, due to the additional possibility of initiating arbitration proceedings against a Member State, and most likely also in substantial regard, due to potentially higher protection standards (see above).[23] It is, however, disputed whether or not this unequal treatment could be regarded as exceptionally permissible.

Proponents of intra-EU BITS justify the admissibility with reference to CJEU rulings concerning double tax agreements.[24] Here, the Court had ruled that '(t)he fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence of bilateral double taxation conventions',[25] which therefore do not need to be extended to companies resident in a third Member State.[26] The Court argued that therefore companies from different Member States were not in the same situation and double tax agreements did not constitute discrimination of companies for other Member States, nor do they amount to infringement of the freedoms of establishment and the free movement of capital.[27]

The consideration that reciprocal advantages are an inherent consequence of bilateral agreements would equally apply to investment agreements. Both types of agreements aim at the facilitation of the internal market in a field of law, which has not yet

19 EGC, case T-646/16, *Micula and others v. Commission,* ECLI:EU:T:2016:135.
20 Ibid.
21 See *Kokott/Sobotta*, (fn. 13), p. 6; with further references.
22 See, for example, CJEU, case C-55/00, *Gottardo,* ECLI:EU:C:2002:16.
23 On the applicability of Art. 18 TFEU instead of Arts 49, 63 TFEU see, for example, *Wathelet Opinion*, (fn. 6), paras 54 ff.
24 CJEU, case C-376/03, *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, ECLI:EU:C:2005:424; CJEU, case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, ECLI:EU:C:2006:773.
25 CJEU, *Test Claimants in Class IV of the ACT Group Litigation* (fn. 24), para. 91.
26 Ibid., para. 92.
27 CJEU, *Test Claimants in Class IV of the ACT Group Litigation* (fn. 24), paras 91-94.

been harmonised.[28] In any case, a potential infringement could be remedied through most-favoured-nation treatment.[29] This was also the position of AG Wathelet.[30]

In contrast, opponents argue that both situations differ in relevant aspects. As mentioned above, investor protection is inherent in internal market law, whereas tax law is still by and large in the sovereignty of Member States. Whereas double-tax agreements aim at the reciprocal allocation of taxes and are indispensible in order to avoid double taxation, which provides an obstacle to the internal market, investor protection simply aims at reciprocal advantages to the disadvantage of third party competitors in a field of law where EU law has already provided for a level-playing field.[31] Finally, remediation through most-favoured-nation treatment would go into the wrong direction, as it would further increase the above-mentioned conflicts between EU law and investor protection agreements.[32]

III. The judicial system of the EU

With regard to procedure, the question as to whether investor arbitration infringes the EU's system of judicial competences, and in particular the exclusive jurisdiction of the CJEU as enshrined in Arts 267 and 344 TFEU, was at stake. Authors have debated whether arbitration tribunals decide upon the interpretation or application of the Treaties at all; whether investor arbitration was more of a public or of a private character, which translates to the question of whether Art. 344 TFEU covers disputes between an investor and a Member State; and, in terms of Art. 267 TFEU, whether investment arbitration is comparable to commercial arbitration with reduced requirements concerning the possibility for preliminary rulings, or whether arbitration panels could be regarded as Member State courts or could otherwise be obliged to submit questions for preliminary ruling to the Court of Justice.

1. Earlier case law of the Court of Justice

Hereby, earlier rulings of the Court of Justice concerning the EU judicial system and its own exclusive competences provided for a starting point for discussion.

MOX Plant[33] concerned an infringement procedure against Ireland that had submitted a dispute with the United Kingdom concerning the UN Convention on the Law of the Seas (UNCLOS) to the dispute settlement procedure provided for therein. The CJEU regarded this as an infringement of Art. 344 TFEU since 'an international agreement cannot affect the allocation of responsibilities defined in the Treaties and,

28 See e.g. *Tietje*, Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts, Beiträge zum Transnationalen Wirtschaftsrecht, issue 104, 2011, pp. 9 ff.; *Wehland*, (fn. 12), pp. 232 f.
29 See *Wehland*, (fn. 12), p. 233; *Eilmannsberger*, (fn. 13), pp. 402 f.; BGH, (fn. 5), paras 77 f.
30 *Wathelet Opinion*, (fn. 6), paras 73 ff. and 81 f.
31 See *Kokott/Sobotta*, (fn. 13), p. 9.
32 See also *Kleinheisterkamp*, (fn. 12), pp. 90 f.
33 CJEU, case C-459/03, *Commission v. Ireland*, ECLI:EU:C:2006:345.

consequently, the autonomy of the Community legal system, compliance with which the Court ensures (…). That exclusive jurisdiction of the Court is confirmed by Article 292 EC (now Art. 344 TFEU), by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein'.[34] The decisive consideration was that the UNCLOS provisions at issue 'come within the scope of Community competence which the (EU) exercised by acceding to the Convention, with the result that those provisions form an integral part of the (EU) legal order'.[35]

In Opinion 2/13 (Accession of the Union to the European Convention on Human Rights),[36] the Court held that 'as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR'.[37] Consequently, the competences of the European Court of Human Rights under the ECHR would infringe Art. 344 TFEU.[38]

In Opinion 1/09 (European Patents Court),[39] the Court did not see an infringement of Art. 344 TFEU, as the European Patents Court would only be concerned with disputes between private parties.[40] However, the establishment of such a court would constitute an infringement of Art. 267 TFEU as '(i)nternational agreements may not deprive 'ordinary' courts within the European Union of their tasks and, thereby, of the obligation, to refer questions for a preliminary ruling as provided for in Article 267 TFEU. They may not infringe the system of direct cooperation between the Court of Justice and the national courts set up by Article 267 TFEU which ensures the correct application and uniform interpretation of European Union law'.[41]

EcoSwiss,[42] finally, was concerned with the admissibility of private commercial arbitration. Here, the Court held that commercial arbitration was permissible, also if the arbitration panel interprets EU law. The possibility for judicial review – including the possibility for request for a preliminary ruling – at the stage of execution of arbitration award was regarded as sufficient, even in case the judicial review was limited to the *ordre public*. This was justified by the efficiency of arbitration.

2. 'Interpretation or application of EU law'

As Art. 344 and Art. 267 TFEU relate to the interpretation and application of EU law, arbitration clauses in investment treaties can only come into conflict if arbitration

34 Ibid., para. 123.
35 Ibid., para. 126.
36 CJEU, opinion 2/13, ECLI:EU:C:2014:2454.
37 Ibid., para. 205.
38 Ibid., paras 203-214.
39 CJEU, opinion 1/09, ECLI:EU:C:2011:123.
40 Ibid., para. 63.
41 Ibid., paras 78 ff.
42 CJEU, case C-126/97, *EcoSwiss*, ECLI:EU:C:1999:269.

panels interpret or apply EU law. This question can be dealt with by a problem-oriented or more doctrinal approach.

The problem-oriented approach is based on the consideration that an arbitration award can either have implicit (non-application) or explicit (incorrect application) effects on the interpretation and application of EU law without the possibility for involvement of the Court of Justice,[43] as the examples of *Moorburg* (with impact on EU environmental law) and *Micula* (with impact on EU subsidies law) clearly show.

From a doctrinal perspective, it would be decisive whether, in a narrow sense, the arbitration tribunal has to literally interpret or apply EU law in order to cause a conflict with Art. 267 TFEU; wether it simply has the competence to take EU law into consideration;[44] or whether it is sufficient that the award affects the interpretation or application of the Treaties;[45] or that the award rules upon a situation which is (already) covered by EU law.[46]

For the narrow interpretation, – as the EU is not a party to intra-EU BITs and thus, contrary to *MOX Plant* and the ECHR Opinion, the BITs are not an integral part of EU law[47] – the decision upon 'the interpretation or application of the treaties' depends first of all on the applicable law and the competences of the panel enshrined in the BIT: on the existence or otherwise of an explicit reference to 'the law in force of the Contracting party concerned' – which was the case at hand in the Dutch-Slovakian BIT. Also, it was regarded as relevant whether the clause in fact provides for the possibility to interpret the internal law or only the possibility to take it into account 'as a fact.'[48]

If there is no reference in the BIT to internal law, the arbitration panel will decide upon the basis of the BIT and other international law applicable between the contracting States, according to the rules of the Vienna Convention on the Law of Treaties of 1969. This limitation to public international law, however, does not necessarily rule out the interpretation of EU law but triggers the follow-on question of whether EU law (in an intra-EU conflict) is 'international law applicable between the parties'; which has also been subject to debate.

43 See e.g. *Hindelang*, Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration'. Legal Issues of Economic Integration (LIEI) 39, 2012, pp. 193 ff.

44 See *Stöbener de Mora*, Das Achmea-Urteil zum Intra-EU-Investitionsschutz, EuZW 2018, pp. 365 f.

45 *Hindelang*, (fn. 43), pp. 196 ff.

46 See e.g. *Schepel*, From Conflicts-Rules to Field Preemption: Achmea and the Relationship between EU law and International Investment Law and Arbitration, https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration (14/05/2018).

47 *Wathelet Opinion*, (fn. 6), paras 160 to 168, regarded this factor to be decisive in order to decline an infringement of Art. 344 TFEU.

48 As for example Art. 8.31.2. CETA provides for. See, for example, *Stöbener de Mora*, (fn. 44), pp. 364 f.

Opponents argue that, since *Costa v. ENEL*,[49] the Court of Justice has established EU law as a legal system *sui generis.* This 'internal law' approach, it was argued, also has to be applied to international relations between Member States in order to avoid contradictions. Moreover, it was held that EU law principles, in particular the supremacy and direct effect of EU law, resemble far more national than international law principles.[50]

Proponents of the opinion that EU law is 'international law' argue that EU law has undoubtedly been established on the basis of international agreements,[51] and that deeper integration leads to more rather than less importance from the perspective of public international law.[52] For the Vienna Convention, the relevance of law depends on whether it is applicable to both parties, as opposed to internal national law of one party only. Thus, EU law would have to be applied or taken into consideration in any arbitration case.

In his analysis in *Achmea*, AG Wathelet focused on the concrete case, where as a first step, he correctly analysed that the arbitration panel – despite the provision in Art. 8(6) BIT, which provides for the possibility to take into account the internal law of the contracting States as well as for agreements between them – first and foremost decides upon an infringement of the BIT as such and that the *Achmea* panel has neither interpreted EU law, nor was the award inconsistent with EU law.[53] EU law was in fact not at stake in this case, as opposed to the cases of *Moorburg* and *Micula*. In a second step, he investigated whether and to what extent the scope of the BIT and EU law overlapped and concluded that, due to the limited and not more favourable rights given to investors by the fundamental freedoms in particular and EU law in general, an interpretation or application of EU law in addition to the application of the BIT is not likely to occur. Thus, he concluded that the interpretation of EU law was not at stake.[54]

3. Applicability of Art. 344 TFEU to investor-State arbitration?

With regard to the applicability of Art. 344 TFEU, authors in favour of a narrow interpretation have argued that the wording of Art. 344 TFEU only covers disputes between Member States and therefore does not provide for an encompassing competence for the Court of Justice for any interpretation or application of EU law in the sense of Art. 19 TEU; which only applies to Art. 267 TFEU.[55] This was also the position of the submitting BGH, which argued that Art. 344 TFEU only obliges Member

49 CJEU, case 6/64, *Costa v. Enel*, ECLI:EU:C:1964:66.
50 See *Tietje* (fn. 28), pp. 8 f.; *Wackernagel*, The Twilight of the BITs? EU Judicial Proceedings, the Consensual Termination of Inter-EU BITs and Why that Matters for International Law, Beiträge zum Transnationalen Wirtschaftsrecht, issue 140, 2016, pp. 10 f.
51 *Eilmannsberger*, (fn. 13), p. 424.
52 See *Hindelang*, (fn. 43), pp. 185 ff.
53 *Wathelet Opinion*, (fn. 6), paras 170 ff.
54 Ibid., paras 179 ff. This was also the position of the submitting BGH, (fn. 5).
55 *Tietje*, (fn. 28), p. 17; *Eilmannsberger*, (fn. 13), p. 404.

States to use proceedings before the Court, which the Treaties provide for, and which is not the case for investor-State disputes.[56]

Proponents of the application of Art. 344 TFEU have considered Art. 344 TFEU as providing for an encompassing competence for the Court of Justice for all disputes concerning the interpretation and application of EU law in the sense of Art. 19 TEU. An intra-EU BIT is a public international law treaty between Member States, thus the arbitration clause within which they undertake to submit *themselves* to another method of dispute settlement would be covered by Art. 344 TFEU. As the arbitration award may affect Member State duties stemming from EU law, the threat for the integrity of EU law is the same, irrespective of whether the claimant is another Member State or a private investor.[57]

4. Infringement of Art. 267 TFEU?

Here, the opponents of the applicability of Art. 267 TFEU basically argued that investor arbitration is comparable to commercial arbitration, and that the uniform interpretation of EU law is equally relevant between private parties and between a private investor and a Member State. Therefore, as the CJEU ruled in *EcoSwiss*,[58] the possibility for a preliminary ruling at the stage of the execution of the arbitration award – although limited to the fundamental provisions of EU law – would be sufficient.[59]

Proponents of the applicability of Art. 267 TFEU argued – in line with their point concerning an infringement of Art. 344 TFEU – that it is the role of the Member State that counts. Therefore, investor arbitration was not comparable to commercial arbitration, which only begs consequences for private parties. Consequently, the (potential) possibility for a preliminary ruling at the stage of the execution of the arbitration award was not sufficient, the more so as the consideration of contradicting (EU) law depends on the applicable execution law, which is often limited to considerations of public policy, as in German civil procedure law (see supra, A.). The ICSID Convention, according to its Arts 53(1) and 54(1), does not even provide for any supervision at all, but the awards have to be executed like national last instance court decisions. Moreover, no supervision can be exercised with a view to execution into extraterritorial assets.[60]

In this regard, AG Wathelet recognised that Member States should avoid the choice of ICSID in their BITs in order to prevent an infringement of Art. 267 TFEU. As this was not the case in the Dutch-Slovakian BIT at hand, he regarded it as compatible with Art. 267 TFEU.[61]

56 BGH, (fn. 5), para. 39. See also *Stöbener de Mora*, (fn. 44), p. 365.
57 See the submission by the European Commission in *Eureko v. Slovak Republic* (fn. 3), pp. 49 ff.
58 CJEU, *EcoSwiss*, (fn. 42).
59 See *Wehland*, (fn. 12), p. 233; BGH, (fn. 5), paras 63 ff.; *Wathelet Opinion*, (fn. 6), paras 244 ff.
60 See e.g. *Hindelang*, (fn. 43), pp. 196 ff.
61 *Wathelet Opinion*, (fn. 6), para. 253.

D. The judgment

The *Achmea* ruling was another step in line with previous decisions – such as *MOX Plant,* the Opinion on the Accession of the EU to the ECHR, the Opinion on a European Patents Court and *Associação Sindical dos Juízes Portugueses* – in which the Court highlighted the autonomy of EU law that is not only based upon its constitutional structure and essential characteristics, such as primacy and direct effect, but also on a set of common values, on mutual trust and the principle of sincere cooperation set out in Art. 4(3) TEU, and finally the importance of the EU's judicial system and the competence of the Court of Justice to safeguard this autonomy.[62] In this regard, a few controversial issues with particular importance for (intra-EU) investor dispute settlement were clarified: namely, the 'interpretation or application of EU law' as international law applicable between the parties from the perspective of an intra-EU BIT, the public character of investor-State arbitration, and the fact that arbitration panels cannot be regarded as Member State courts.

I. Interpretation and application of EU law

In stark contrast to the considerations of AG Wathelet, the Court of Justice did not delimit its analysis to the question of whether the *Achmea* panel had in fact interpreted or applied EU law but rather focused on the competences given to arbitration panels by the BIT and on the abstract potential of an interpretation or application of EU law. The Court ruled that 'given the nature and characteristics of *EU law* (…), that law *must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between Member States*'.[63] 'It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital'.[64]

By clarifying that, from the perspective of an intra-EU BIT, EU law has to be regarded not only as national law of the contracting States but also as international law applicable between the contracting parties, the Court has rejected all considerations that the specific characteristics and the autonomy of EU law, not only from national but also from international law, would also prevent its consideration as international law from an external perspective.[65] And indeed, also from the perspective of Art. 30 of the Vienna Convention, this interpretation makes perfect sense, as the relevance of law that is applicable in international disputes depends on its applicability between both parties as opposed to the internal national law of one party only.

62 See also *Miller*, Autonomie des Unionsrechts versus Schiedsgerichtsbarkeit, EuZW 2018, pp. 359 ff. *Kokott/Sobotta*, (fn. 13), p. 9, had anticipated the importance of this aspect already.
63 CJEU, *Achmea,* (fn. 2), para. 41 (emphasis added).
64 Ibid., para. 42. See also *Miller*, (fn. 62), pp. 360 f.
65 See supra, C. III. 2.

Thus, the ruling does not only affect arbitration clauses, which explicitly provide for the possibility to take the national law of the contracting party concerned into account, but all arbitration clauses in an intra-EU context, as the consideration of EU law as 'other international law applicable between the parties' is always at stake – either explicitly provided for by the arbitration clause, or anyway on the basis of Art. 30 of the Vienna Convention.

The Court of Justice also regarded the fact that arbitration clauses in principle provide the panel with the opportunity to interpret or apply EU law as sufficient to be incompatible with Arts 344 and 267 TFEU. In order to highlight this risk, it referred broadly to the 'fundamental freedoms, including freedom of establishment and free movement of capital.' Apparently, the Court was not impressed by the long elaborations of AG Wathelet to the effect that the arbitration panel first and foremost decides upon an infringement of the BIT as such, and that, due to the limited and not more favourable rights given to investors by EU law, an interpretation or application of EU law in addition to the application of the BIT is not likely to occur (apart from cases where the infringement of the BIT is based on EU law).

Thus, the ruling can only be understood in such a way that every dispute settlement mechanism in an area which is already covered by EU law bears at least the hypothetical risk of an interpretation or application of EU law and is incompatible with the autonomy of EU law – which is particularly true for intra-EU economic relations.[66]

II. Infringements of Art. 344 and Art. 267 TFEU – The public character of investor-State arbitration

The Court of Justice did not explicitly distinguish the coverage of Art. 344 and 267 TFEU but combined the considerations relating to an infringement of these provisions. It started with the established principle[67] that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court' and which 'is enshrined in particular in Article 344 TFEU'.[68] It continued with its equally established considerations concerning 'the autonomy of EU law with respect both to the law of the Member States and to international law (which) is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law', in particular its primacy and the direct effect.[69] Also, EU law is based upon 'a set of common values (…) as stated in Article 2 TEU' which 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected'. To this end, they are obliged to sincere

66 See also *Schepel*, (fn. 46).
67 For example, CJEU, opinion 2/13, (fn. 36), para. 201.
68 CJEU, *Achmea*, (fn. 2), para. 32.
69 CJEU, *Achmea*, (fn. 2), para. 33, with reference to CJEU, opinion 2/13, (fn. 36), paras 165-167.

cooperation, which is also enshrined in Art. 4(3) TEU.[70] 'In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law'.[71] 'In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law'.[72]

The Court therefore highlighted the particular importance of the EU judicial system to guarantee the autonomy of EU law and the particular responsibility of the Member States to ensure the functioning of this system; the Member States therefore being prohibited to submit disputes including investor-State disputes to another means of dispute settlement than provided for by EU law.[73] Consequently, the Court regarded investor arbitration as in relevant respect different from commercial arbitration as 'the former derive(s) from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law' while 'the latter originate in the freely expressed wishes of the parties', thus in private autonomy.[74]

One of the overarching controversial issues in this regard related to the characterisation of investor-State arbitration as private or as public, depending on whether the perspective of the investor or the State was taken. This characterisation also affected the position taken with regard to the (potential) infringement of Arts 344 and 267 TFEU, based in particular upon the different requirements set up by the Court for different constellations in the public-private spectrum: from *MOX Plant,* where the submission of an inter-State dispute between Member States to another means of dispute settlement was regarded as an infringement of Art. 344 TFEU; whereas in the Patents Court Opinion*,* the submission by a Member State agreement of private disputes to another means of dispute settlement was not regarded as an infringement of Art. 344 TFEU, but of Art. 267 TFEU; and in *EcoSwiss*, arbitration between privates based upon their private autonomy was regarded as in line with Art. 267 TFEU, provided that an *ordre public* supervision at the stage of execution is guaranteed. In *Achmea*, the Court of Justice – as opposed to AG Wathelet, who classified investor-State arbitration at the most private end of the spectrum, where it would only have to meet the *EcoSwiss* requirements -, made it clear that Arts 344 and 267 TFEU fully apply to investor-State arbitration. The decisive factor is the Member States' loyalty and their

70 Ibid., para. 34, with reference to CJEU, opinion 2/13, (fn. 36), paras 168, 173.
71 Ibid., para. 35, with reference to CJEU, opinion 2/13, (fn. 36), para. 164.
72 Ibid., para. 36; with references to CJEU, opinion 2/13, (fn. 36), para. 175; CJEU, opinion 1/09, (fn. 39), para. 68; and to CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para. 33. On that latter judgment, see also *Schepel*, (fn. 46).
73 For a critique of this reasoning, see, for example, *Scholtka*, Anmerkung zu EuGH: Investitionsschutzrecht: Schiedsklausel in unionsinternem Investitionsabkommen, EuZW 2018, p. 244; see also *Stöbener de Mora*, (fn. 44), p. 365.
74 CJEU, *Achmea*, (fn. 2), para. 55.

responsibility to ensure the functioning of the judicial system of the EU and the prohibition to submit disputes to another means settlement as provided for.[75] Hereby, Art. 344 TFEU covers disputes between a private party and a Member State – as opposed to purely private disputes, as the comparison with the Patents Court Opinion shows.

III. Arbitration panel is not a Member State court

In line with its established case law,[76] the Court also rejected considerations that arbitration panels could be regarded as Member State courts that could submit questions for preliminary ruling: [77] An arbitration panel 'cannot in any event be classified as a court or tribunal of a Member State within the meaning of Art. 267 TFEU',[78] because it does not form part of the judicial system of the contracting States, as opposed to the Portuguese tax tribunal, which forms part of the national judicial system provides for in the Portuguese constitution,[79] and the Benelux Court of Justice,[80] which has strong links with the judicial systems of the Member States.[81]

Further, investor arbitration does not provide for safeguards to ensure that it is subject to review by a Member State court that would offer the possibility of a reference to the Court of Justice for preliminary ruling in accordance with Art. 19(1) TEU, as this depends upon the procedural law that is applicable in the arbitration.[82] It was only due to German civil procedure law, which was applicable in the particular case of *Achmea*, that the Court was provided the chance for a preliminary ruling. Still, the review is then usually limited to the consistency of the arbitration award with public policy, which translates only to the fundamental principles and provisions of EU law,[83] but not necessarily to secondary law.[84]

Another result would have been surprising indeed from the perspective of previous case law of the Court of Justice, in particular given the rooting of arbitration panels in public international law and their conceptual independence from the internal judicial system of the contracting States. Moreover, the Court's view is perfectly in line with the rationale of investor arbitration, as the independence of investor arbitration from the internal judicial system of the contracting States is the very reason for its

75 CJEU, *Achmea*, (fn. 2), paras 34 ff.
76 See CJEU, case C-377/13, *Ascendi*, ECLI:EU:C:2014:1754, paras 24-26, with further references.
77 See also *Behrens*, Zur Vorlagebefugnis von Schiedsgerichten, EuZW 2018, pp. 49 f.; *Hindelang*, verfassungsbog.de/the limited-immediate-effects-of-cjeus-achmea-judgement, (09/03/2018).
78 CJEU, *Achmea*, (fn. 2), paras 46 f.
79 See CJEU, *Ascendi*, (fn. 76), paras 25 f.
80 See CJEU, case C-337/95, *Parfums Christian Dior*, ECLI:EU:C:1997:517, para. 21; CJEU, case C-196/09, *Miles*, ECLI:EU:C:2011:388, para. 40.
81 CJEU, *Achmea*, (fn. 2), paras 43-49.
82 Ibid., paras 50 ff.
83 Ibid., paras 52-54.
84 See, however, CJEU, case C-40/08, *Asturcom*, ECLI:EU:C:2009:615, paras 51 ff., for unfair contract terms law as public policy.

existence; which is also reflected in the decisions of arbitration panels.[85] Requiring Member States instead to insist on stronger links with their judicial systems and to ensure an encompassing review of arbitration awards – which would include the choice of an adequate procedural law, the reform of the procedural laws of arbitration bodies and the prevention of the choice of an arbitration seat outside the EU and of the execution of awards outside the EU – would be most difficult to ensure from the perspective of EU law and contrary to the rationale of investor arbitration. That possibility was thus not taken into consideration by the Court.[86]

E. Implications and perspectives

I. Intra-EU BITs

The ruling has immediate consequences for all arbitration clauses in intra-EU BITs. The Court has not left any possibility to immunise these clauses against their incompatibility with EU law. In particular, they cannot be immunised by introducing the formula that EU law should not be interpreted by the panel but only taken 'as a fact'.[87]

The (potential) interpretation of EU law cannot be avoided nor can its control via preliminary ruling procedure be ensured. Thus, the Member States are, in line with Art. 4(3) TEU, obliged to set aside these clauses[88] and to prevent the execution of arbitration awards on their territory.[89] Questions remain as to the practicalities of setting aside these clauses in particular with a view to the legitimate expectations of investors that are protected by so-called sunset clauses;[90] which increase the already high level of protection of the investors' legitimate expectations, as opposed to the severely limited protection of trust under EU law in a situation, which conflicts with EU law, as often spelt out by the Court of Justice in EU subsidies law.[91]

Further, it remains open, whether it is only the arbitration clause that infringes upon EU law, or whether intra-EU BITs as such violate EU law, as the Court of Justice has not answered the third question related to the principle of non-discrimination of

85 See also *Schepel*, (fn. 46); *Thym*, Todesstoß für autonome Investitionsschutzgerichte, verfassungsblog.de/todesstoss-fuer-autonome-investitionsschutzgerichte/, (08/03/2018).

86 See also *Miller*, (fn. 62), pp. 360 ff.; *Thym*, (fn. 85). See also *Gundel*, Völkerrechtliche Rahmenbedingungen der Energiewende, Zeitschrift für das gesamte Recht der Energiewirtschaft (EnWZ) 2016, p. 248.

87 In this direction, however, the interpretation of the ruling by *Stöbener de Mora*, (fn. 44), pp. 364 f.; leaving this possibility open: *Klages*, Autonomie sticht Schiedsklausel, EuZW 2018, p. 217.

88 Which, however, might have to be secured by the Commission's renewed efforts to urge Member States into this direction; see *Hindelang*, (fn. 77).

89 See, for example, *Klages*, (fn. 87), p. 217. The ruling might however not affect current arbitration proceedings, in particular outside the EU, and the same applies to execution into assets located outside Europe, see *Hindelang*, (fn. 77).

90 See, for example, *Scholtka*, (fn. 73), p. 244; *Stöbener de Mora*, (fn. 44), p. 366.

91 See, for example, CJEU, case C-408/04, *Commission v. Salzgitter*, ECLI:EU:C:2008:236; see also *Miller*, (fn. 62), pp. 362 ff., with further references.

Art. 18 TFEU. Although answering this question was not necessary in order to establish the unlawfulness of the arbitration clause in *Achmea* and could thus be regarded as an expression of 'judicial economy',[92] it would have been relevant for the lawfulness of the BITs as such. If the arbitration clause established an unequal treatment of investors on the basis of their nationality, it would be likely that the BIT as such also creates unequal treatment – given the broader standards of investor protection in BITs as compared to EU law.[93]

Although the substantive compatibility of intra-EU BITs as such with EU law has not been decided upon, substantive tensions with EU law are far less likely to materialise if the disputes were decided by regular courts. Both from the EU law perspective and from the public international law perspective enshrined in the conflict rules of Art. 30 of the Vienna Convention, (more recent) EU law must be regarded as superior. However, the practice of arbitration panels – e.g. in *Micula* and *Achmea* – has shown a certain tendency to disregard this supremacy, which is less likely to occur within the EU's judicial system.[94]

II. The Energy Charter Treaty (ECT)

In this regard, the Energy Charter Treaty, which provided the basis for both *Vattenfall* arbitration proceedings against Germany relating to *Moorburg* and to the German nuclear phase-out, provides specific problems, as it is not a pure intra-EU BIT but also has a number of contracting third States, and the EU has also acceded to the Treaty. The Court's consideration that the BIT clauses are based upon 'an agreement which was concluded not by the EU but by Member States'[95] has already led to speculation that due to the EU's accession, the ECT might enjoy higher legitimacy and would not be affected by the ruling.[96] However, this consideration does not prevent an infringement of the principle of mutual trust between Member States. Instead, it could be related to the extra-EU scope of the Treaty.[97] Thus, in principle, the Member States would have to set aside the provisions and stop arbitration proceedings and execution of awards as far as intra-EU relations are concerned and as far as they come

92 See also e.g. *Szilagyi*, The CJEU Strikes Again in Achmea: Is this the end of investor-State arbitration under intra EU-BITs?, http://worldtradelaw.typepad.com/ielpblog/2018/03/guest-post-the-cjeu-strikes-again-in-achmea-is-this-the-the-end-of-investor-state-arbitration-under-intr.html.

93 See e.g. the evaluation of *Wathelet Opinion*, (fn. 6), paras 179 ff.

94 In ICSID, *Micula*, (fn. 17), the arbitration panel argued that States could not rely on EU law in order to justify infringements of obligations towards investors (see also above); in CJEU, *Achmea*, (fn. 2), the panel argued that it was not for the arbitration tribunal to disregard rights stemming from a valid treaty because they might infringe EU law; see also *Hindelang*, (fn. 43), pp. 179 ff.

95 CJEU, *Achmea*, (fn. 2), para. 58.

96 See, for example, *Scholtka*, (fn. 73), p. 244, Also, such an interpretation would be in certain contrast with the CJEU's considerations in its opinion concerning the EU's accession to the ECHR, where exactly the EU's accession was the problem, CJEU, opinion 2/13, (fn. 36).

97 See *Miller*, (fn. 62), p. 362.

under their jurisdiction.[98] In this regard, either an exception clause to the effect that the ECT does not apply to intra-EU situations, or that the EU has to be regarded as a single member of the ECT could be introduced.[99]

Concerning potential substantive inconsistencies of the ECT with EU law, two differences to intra-EU BITs exist. First, the problem of non-discrimination (Art. 18 TFEU) does not arise, as all Member States are parties to the ECT. Second, the supremacy of (competing) EU law cannot be established, as the EU itself is a party to the ECT, which therefore forms part of EU law itself.[100]

III. Extra-EU investor protection

The huge – and at first glance unrestricted – emphasis laid on the autonomy of EU law and its safeguard, the EU's judicial system, has also led to speculation about the extent to which the *Achmea* decision could also apply to extra-EU investor protection, in particular to the CETA agreement.

With regard to international dispute settlement in general, the CJEU has again[101] offered general considerations: '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 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'.[102] The Court therefore distinguished such an admissible external international law situation from intra-EU BIT arbitration not only on the basis of its competences concerning the interpretation of EU law, but also on the basis of considerations that the submission of intra-EU conflicts to an arbitration body (which is not part of the EU's judicial system) 'by an agreement which was concluded not by the EU but by Member States' 'call(s) into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties'.[103]

This already highlights two aspects, which might be of relevance for the distinction of intra-EU BITs and CETA. First, in an extra-EU agreement, EU law would only be characterised as the national law of one of the contracting parties and thus, by defining the applicable law respectively, could somehow be immunised against the interpretation and application of an external panel or court, as it is, for example, the aim of Art. 8.31.2. CETA. That provision prohibits the interpretation of internal law,

98 See also *Hindelang*, (fn. 77).
99 See *Gundel*, (fn. 86), p. 247, with further references.
100 See, for example, *Kokott/Sobotta*, (fn. 13), pp. 7 ff.
101 As e.g. already in the opinion on the Accession to the ECHR, CJEU, opinion 2/13, (fn. 36), paras 182 f., and on the European Patents Court, CJEU, opinion 1/09, (fn. 39), paras 74, 76.
102 CJEU, *Achmea*, (fn. 2), para. 57.
103 Ibid., para. 58.

which has to be applied as a fact in line with the meaning given by national courts. This, however, does not prevent conflicts with EU law, in particular the potential sanctioning of the implementation of EU law by way of compensation; which by itself shall be prevented by the introduction of a 'right to regulate' for the contracting States in Art. 8.9.1. CETA. The extent to which these safeguards will be regarded as sufficient, remains to be seen.

Second, in an extra-EU situation, the principles of mutual trust and sincere cooperation between Member States are less affected. Moreover, the preservation of the EU legal and judicial system is less likely to be affected, as it does not encompass extra-EU situations.[104]

At the same time, however, authors have suggested that both aspects equally apply in an extra-EU situation, in particular in relation to the CETA agreement. According to these authors, the principle of loyalty extends to extra-EU situations, as the Member States have to protect the unity of the EU's legal and judicial system also in international representation.[105] The autonomy of EU law – which encompasses not only fundamental freedoms but the whole of primary and secondary law – can be equally put at risk by investment agreements with third States. And in fact, in terms of substance, CETA interferes with many fields of law covered by EU law, such as internal market law and non-discrimination (as it might well be that a Canadian investor under Canadian law is at the same time a European company under European law) as well as with social or environmental secondary law, the implementation of which might lead to compensation claims.[106] Moreover, the Court of Justice itself has referred to rulings (in particular the opinion concerning the EU's accession to the ECHR), in which an agreement with third parties has been declared to infringe the EU's autonomy.[107]

Following from that, the relevant requirements laid down in the *Achmea* judgment could also be infringed by CETA investor dispute settlement: Art. 8.31.2 CETA does not prevent conflicts with EU law,[108] as in fact, it is the very idea of investor protection to protect investors from (changes of) national – here:EU – law. The submission of conflicts to an external CETA court – which can even less be regarded as a Member State court – equally constitutes a deliberate exclusion of the preliminary ruling procedure. Finally, CETA court rulings are binding and have to be executed without

104 See *Miller*, (fn. 62), p. 362.

105 See *Eckes*, Don't Lead with Your Chin! If Member States continue with the ratification of CETA, they violate European Union law, https://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law (14/05/2018); as a consequence, Member States would not be allowed to sign CETA until its compatibility with EU law has been confirmed by the Court of Justice.

106 See *Schepel*, (fn. 46).

107 See *Thym*, (fn. 85).

108 A consideration, which obviously includes the insufficient protection of Art. 8.9.1. CETA, the ‚right to regulate' as well.

additional review concerning EU law (Arts 8.39 and 8.41 CETA), which was regarded as insufficient.[109]

Belgium has given the Court of Justice the opportunity to issue an opinion on the questions whether the intended 'Investor Court System' is compatible with (1) the exclusive competence to the Court to provide the definitive interpretation of EU law, (2) the general principle of equality and the 'practical effect' requirement of EU law, (3) the right to access to the courts, and (4) the right to an independent and impartial judiciary.[110]

Thus, it remains to be seen how far the decisive considerations of the *Achmea* ruling, namely the autonomy of EU law and the principle of loyalty, also extend to an extra-EU context and whether the safeguards enshrined in CETA might be regarded as sufficient.

However, one should be cautious to base the (potential) rejection of an international investment court and of other means of international dispute settlement[111] on the considerations of the Court in *Achmea* alone. In this regard, a decisive difference remains between an intra- and an extra-EU context. Undoubtedly, there is a need for international cooperation and international dispute settlement (which has also been acknowledged by the Court of Justice), as the latter in principle provides for legally structured, fair and inclusive fora for conflict resolution (at all) and thus for horizontal legitimacy.[112] In contrast, the EU already provides for an elaborate and inclusive legal and judicial system. As a consequence, the relevant considerations differ. From an intra-EU perspective, the question is whether there is a need for additional rules and conflict resolution and how far and under which conditions this may side-line the existing legal order; a question which can be answered perfectly from a purely internal EU perspective, with a clear emphasis on the autonomy of the EU legal order and the loyalty duties of the Member States. In contrast, the need for international dispute settlement and the related legitimacy requirements require a broader perspective. Thus, although there are good reasons to reject the need for and the legitimacy of

109 See *Thym*, (fn. 85); *Schepel*, (fn. 46); *Szilagyi*, (fn. 92) even argues that – in line with the Court's general broad interpretation of its own competences, this ruling would equally apply to international dispute settlement that is not directly enforceable, such as the WTO dispute settlement; the Court of Justice had simply not been asked bevor the WTO Agreement was signed.

110 CJEU, opinion 1/17, OJ C 369 of 30/10/2017, p. 2.

111 See *Szilagyi*, (fn. 92).

112 The roots of which derive from international peace-keeping; see *Bogdandy/Venzke (eds.)*, International Judicial Lawmaking. On Public Authority and Democratic Legitimation on Global Governance, 2012; see also *Habermas*, Does the Constitutionalization of International Law Still Have a Chance?, in: Habermas, The Divided West, 2007, pp. 115 ff.: 'Nation-states (…) encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society (...)'.

investor dispute settlement also in an international setting,[113] and in particular serious concerns exist in relation to democracy and the rule of law,[114] the lawfulness and legitimacy of international dispute settlement in general cannot be based upon the autonomy of EU law alone but require thorough evaluation of multi-level legitimacy considerations.[115]

113 See e.g. *Schneiderman*, Compensating for Democracy's 'Defects': The Case of International Investment Law, in: Joerges/Glinski (eds.), The European Crisis and the Transformation of Transnational Governance: Authoritarian Management versus Democratic Governance, 2014, pp. 47 ff.
114 See, for example, *Stoll/Holterhus/Gött*, Investitionsschutz und Verfassung, 2017.
115 The discussion of which would by far go beyond the scope of this article.