Upstream Review of intra-EU ICSID Arbitration and its Inherent Consequences

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Contents

Abstract

EU Member States may have recourse to "upstream" national judicial protection under the German Civil Procedure Code to declare inadmissible and thereby preclude intra-EU investment arbitration proceedings brought under the auspices of the ICSID Convention. That remarkable conclusion by the Bundesgerichtshof (German Federal Court of Justice) constitutes the first attempt of a higher court of an EU Member State to render compatible the seemingly contradictory obligations on national courts arising from EU law and the ICSID Convention. However, even more important than the court's conformity assessment are the inherent consequences arising from its conclusion: the incompatibility of the ICSID Convention with EU law and the obligation, on all EU Member States and their institutions, to disapply that convention in intra-EU investment arbitration matters and to ultimately denounce it collectively.

Keywords: EU Law, Intra-EU Investment Arbitration, *Achmea*, ICSID Convention, Section 1032(2) ZPO, Interpretation in Conformity, Sincere Cooperation, Incompatibility, Denounciation

A. Introduction

On 27 July 2023, the Bundesgerichtshof (German Federal Court of Justice) (BGH), the highest German court in civil matters, handed down its order in three cases

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(hereafter BGH order)[1] concerning the question of whether proceedings between an EU investor and an EU Member State (intra-EU investment arbitration) conducted under the auspices of the Convention on the International Centre for Settlement of Investment Disputes (ICSID Convention) may be precluded by German courts under Section 1032(2) of the German Civil Procedure Code (ZPO) for lack of valid consent.

In essence, the BGH recognizes that EU Member States may have recourse to "upstream" national judicial protection through the mechanism contained in Section 1032(2) ZPO in intra-EU investment arbitration matters, even where conducted under the auspices of the ICSID Convention. With that decision, a higher national court of an EU Member State for the first time has rendered compatible the (seemingly incompatible) obligations on national courts arising under EU law to enable full judicial review of (intra-EU investment) arbitral awards, on the one hand, with the blocking effect of precisely that type of review by national courts under the ICSID Convention, on the other hand.[2]

This paper is structured as follows. Section B will briefly recap the legal background to the issues underlying the BGH's order. Thereafter, Section C will explain both the procedural background to that order as well as its outcome. In view of the limited depth of existing scholarship on the BGH's order, a detailed appraisal of the BGH's conform interpretation exercise is contained in Section D. Moreover, given that other commentators have so far failed to consider the corollaries of the BGH's order, Section E will posit two inherent consequences: *first*, that the principle of sincere cooperation obliges German national courts to open access to Section 1032(2) ZPO applications also to intra-EU arbitrations without a German link and, *second*, that, in intra-EU enforcement matters, EU law obliges national courts to disapply the ICSID Convention until the EU Member States have collectively denounced that convention.

B. The EU law framework

Under Article 19(1), first subparagraph, Treaty on European Union (TEU), the Court of Justice of the European Union (CJEU) ensures that, in the interpretation

1 I ZB 43/22, I ZB 74/22 and I ZB 75/22. The German original text of the BGH's order can be found at: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=134423&pos=18&anz=1061 (3/7/2024).

2 Thereby arguably placing the German courts as the first port of call for EU Member States to file an application in intra-EU investment arbitration proceedings under Section 1032(2) ZPO. From the perspective of EU law, it is clear that that avenue would satisfy Germany's obligations under the principle of sincere cooperation (see, for more detail, Section E below), which mandates that EU Member States, including their courts, assist one another to prevent breaches of EU law, irrespective of their national procedural rules. Taking the opposing (and exclusively national procedural) view, see *Weyland/Spetzger*, Transatlantic Law Journal Issue 2023/3, p. 131 (claiming that there may be issues with the lack of legitimate interest in a situation where there are no points of contact with Germany).

and application of the EU Treaties, EU law is observed. It exercises its powers in respect of disputes which come within the scope of the provisions of the EU Treaties.

The protection of investments within the territory of the EU Treaties falls within the scope of EU law.[3] For that reason, the CJEU holds jurisdiction to decide on disputes between EU natural and legal persons and the EU Member States that relate to intra-EU investment matters (in whatever form), usually by means of the preliminary reference procedure contained in Article 267 of the Treaty on the Functioning of the European Union (TFEU) – the "keystone of the [EU] judicial system".[4]

Under Article 344 TFEU, EU Member States undertake not to submit a dispute concerning the interpretation or application of EU law to any method of settlement not embedded within the judicial architecture of the EU Treaties.[5] That provision thus complements Article 19(1) TEU and Article 267 TFEU, according to which the CJEU alone, as apex court in the judicial architecture established by the EU Treaties, holds the jurisdiction to ultimately ensure the interpretation and application of EU law.

While the resulting exclusivity is not a feature that is unique to EU law,[6] it is an essential – even constitutional – feature of the EU legal order as it ensures that the allocation of powers fixed by the EU Treaties are preserved.[7] The CJEU views

3 See, to that effect, ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 42 (finding that a link to EU law is inter alia reflected in the provisions on the fundamental freedoms, including the freedom of establishment and the free movement of capital). See also, as regards the protection afforded by the latter right in cases of (indirect) expropriation, ECJ, joined cases C-52/16 and C-113/16, *SEGRO and Horváth,* ECLI:EU:C:2018:157, para. 129 (relating to the EU law compatible nature of legislation bringing about the extinction of rights of usufruct acquired by contract over agricultural land).

4 See ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, para. 46. Under that procedure, EU Member State national courts are provided "the most extensive power, or even the obligation, to make a reference to the [CJEU] if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of the provisions of EU law and requiring a decision by them". See Opinion 1/09 of the ECJ, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, para. 83. See also Opinion 1/17 of the ECJ, *EU-Canada CET Agreement* ELCI:EU:C:2019:341, para. 111.

5 See ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 17.

6 For instance, Article III Section 2 of the United States Constitution vests original (and exclusive) jurisdiction in the United States Supreme Court over "controversies between two or more States". See also Article 131 of the Constitution of India, which assigns exclusive original jurisdiction to the Indian Supreme Court in all cases between the Government of India and the States of India, or between States themselves. In addition, Article 32 of the Constitution of India grants original jurisdiction to the Indian Supreme Court on all cases involving the enforcement of fundamental rights of citizens.

7 See, to that effect, Opinion 2/13 of the ECJ, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, para. 201 (explaining that an international agreement cannot affect the allocation of powers fixed by the EU Treaties or, consequently, the autonomy of the EU legal system).

any (potential) threat to the integrity of (even part of) that system as automatically putting in jeopardy the autonomy of the entire EU legal order.[8]

The reason for that "red line" lies in the multi-level system established by the EU Treaties. In that system, competences and responsibilities are distributed among the EU Member States and their institutions and the European Union and its institutions in a way that establishes a pre-determined balance of power. Like in any federalised structure, the retention of that balance of powers is vital to safeguard the essential characteristics of the system as a whole. While that requirement does not imply a static framework incapable of accommodating different legal arrangements,[9] the principle of autonomy of EU law requires that the main pillars of that system must remain unaffected.

One of the main pillars of that framework is that *all* bodies hearing disputes involving the EU Member States and raising questions of EU law must, as regards both substance and procedure,[10] be able to ensure that EU law is fully applied and that the rights and obligations conferred by it on all subjects of EU law, including

8 To that effect, ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 56 (finding that the mere possibility of interpretation and application of EU law is sufficient to undermine the autonomy of EU law); ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, paras. 59 and 60 (highlighting that the mere "possibility" of undermining the effectiveness of EU law is sufficient to render an "outside" dispute settlement system incompatible with the EU Treaties); ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, paras. 46 and 47 (explaining that an "ad hoc" dispute settlement system arising from an arbitration clause is "capable" of calling into question not only the principle of mutual trust but also the preservation of the "particular nature" of EU law is incompatible with the judicial structure established by the EU Treaties) and ECJ, case C-638/19 P, *Commission v European Food and Others*, ECLI:EU:C:2022:50, paras. 141 and 145 (finding that the consent by Romania to the establishment of an arbitral tribunal, "which does not form part of the EU judicial system within the second subparagraph of Article 19(1) TEU … lacked any force" from that Member States' accession to the European Union).

9 Think, for instance, the Benelux Court, as a court common between three EU Member States (see ECJ, case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, ECLI:EU:C:1997:517, para. 22) or the Unified Patent Court, as an international court integrated into the EU legal architecture that nonetheless holds exclusive jurisdiction in a specific area also governed by EU law (see Opinion 1/09 of the ECJ, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, para. 89 and *Agreement on a Unified Patent Court* (OJ C 175 of 20/6/2013, p. 1)).

10 See, for example, ECJ joined cases C-615/20 and C-671/20, *YP and Others (Waiver of immunity and suspension of a judge)*, ECLI:EU:C:2023:562, paras. 70–72 and 76 (disapplying a national principle of res judicata on the basis that "where an act such as the resolution at issue was adopted by a body which does not constitute an independent and impartial tribunal within the meaning of EU law, no consideration relating to the principle of legal certainty or the alleged finality of that resolution can be successfully relied on in order to prevent the referring court and the judicial bodies with jurisdiction for designating and modifying the composition of the formations of the national court from disapplying such a resolution").

the EU Member States when acting within that field, are effectively respected.[11] In other words, that there is a way to ensure the compliance with the rights and obligations arising from EU law, and thus adherence to the fundamental right to effective judicial protection (the essence of which reflects one of the values contained in Article 2 TEU: the rule of law).[12]

That is why the judgments in *Achmea*, *Republic of Moldova* and *PL Holdings* all drive home the point that only systems embedded *within* the treaty structure envisaged by Article 19(1) TEU are compatible with the autonomous nature of the EU legal order.[13]

The converse is simple: any system of dispute settlement between the European Union and its Member States, which is external to that envisaged by Article 19(1) TEU, and therefore does not maintain the CJEU as the apex jurisdiction for the interpretation of questions of EU law – such as that involving the current system of intra-EU investment arbitration – cannot circumvent the EU judicial architecture, but must be squarely placed within it.[14]

Most arbitral tribunals are not integrated into the national systems of the EU Member States,[15] and accordingly cannot be classified as a court or tribunal "of a Member State" within the meaning of Article 267 TFEU.[16] Therefore, they do not form part of the system constituted under Article 19(1) TEU, with the effect that

11 See, to that effect, ECJ, case C-430/21, *RS (Effect of judgments of a constitutional court)*, ECLI:EU:C:2022:99, para. 39 (explaining that "Article 19 TEU ..., which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice").

12 See, to that effect, ECJ, case C-619/18, *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531, para. 58 and ECJ, case C-718/21, *Krajowa Rada Sądownictwa (Continuity in office of a judge)*, ECLI:EU:C:2023:1015, para. 61 (both laying down that it is "of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded").

13 See ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, paras. 35–36 ; ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, para. 45 and ECJ, case C-638/19 P, *Commission v European Food and Others*, ECLI:EU:C:2022:50, para. 139.

14 See, for instance, ECJ, case C-459/03, *Commission v Ireland* ECLI:EU:C:2006:345, paras. 80–139.

15 See, for example, ECJ, case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, ECLI:EU:C:2014:1754, paras. 25 et seq. (explaining that "the status of 'court or tribunal of a Member State' of the tribunal in question [derived] from the fact that the tribunal as a whole was part of the system of judicial resolution of tax disputes provided for by the Portuguese constitution itself"). See also, for instance, ECJ, case C-196/09, *Paul Miles and Others v. Écoles européennes*, ECLI:EU:C:2011:388, para. 41 (distinguishing the Complaints Board from the Benelux Court, since the former "does not have any such links with the judicial systems of the Member States").

16 That is also the position that the BGH takes as regards ICSID-based tribunals. See BGH order, para. 107 (explaining that "an ICSID arbitral tribunal does not belong to the court system of the EU because it is not a court entitled to request a preliminary ruling").

the CJEU views those tribunals as incapable of making a reference for a preliminary ruling, within the meaning of Article 267 TFEU.[17]

The result is that arbitral tribunals, such as those established under the ICSID Convention, are not national courts capable of ensuring the full effectiveness of EU law.[18]

To exercise that task, such tribunals must be integrated into the system of Article 19(1) TEU (and thus able to act in their capacity of "guardians" of the EU legal system).[19] This integration is "essential for the preservation of the Community character of the law established by the Treaties, [which] aims to ensure that, in all circumstances, that law has the same effect in all Member States".[20]

Consequently, when a national court operating within the Article 19(1) TEU structure is faced with an intra-EU arbitration scenario, that court is obliged *not only* to void of its own motion the underlying arbitration clause establishing the EU law-incompatible dispute settlement mechanism,[21] *but also* to deny any effect to decisions or awards resulting from the resulting (and non-integrated) arbitral tribunal, irrespective of the types of rules under which that tribunal operates.[22]

C. Placing the BGH's order

Section 1032(2) ZPO[23] provides that a German court may determine the admissibility or (or lack thereof) of arbitral proceedings at the request of a party. That provision, which has been described as "a peculiarity of domestic German arbitration law",[24] is aimed at enhancing the efficiency of arbitrations and promotes legal

17 To that effect also Opinion of AG Szpunar, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, point 77 (opining that a tribunal established under Article 26 ECT "is not a part of the judicial system of the Member States … [n]or does it constitute a court or tribunal common to several Member States, since it has no connection with the judicial systems of the Member States").

18 See, for example, ECJ, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 43 and the case-law cited.

19 See Opinion 1/09 of the ECJ, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123, para. 66.

20 Ibid., para. 83.

21 See, to that effect, ECJ, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 60 and ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, paras. 50 et seq.

22 See, to that effect, ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, paras. 52–55 and ECJ, case C-638/19 P, *European Commission v European Food SA and Others*, ECLI:EU:C:2022:50, paras. 42–44.

23 That provision reads as follows: „Bei Gericht kann bis zur Bildung des Schiedsgerichts Antrag auf Feststellung der Zulässigkeit oder Unzulässigkeit eines schiedsrichterlichen Verfahrens gestellt werden." ["Until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings."]

24 See *Scherpf/Hermes*, Arbitration International 2023/4, p. 518. Along the same lines *Wettstein/Schöttmer*, European Investment Law and Arbitration Review 1/2024, p. 2 with further references.

certainty at a very early stage of arbitral proceedings.[25] A resulting declaration of inadmissibility binds the German courts (and the tribunal insofar as an award rendered in violation of such a declaration is considered null and void).[26]

However, since a request under Section 1032(2) ZPO is not meant to operate as an impediment to the general principle of *Kompetenz-Kompetenz* (by reason of which an arbitral tribunal decides on its own jurisdiction), said request must be filed *before* the constitution of the arbitral tribunal.[27] That provision accordingly grants to German courts the power of conducting an *upstream* compatibility review *prior* to arbitration proceedings being commenced.

Under Section 1025(2) ZPO, the Section 1032(2) ZPO facility may also be applied to foreign-seated arbitral proceedings as well as to those for which no seat of arbitration has yet been determined.[28]

One of the fundamental questions arising in the BGH proceedings underlying the order at issue was whether Section 1032(2) ZPO could also be applied to ICSID arbitration proceedings, given that those proceedings famously do not have any seat of arbitration.[29] The BGH confirms the applicability of that provision to intra-EU investor-State arbitration proceedings, and particularly those conducted under the ICSID Convention – a set of rules regarded by practitioners as a "closed loop" or "self-contained" system detached from review or involvement of national courts.[30]

With that conclusion, the BGH resolves a conflict between two lower courts: the Kammergericht Berlin (Berlin Higher Regional Court, Germany), which, in a deci-

25 Ibid., *Scherpf/Hermes*, Arbitration International 2023/4, p. 519, referring to Drucksachen [BT] 13/5274, p. 38.

26 In assuming jurisdiction at a point that early in the lifetime of an arbitral proceeding, the German courts may thus rule on the admissibility of an arbitration without taking a position on the substance underlying the dispute.

27 According to the *Kompetenz-Kompetenz* doctrine, an arbitral tribunal generally has jurisdiction to consider and decide on any disagreements regarding its own jurisdiction. In certain circumstances, that power is subject to subsequent (i.e. downstream) judicial review. In the context of investor-State disputes, an arbitral tribunal's authority to rule on its own jurisdiction may be subject to the review of national courts with respect to ad hoc arbitrations; or the review of an ad hoc committee with respect to ICSID arbitrations.

28 That provision reads as follows: „Die Bestimmungen der §§ 1032, 1033 und 1050 sind auch dann anzuwenden, wenn der Ort des schiedsrichterlichen Verfahrens im Ausland liegt oder noch nicht bestimmt ist." ["The provisions of sections 1032, 1033 and 1050 are to be applied also in those cases in which the place of arbitration is located abroad or has not yet been determined."]

29 See, in this regard, *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 Mar. 2008), para. 228 ("unlike other types of arbitration, the place of arbitration in ICSID proceedings carries no legal consequences as the ICSID system is self-contained. In particular, the choice of the place of arbitration does not trigger the application of the local arbitration law nor create jurisdiction of the local courts in aid and control of arbitration"). Accordingly, *Broches* has argued that the self-contained regime is insulated from the law of the place of arbitration, which does not have "juridical relevance" to determine the procedural and substantial law applicable to ICSID proceedings. See *Broches*, Yearbook Commercial Arbitration 1993, p. 711.

30 See, generally, *Giardina*, pp. 199–219.

sion of 28 April 2022, declared an application by Germany under Section 1032(2) ZPO in an intra-EU investment arbitration as inadmissible,[31] and the Oberlandesgericht Köln (Cologne Higher Regional Court, Germany), which, in two decisions of 1 September 2022, had allowed such an application in favour of the Netherlands, again in intra-EU arbitration proceedings. [32]

Against the background of a significant number of investment arbitration tribunals finding jurisdiction in intra-EU investment arbitrations[33] on the basis of the ICSID Convention *in spite of* the directions of the CJEU as to the incompatibility with EU law[34] – and thereby also with the national law of those EU investors and EU Member States[35] – the BGH's decision to interpret Section 1032(2) ZPO to "fill the gap" between *available* remedies under German law (for commercial and UNCITRAL-based arbitrations)[36] and *required* remedies (given the binding nature of higher-ranking EU law,[37] which considers intra-EU investment arbitration

31 See Kammergericht Berlin – order of 28 April 2022 – 12 SchH 6/21 (ECLI:DE:KG:2022:0428.12SCHH6.21.0A), published at 12 SchH 6/21 and BeckRS 2022, 36382. Underlying this case is an action by the Irish company Mainstream Renewable Power Ltd., which initiated proceedings against Germany after that State had introduced new legislation relating to the renewable energy sector and thereby affected an offshore wind park that the applicant was operating.

32 See Oberlandesgericht Köln – orders of 1 September 2022 – 19 SchH 15/21 (ECLI:DE:OLGK:2022:0901.19SCHH15.21.00) and 19 SchH 14/21 (ECLI:DE:OLGK:2022:0901.19SCHH14.21.00), published at 129 SchH 14/21, BeckRS 2022, 22872 and 19 SchH 14/21 and BeckRS 2022, 22871 respectively. These cases concerned actions by Uniper and RWE against the Netherlands in the light of that State's legislation to phase out coal by the year 2030.

33 As *Maxian Rusche* explains, those tribunals do not consider themselves bound by the case-law of the CJEU. See *Maxian Rusche*, European Investment Law and Arbitration Review Online 2021/1, p. 317. See also the abbreviated list of tribunal awards referenced at footnote 21 of that contribution.

34 See, for example, ECJ, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 60 (declaring intra-EU arbitration incompatible with EU law) and ECJ, case C-333/19, *Romatsa and Others*, ECLI:EU:C:2022:749, para. 41 (clarifying that the *Achmea* logic also applies to awards rendered under the ICSID system).

35 See, by analogy, ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, para. 33 (explaining that "EU law forms part of the law in force in every Member State").

36 See, to that effect, BGH order, para. 35 (explaining that '"insofar as the delocalised and thus non-national ICSID investment arbitration proceedings are not covered by the 'wording of the law, this constitutes an unintended regulatory gap in the law. There is no indication that the legislator intended to exclude this special constellation from the 10th Book of the German Code of Civil Procedure").

37 See, for example, ECJ, case C-131/97, *Carbonari and Others*, ECLI:EU:C:1999:98, paras. 49 et seq. (finding that the national court must consider national law as a whole so as to come to a finding of conform interpretation with EU law).

incompatible with the constitutional framework of the EU Treaties),[38] is the only reading that realistically could have ensured the full effectiveness of EU law in view of the availability of that type of procedural remedy.[39]

In other words, the BGH's conclusion is the only one that it could have reached in the circumstances of the cases before it and by reason of its mandate as "EU law judge" ("*le juge de droit commun du droit de l'Union*").

As the BGH explains, "the international ICSID Convention ranks like a simple federal law in the German legal order due to the fact that it was ratified by the 1969 Act pursuant to Article 59 (2) sentence 1 German Constitution".[40] EU law, on the other hand, "originates from an autonomous source, namely the Treaties, and takes precedence over the law of the Member States",[41] an autonomy that "exists both vis-à-vis the law of the Member States and vis-à-vis international law".[42] As such, "the blocking effect of Article 41(1) ICSID Convention does not prevent an application under Section 1032(2) German Code of Civil Procedure from being admissible, because of the primacy of EU law – also vis-à-vis public international law".[43]

D. The novelty of interpretation

The BGH's conclusion has essentially been criticised from two angles: *first*, that by ratifying the ICSID Convention, State signatories have provided a standing (and binding) offer to arbitrate, which an investor from an ICSID signatory State may accept at any time by means of a bilateral or multilateral investment treaty, or, in rarer cases, through a law or contract that makes reference to the ICSID Convention;[44] and, *second*, that by reason of the ICSID Convention constituting a "closed-loop system", any involvement of national courts is excluded by design.[45]

38 Thus rendering them unenforceable within the European Union; see, to that effect, ECJ, case C-333/19, *Romatsa and Others*, ECLI:EU:C:2022:749, paras. 43 et seq. (explaining that an ICSID-based intra-EU arbitral award "ne saurait donc produire aucun effet et ne peut ainsi être exécutée en vue de procéder au versement de l'indemnisation accordée par celle-ci") (translation: "could not produce any effect and cannot therefore be enforced with a view to paying the compensation awarded by it")).

39 See, for instance, ECJ, cases C-397/01 to C-403/01, *Pfeiffer and Others*, ECLI:EU:C:2004:584, para. 114 (stating that consistent interpretation is "inherent in the system of the Treaty, since it permits the national court, for matters within its jurisdiction to ensure the full effectiveness of Community law when it determines the dispute before it").

40 See BGH order, para. 55.

41 Ibid., para. 67.

42 Ibid., para. 68.

43 Ibid., para. 67.

44 See, to that effect, *Tietje*, Zeitschrift für Schiedsverfahren 2023/5, p. 304 (referring to standing consent by means of bilateral investment treaties).

45 See, to that effect, *Weyland/Spetzger*, Transatlantic Law Journal 2023/3, p. 131; *Masser*, Transatlantic Law Journal 2023/3, p. 100; *Scherpf/Hermes*, Arbitration International 2023/4, pp. 522 et seq., *Wettstein/Schöttmer*, European Investment Law and Arbitration Review 2024/1, p. 5, and *Pacas Castro*, Zeitschrift für Europarechtliche Studien 2024/1, p. 52.

The first line of criticism is essentially based on Articles 26(1) ICSID Convention. Pursuant to that provision, "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".

As the CJEU's case law stands currently, it is not clear as to whether standing offers to arbitrate are *generally* compatible with the structure of the EU Treaties.[46] That, however, is not determinative of the view that EU law takes of Article 26(1) ICSID Convention: in establishing a standing offer to arbitrate, that provision creates bilateralised obligations between ICSID signatories.[47] As such, just like the Energy Charter Treaty or other multilateral treaties which put in place such "bundles" of bilateral obligations,[48] EU law "cuts" those bilateralised ties insofar

46 Compare, in this regard, ECJ, case C-638/19 P, *European Commission v European Food SA and Others*, ECLI:EU:C:2022:50, para. 144 (explaining that standing consent by an EU Member State to BIT dispute settlement "does not originate in a specific agreement reflecting the freely expressed wishes of the parties concerned") with the standing offers to arbitrate at issue in Opinion 2/15 of the ECJ, *EU-Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, paras. 288–292 (specifically referring to a prior paragraph highlighting the purely competence-related nature of the opinion before it, but then, when explaining the outlines of the envisaged dispute settlement system, including the standing offer to arbitrate, inserting a sentence on said regime "remov[ing] disputes from the jurisdiction of the courts of the Member States") and View of Advocate General Kokott in ECJ, case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:675, point 189 (noting that "a dispute between an ESM Member and the ESM is in fact, or at least can be assimilated to, a dispute between the ESM Member and the other ESM Members, who within the ESM have adopted a majority decision be followed").

47 See, to that effect, ECJ, case C-516/22, *Commission v United Kingdom*, ECLI:EU:C:2024:231, para. 75 (explaining that "for the reasons set out by the Advocate General in points 133–137 of his Opinion, and as the Commission has argued in support of the present complaint, that international agreement [the ICSID Convention], despite its multilateral nature, is intended to govern bilateral relations between the contracting parties in an analogous way to a bilateral treaty"). See also, by analogy, ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, para. 64. That is why, contrary to what has often been argued, the non-enforcement of an intra-EU arbitration award by reason of its incompatibility with EU law does not incur liability of a third State ICSID signatory. See ECJ, case C-516/22, *Commission v United* Kingdom, ECLI:EU:C:2024:231, paras. 76 et seq. (explaining that membership to the ICSID Convention creates "a purely factual interest [that] cannot be equated with a 'right', within the meaning of the first paragraph of Article 351 TFEU, capable of justifying the application of that provision" and thereby "engag[ing] the international liability of the United Kingdom for failure to fulfil its obligations under that convention in the context of the enforcement of an arbitral award made at the conclusion of a dispute between Member States").

48 See, among others, ECJ, case 286/86, *Ministère Public v Deserbais*, ECLI:EU:C:1988:434 (concerning the Stresa Convention on Cheeses); ECJ, joined cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, ECLI:EU:C:1995:98 (concerning the Berne Convention for the Protection of Literary and Artistic Works); ECJ, case C-147/03, *Commission v Austria*, ECLI:EU:C:2005:427 (concerning the Council of Europe Convention on the Equivalence of Diplomas); ECJ, case C-301/08, *Bogiatzi v Deutscher Luftpool et al.*, ECLI:EU:C:2005:427 (concerning the Warsaw Convention on International Carriage by Air); and case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655 (concerning the Energy Charter Treaty). See also, for a detailed analysis of the rights of third States in intra-EU situations, *Klabbers*, pp. 115–149.

as they would enable intra-EU investment arbitration (and thus a potential parallel system of dispute settlement that removes from the jurisdictional framework of Article 19(1) TEU certain disputes that *may* involve the interpretation or application of EU law)[49] and replaces it, given the constitutional requirements of EU membership, with that envisioned by the EU Treaties.[50]

The conclusion is simple: from the perspective of EU law, EU Member States cannot legally "consent", even at the level of public international law, to resolve their EU law-based disputes within the "ICSID bubble".[51]

It follows that since the obligation to respect the primacy of EU law cannot be waived by means of a dispute settlement system external to that envisioned by Article 19(1) TEU,[52] any arbitration tribunal to be constituted on the basis of that flawed waiver does not hold the required jurisdiction to resolve an intra-EU

49 Such that we are squarely back in the *Komstroy* scenario; see ECJ, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 60 and the case law cited. On the question of how such a system could be made compatible with EU law, see, generally, *Kuplewatzky*, Jean Monnet Paper 2022/1.

50 See, to that effect, ECJ, case C-638/19 P, *Commission v European Food and Others*, ECLI:EU:C:2022:50, paras. 141 and 145 (explaining inter alia that "since, with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, the consent given to that effect by Romania, from that time onwards, lacked any force").

51 See, to that effect, ECJ, case C-638/19 P, *Commission v European Food and Others*, ECLI:EU:C:2022:50, para. 145. See also the Award of 16 July 2022 in *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain* (SCC Case No. V2016/135, paras. 469–470): "[t]he Tribunal deems important to note that the primacy of EU law in the relations between EU Member States, such as Denmark and Spain, is not a matter of *lex specialis* or of *lex posterior*, but one of *lex superior*. EU Member States are part of a network of legal relations, including the ECT, EU law and many other norms and agreements. Some of these norms, including provisions of the EU Treaties, are deemed by them as superior and overriding with respect to some other norms. Which specific norms can display this overriding character can be ascertained by reference to the case law of the CJEU. Indeed, when recalling the long-held principle of the primacy of EU law, in the Declaration 17 to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, EU Member States placed particular emphasis of the CJEU case law. … Seen from a *lex superior* perspective, the ECT could only override EU law in intra-EU relations if the ECT, including its Article 16, could be considered *as lex superior* with respect to the relevant norms of EU law, including Articles 267 and 344 TFEU and the principle of primacy. The Tribunal considers that there are no grounds on which the ECT could have such an overriding character in the circumstances of this case."

52 See, to that effect, ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, para. 50 (explaining that if "each request for arbitration made to a Member State by an investor from another Member State, on the basis of an arbitration clause in a bilateral investment treaty between those two Member States, may, despite the invalidity of that clause, constitute an offer of arbitration to the defendant Member State concerned, which could then be regarded as having accepted that offer simply because it failed to put forward specific arguments against the existence of an ad hoc arbitration agreement … [that] would have the effect of maintaining the effects of the commitment – which was entered into by that Member State in breach of EU law and is, therefore, invalid – to accept the jurisdiction of the arbitration body before which the matter was brought").

dispute brought before it.[53] In other words, such a tribunal does not hold the *Kompetenz-Kompetenz* to decide on its *Kompetenz-Kompetenz* since an EU Member State lacks, from its date of accession to the European Union, the capacity to make a valid offer to arbitrate under EU law.

The novelty of the BGH's approach therefore lies in the attempt to "repair" the difficulties arising from (what EU law views as) the *inability*[54] of EU Member States to consent, at the level of public international law, to a system of dispute settlement not contained within the judicial system established by the EU Treaties, but which nonetheless may involve the interpretation and application of EU law, all the while achieving the result that is demanded from the international agreement in question (that is to say the exclusivity of jurisdiction of an arbitral tribunal constituted under the ICSID Convention).

In its passage through that proverbial Strait of Messina, the BGH explains that on the one side lies "the principle of the German Constitution's openness to international law [which] requires that domestic laws should, where possible be interpreted in such a manner, that they do not cause any conflict with the Federal Republic of Germany's obligations under international law".[55] That methodological principle of interpretation demands that where "a statute [can be] interpreted in several ways, then the interpretation that is open to international law is generally to be preferred".[56] On the other side, however, the supremacy of EU law "requires that the domestic courts, which have to apply the provisions of EU law within their

53 See, to that effect, ECJ, case C-109/20 *PL Holdings*, ECLI:EU:C:2021:875, para. 51 (laying down that an invalid arbitration clause vitiates "the validity of an arbitration body's jurisdiction").

54 The word "inability" should be flagged as particularly important in this context since, absent changes to the EU Treaties, it is highly doubtful that EU Member States, even in their capacity as sovereign States could ever even collectively agree to an interpretation of the EU Treaties that runs counter the established case law of the CJEU. That is to say that, in the remote scenario where the Representatives of the Heads of State or Government were willing to formulate an interpretative declaration within the meaning of Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties to convey, in a subsequent agreement between the EU Member States, and thus the signatory parties to the Treaties, their collective interpretation that Article 19(1) TEU after all does allow for a system of parallel dispute settlement in intra-EU investment arbitration matters. While the ECJ has in the past taken the position that it cannot pronounce itself on the illegality of such a declaration (see ECJ, case C-684/20 P, *Sharpston v Council*, ECLI:EU:C:2021:486, para. 45), given the specific characteristics of the EU law system and the existing jurisprudence on the compatibility of intra-EU arbitration with Articles 19 TEU, 267 and 344 TFEU, it is unlikely that the ECJ would accept that kind of interpretation to bind it (even if, as in ECJ, case C-135/08, *Rottmann*, ECLI:EU:C:2010:104, para. 40, it could certainly take account of that kind of declaration). See, along the same lines, as regards the European Union's accession to the European Convention on Human Rights, Opinion of the Council Legal Service, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – Interpretative declaration concerning the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU (competence of the Court of Justice in CFSP matters) – Compatibility with the Treaties, ST 10360/22, para. 16.

55 BGH order, para. 55.

56 BGH order, para. 55.

jurisdiction, ensure the full effect of these provisions. To that end, those national courts must exercise their own decision-making power to disapply any conflicting domestic provision, if necessary, without first requesting or awaiting a change in the national law by the legislator or some other constitutional process to eliminate such a conflicting provision".[57]

Conform interpretation is a method of interpreting the law; a way of reading it. By means of that method, a court cannot create new rights or obligations where none previously existed. Nor can it step into the shoes of the legislature and amend the law before it. That is already obvious from its very name and nature: conform *interpretation*.

Primacy of EU law being a founding pillar of the EU legal order where the conditions for direct effect are not satisfied,[58] national courts are under an obligation to interpret their national law – including any international law that their domestic legislature sought to "implement" into its legal system – in favour of a result that ensures the overriding effect of the "more supreme layer" of EU law.[59] The obligation on national courts is accordingly not one of *balancing* various conflicting rules of law. It is one of *prioritising*: to the extent that a provision of national law stands in the way of ensuring the effectiveness of EU law, it must be disapplied.[60]

Viewed against the above obligation on national courts, the second line of criticism of the BGH's approach appears overly monist and one-dimensional: the "closed-loop" system of the ICSID Convention, which does not form part of EU law,[61] may stand within the national systems of the EU Member States only so far as

57 BGH order, para. 68.

58 Hence, that is why the ECJ in *Pfeiffer and Others* considered that judicial principle to be "inherent in the system of the Treaties". See ECJ, case C-397/01, *Pfeiffer and Others*, ECLI:EU:C:2004:584, para. 114 (stating that consistent interpretation is "inherent in the system of the Treaty, since it permits the national court, for matters within its jurisdiction to ensure the full effectiveness of Community law when it determines the dispute before it").

59 See, for instance, See Opinion 1/09 of ECJ, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123, para. 65 (terming primacy one of the "essential characteristics of the European Union legal order").

60 See, ex multis, ECJ, case C-213/89, *Factortame and Others*, ECLI:EU:C:1990:257, para. 23 (explaining that "Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule").

61 As the ECJ judgments in *Intertanko* and *Commune de Mesquer* explain (ECJ, case C-308/06 *Intertanko and Others*, ECLI:EU:C:2008:312, para. 49 and ECJ, case C-188/07, *Commune de Mesquer*, ECLI:EU:C:2008:359, para. 85), an international agreement to which the European Union has not acceded cannot form part of EU law unless two conditions are satisfied: first, if all the EU Member States are parties to it, and, second, if there has been a full transfer of the competences previously exercised by the EU Member States to the European Union in the meantime. Since Poland is not a signatory to the ICSID Convention, the first of those two cumulative conditions fails, with the consequence that the ICSID Convention does not form part of EU law.

its interpretation does not make the enforcement of EU law-based rights impossible or excessively difficult.[62]

That idea, known also as the principle of effectiveness in situations where the national systems of the EU Member States hold procedural autonomy, was classically stated first in the famous *Rewe-Zentranfinanz and Rewe-Zentral* judgment of 1976.[63] It extends as far as international law obligations that may bind the EU Member States.[64]

In its assessment of the limits of national procedural autonomy, the BGH engages deeply with the structure and objective of the ICSID Convention, as implemented into German law. It explains that "[the ICSID Convention's] spirit and purpose …, which is designed to decouple domestic law and ordinary courts as much as possible … also suggests a comprehensive decision-making power within the ICSID system from the point of a request being submitted or, in any event, from the time proceedings are initiated".[65] From that perspective, the BGH finds, "the ICSID Convention deliberately deviates from involving the ordinary courts",[66] since, "pursuant to Article 41(1) ICSID Convention, the decision as to whether the jurisdictional requirements of Article 25 ICSID Convention have been met … fundamentally rests solely with the arbitral tribunal",[67] and thus the *Kompetenz-Kompetenz* of the arbitral tribunal, which is required by Article 41(1) thereof.[68]

Given those premises, the BGH considers that its conformity interpretation requires it to disapply the German national provisions implementing Article 41(1) ICSID Convention in the context of intra-EU arbitrations, to the extent that that provision could stand in the way of a front-loaded consent control mechanism, such as that contained in Section 1032(2) ZPO.[69] In that way, the national courts may "bindingly anticipate the ex-post control required in the context of ICSID arbitration proceedings … and thereby prevent any (later) declaration of enforceability of an ICSID award in Germany to the binding effect of this decision".[70]

62 See, to that effect, BGH order, para. 76.

63 See ECJ, case 33/76, *Rewe-Zentranfinanz and Rewe-Zentral*, ECLI:EU:C:1976:188, para. 5 (explaining that, in the absence of EU legislation, it is for each EU Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which individuals derive from EU law, so long as those rules are no less favourable than those governing similar domestic actions (the requirement of equivalence) and that those rules not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the requirement of effectiveness)). Since then, that principle has been restated in dozens of cases; see, among others, ECJ, case C-234/17, *XC and Others*, ECLI:EU:C:2018:853, paras. 21 et seq. and the case law cited.

64 See, notably, ECJ, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, paras. 285 et seq.

65 See BGH order, para. 63.

66 Ibid., para. 68.

67 Ibid., para. 60.

68 Ibid., para. 65.

69 Ibid., para. 78.

70 Ibid., para. 79.

While the BGH does not further engage with the EU law compatibility of that approach, the case-law of the CJEU appears open to the use of "upstream" control remedies in national systems so long as questions of EU law may be resolved by a "court or tribunal", within the meaning of Article 267 TFEU, before or after "leaving" the system of Article 19(1) TEU.[71]

The elegance of the BGH's interpretative front-loading of the EU compatibility of ICSID-based arbitrations is especially apparent when viewed against the conflicting obligation, also incumbent on national courts,[72] of performing effective "judicial review of an ICSID award in an intra-EU investor-State constellation … [which] is mandatory [under EU law] in the downstream proceedings",[73] despite the ICSID Convention generally[74] not permitting a "subsequent review of the decision on jurisdiction by the ordinary courts … since jurisdictional competence must be carried out exclusively within the framework of the arbitration proceedings themselves".[75]

In concluding that a front-loaded compatibility review under EU law is possible, the BGH also ties in the obligation highlighted in the judgment in *PL Holdings* that "where such a dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, [the EU Member States] are required to challenge, before that arbitration body or before the court with jurisdiction, the

71 See, by analogy, ECJ, case C-199/11, *Otis and Others*, ECLI:EU:C:2012:684, paras. 46, 49 and ECJ, case C-682/15, *Berlioz Investment Fund*, ECLI:EU:C:2017:373, paras. 55 and 56 (finding that the principle of effective judicial protection requires that a decision of a body not capable of making a preliminary ruling must be subject to subsequent control by a body capable of ensuring full review in law and in fact). See also, to that effect, as regards the compatibility of front-loading an EU compatibility review by the CJEU, Opinion of AG General Čapeta, joined cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, ECLI:EU:C:2023:901, point 150.

72 See, for example, ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, paras. 54, 57) (explaining that, while required of an arbitral award rendered by a tribunal not forming part of the Article 19(1) TEU infrastructure, the scope of downstream review depends on the jurisdiction of the national courts under national law). See also ECJ, case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 37 and ECJ, case C-124/21 P, *International Skating Union*, ECLI:EU:C:2023:1012, para. 193 (generally accepting the compatibility, with EU law, of arbitration mechanisms between natural and legal persons subject to the requirement that a national court is able to review public policy questions of EU law).

73 BGH order, para. 72.

74 Although it should be recalled that even the UK Supreme Court in *Micula a.o. v Romania* [2020] UKSC 5, para. 78, considered that "in light of the wording of articles 54(1) and 55 [of the ICSID Convention] and the travaux préparatoires reviewed above, it is arguable that there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the [ICSID] Convention."

75 See BGH order, para. 64. See also para. 108 (explaining that "in view of Articles 53, 54 ICSID Convention, an ICSID award is not subject to a sufficient review by a court of a Member State with regard to its compatibility with EU law").

validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body".[76]

With its solution, the BGH equally avoids wading into the murky waters of the effect and limits of Article 54(1) ICSID Convention. For one, the BGH considers that a declaration on the incompatibility of EU law by a national court preceding an intra-EU arbitration under the ICSID Convention "can have persuasive force through the 'doctrine of comity' in third countries, despite the binding effect of an ICSID award".[77] That idea of adjudicative comity, that is to say of deference by courts of a third State towards decisions of, in this case, the German courts is particularly well developed in the US courts, and may, in certain situations, even excuse the violation of US law if required by foreign law.[78] For another, the BGH's conformity interpretation avoids a discussion of sovereign immunity[79] upon enforcement of an ICSID award, particularly against the background that even the courts of traditionally arbitration-friendly destinations, like the United Kingdom and the United States of America, have so far failed to take a clear position on the effect of ICSID membership on sovereign immunity defences.[80] For its part, and taking a similar line as the BGH in the order at issue, the US Department of Justice

76 See ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, para. 52. See also, to that effect, BGH order, para. 80.

77 BGH order, para. 91.

78 See Restatement (Fourth) of Foreign Relations Law § 442 and the defence of foreign State compulsion (explaining that, in rare situations, when a violation of US law is compelled by the law of another State, courts in the United States may excuse the violation of US law, or moderate the sanction imposed for such a violation, to the extent doing so is consistent with that law). See also, on the idea of foreign State compulsion under EU law, ECJ, joined cases C-89, 104, 114, 116, 117 and 125–129/85, *A. Ahlström Osakeyhtiö v Commission*, ECLI:EU:C:1993:120, para. 20 (explaining that "there is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded").

79 See, in that regard, ECJ, case C-641/18, *Rina*, ECLI:EU:C:2020:349, para. 56 (explaining that "the immunity of States from jurisdiction is enshrined in international law and is based on the principle par in parem non habet imperium, as a State cannot be subjected to the jurisdiction of another State. However, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*").

80 Compare, in this regard, the judgment of the High Court of England & Wales in *Border Timbers Limited and another v Republic of Zimbabwe* [2024] EWHC 58 (Comm), paras. 109 et seq. and the judgment of the High Court of England & Wales in *Infrastructure Services Luxembourg Sarl v Kingdom of Spain*, [2023] EWHC 1226 (Comm), paras. 20, 56. Taking the same position as the latter, see the High Court of Australia in *Kingdom of Spain v Infrastructure Services Luxembourg Sarl* [2023] HCA 11, paras. 74 et seq.; and the High Court of New Zealand in *Sodexo Pass International SAS v Republic of Hungary* [2021] NZHC 371, para. 60. Compare similarly the order of 29 March 2023 of the US District Court for the District of Columbia in *Blasket Renewable Investments, LLC, v Kingdom of Spain* (Civil Action No. 21-3249), declining subject-matter jurisdiction under the US Foreign Sovereign Immunities Act, and the decision of 29 June 2021 by a different composition of the same court in *Infrared Environmental Infastructure GP Ltd. V Spain* (Civil Action No. 20-817).

has taken the position that the assessment of an arbitration agreement's *validity* may be severed from the antecedent determination as to whether an agreement to arbitrate was actually *formed*. [81] In this regard, it has explained in an *amicus curiae* submission before the US Court of Appeals for the District of Columbia Circuit that the New York Convention and the ICSID Convention "establish frameworks for arbitrating disputes and enforcing arbitral awards that may result[; however,] the conventions by themselves do not commit a foreign state to engage in arbitration and therefore they could not implicitly waive sovereign immunity for any enforcement action".[82]

E. Inherent consequences

Intra-EU investment arbitration calls into question the principle of mutual trust between the EU Member States.[83] The fact that EU Member State share with all other EU Member States, and recognise that they share with them, a set of common values on which the European Union is established constitutes the very foundation for, and justification of, the existence of mutual trust.[84]

The principle of sincere cooperation, contained in Article 4(3) TEU, goes hand-in-hand with that of mutual trust. Recently referred to as the "backbone of the legal system created under the EU Treaties",[85] sincere cooperation binds all institutions within the EU Member States, including their national courts,[86] "and, to that end, to

81 Compare Brief of the United States as Amicus Curiae, *Nextera Energy Global Holdings B.V. v Kingdom of Spain*; *9REN Holdings S.A.R.L. v Kingdom of Spain*; *Blasket Renewable Investments LLC v Kingdom of Spain* (Nos. 23-7031, 23-7032, 23-7038) (2 February 2024), p. 16 and the Brief of the United States as Amicus Curiae 7, *Process & Industrial Developments Limited v Federal Republic of Nigeria* (No. 21-7003) (20 January 2022), in which the position was taken that "an award need not be valid to provide the district court with jurisdictions under the arbitration exception [to the US Foreign Sovereign Immunities Act], as the validity of an arbitral award is a merits question".

82 See Brief of the United States as Amicus Curiae, *Nextera Energy Global Holdings B.V. v Kingdom of Spain*; *9REN Holdings S.A.R.L. v Kingdom of Spain*; *Blasket Renewable Investments LLC v Kingdom of Spain* (Nos. 23-7031, 23-7032, 23-7038) (2 February 2024), p. 20. For completeness, it should be highlighted, however, that, in May 2024, the US Court of Appeals for the District of Columbia Circuit in *Ioan Micula, et al. v Government of Romania* (No. 23-7008) dismissed for lack of jurisdiction similar arguments relating to comity and the validity of the arbitration agreement.

83 See, for further reflection, *Centeno Huerta/Kuplewatzky*, European Papers 1/2019, pp. 61–78.

84 ECJ, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 34 and the case law cited.

85 Opinion of AG Emiliou, case C-516/22, *Commission v United Kingdom*, ECLI:EU:C:2023:857, para. 58.

86 See, in that respect, ECJ, case C-344/98, *Masterfoods and HB*, ECLI:EU:C:2000:689, paras. 49, 56 et seq. (explaining that "the Member States' duty under Article 5 of the EC Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts").

take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties".[87]

Sincere cooperation requires that the EU Member States assist one another in preventing infringements of EU law. That obligation even extends *outside the scope of EU law*: In its judgment in *Matteuci*, the CJEU held that "even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law".[88]

Accordingly, the principle of sincere cooperation stands witness to the idea that the European Union's legal order goes far beyond the traditional understanding of the reciprocal treaty obligations in international law: that is, that EU membership obligations transverse the traditional understanding (and limits) of the general international law principle of compliance with treaty commitments (*pacta sunt servanda*), laid down in Article 26 of the Vienna Convention on the Law of Treaties.

On substance, the BGH finds the applications before it, made pursuant to Section 1032(2) ZPO, well-founded and thus capable of precluding the ICSID-based intra-EU investment arbitrations at issue.[89] Under German law, the front-loaded review of consent to ICSID-based intra-EU arbitration thereby (unhappily) marries Germany's obligations under the ICSID Convention with EU law.

EU Member State's obligation under the principle of sincere cooperation also requires that other EU Member States are able to access that procedural framework to apply for inadmissibility declarations for their pending intra-EU ICSID arbitrations.[90] The resulting forced openness to similar disputes has led to at least one other EU Member State to file a Section 1032(2) ZPO application to prevent an intra-EU arbitration against it to go ahead.[91]

Similarly, the decision has already exhibited a certain "signalling effect"[92] (as the BGH calls it) for pending intra-EU arbitrations: following the BGH's decision, in November 2023, RWE, a German multinational energy company, discontinued its ICSID-based arbitration commenced under the Energy Charter Treaty in relation to coal phase-out policies in the Netherlands.[93]

87 BGH order, para. 98.
88 ECJ, case C-235/87, *Matteuci*, ECLI:EU:C:1988:460, para. 19.
89 BGH order, paras. 95, 133.
90 See, to that effect, *Maxian Rusche*, Praxis des Internationalen Privat- und Verfahrensrechts 2021/6, p. 499.
91 According to *Wettstein* and *Schöttmer*, Spain has filed a Section 1032(2) ZPO application in relation to the ICSID-based proceedings in *WOC Photovoltaik Portfolio GmbH & Co. KG and Others v. Kingdom of Spain* (ICSID Case No. ARB/22/12). See *Wettstein/Schöttmer*, European Investment Law and Arbitration Review 2024/1, p. 8.
92 See BGH order, para. 91.
93 See Order of the Tribunal Taking note of the Discontinuance of the Proceeding and Decision on Costs, *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands* (ICSID Case No. ARB/21/4), 12 February 2024, paras. 26, 28, 31).

But what about Section 1032(2) ZPO applications filed *after* the constitution of the tribunal? What about EU Member States that take a monist approach to international law commitments?

For those cases, the more consequential finding of the BGH is a different one: in concluding that Article 41(1) ICSID Convention grants a tribunal constituted under that convention an exclusive right to decide on its *Kompetenz-Kompetenz*, the BGH finds that the ICSID Convention also excludes *prior and later* review of national courts in the EU Member States. Structurally, the very system thereby established is thus incompatible with EU law.[94]

A similar incompatibility finding may also arise separately from the supposed exclusivity of jurisdiction arising from Article 26 ICSID Convention, were that provision to be read as capable of precluding any competence of EU Member State courts to review the presence of valid consent to ICSID-based intra-EU arbitration.[95]

If, as the BGH implies, the ICSID Convention thus cannot be interpreted compatibly with the EU Member States' higher-ranking obligations under EU law unless (at least) Article 41(1) ICSID Convention is disapplied, the resulting obligation on EU Member States is simple: to take all appropriate steps to eliminate existing incompatibilities between that convention and the EU Treaties.[96]

How is that result achieved in practice? In one of two ways: first, by entering into consultations with other ICSID signatories to *amend* that convention so as to ensure its non-application between EU Member States; or, second, by collectively *denouncing* that convention.[97]

A collective renegotiation with all signatories of the ICSID Convention, similarly to that which was attempted for the Energy Charter Treaty, cannot be excluded

94 See, for example, BGH order, paras. 54, 60, 63, 68.

95 See, to that effect, *Stanimir*, in: Schill/Malintoppi/Reinisch/Schreuer/Sinclair (eds.), Article 26, pp. 543 et seq.; *Haridi*, Article 26, in: Fouret/Gerbay/Alvarez (eds.), para. 2.256.

96 See, for example, ECJ, case C-435/22 PPU, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, ECLI:EU:C:2022:852, para. 122 and the caselaw cited.

97 See, by analogy, ECJ, case C-216/01, *Budějovický Budvar*, ECLI:EU:C:2003:618, paras. 169 et seq. and the case law cited; case C-720/18 and C-721/18, *Ferrari*, ECLI:EU:C:2020:854, paras. 68 et seq. and the case law cited.

from the outset.[98] It is, however, at best, unlikely.[99] At the same time, the status quo maintains a system of dispute settlement that, as this paper has explained, proves incompatible with one of the most fundamental pillars of EU law: the principle of primacy. Accordingly, mere *membership* to the ICSID Convention inherently presents a constant (and non-negligible) risk of permitting EU investors and EU Member States to "opt out" from the judicial architecture established in Article 19(1) TEU.[100]

Given that the judgments in *Achmea*, *Komstroy* and *PL Holdings* are all founded on the mere risk of distorting the essential character of the powers of the European Union, its institutions, and the EU Member States, does the principle of sincere cooperation not mandate one very particular outcome above all: a *disapplication*, by EU Member State national courts, of the ICSID Convention of their own motion until all EU Member States have coordinated to *collectively denounce* that convention?

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98 See, by analogy, the *Decision authorising the opening of negotiations on the modernisation of the Energy Charter Treaty, to the extent this falls within the competence of the Union* (ST 10745/1/19 REV.1), which lays down the Commission's negotiating mandate during the Energy Charter Modernisation negotiations and *inter alia* mandates that the European Union, through the negotiations, "ensure that any rule or commitment agreed upon by the European Union should be in line with the EU legal framework' and 'ensure that the aim of the provision in the Modernised ECT remains that of providing that none of the ECT provisions should be construed so as to oblige any Party to the ECT which is a party to an Economic Integration Agreement (EIA) to extend to another Party of the ECT which is not a party to that EIA any preferantial [sic] treatment applicable between the parties of the EIA".

99 As the example of the modernisation of the Energy Charter Treaty shows. See Proposal for a Council decision on the withdrawal of the Union from the Energy Charter Treaty (COM/2023/447 final) (explaining that "remaining a Contracting Party to the current, unmodernised ECT is not an option for the EU or its Member States, as the current, unmodernised Treaty is not in line with the EU's investment policy and law and with the EU's energy and climate goals"), approved by the Council on 7 March 2024 (see Council item ST 6509 2024 INIT). See also European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)) ("urges the Commission to initiate immediately the process towards a coordinated exit of the EU from the ECT and calls on the Council to support such a proposal; believes this to be the best option for the EU to achieve legal certainty, and prevent the ECT from putting the EU's climate and energy security ambitions in further jeopardy").

100 See, by analogy, ECJ, case C-109/20, *PL Holdings*, ECLI:EU:C:2021:875, para. 47. See also, to that effect, ECJ, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, paras. 60–62.

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