Achmea and its Aftermath – How did we get here and where do we go from here?

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Abstract

The *Achmea* decision of the European Court of Justice (ECJ) triggered case law and developments which caused a profound impact on the system of investment protection within the European Union. Ostensibly, it deals with issues of jurisdiction but at its core it is about the relationship and the hierarchy between legal systems – between the law of the European Union, public international law and the international treaty system.

Keywords: *Achmea,* Komstroy, PL Holdings, Investment Law, ECT, BIT, intra-EU, EU Law, ICSID, Arbitration, ECJ, German Federal Court of Justice

Preface

Torsten Stein has dedicated his professional life to public international law and the law of the European Union. With a true international mindset, he has researched diverse fields of this area and dealt from many angles with the relationship between legal systems. A pioneer in academic work on human rights but also providing hands on support to States, for example assisting Mongolia in the drafting of its constitution.

Research and academia was only one part of Torsten Stein's professional life. His students, whether young university students, PhD students or any other level were the center of his true dedication. Not limited to being a brilliant academic, his students were privileged to experience Torsten Stein as a rare example of a human, kind and loyal academic teacher.

I was fortunate to meet Torsten Stein as a student in Heidelberg. He became my mentor, accompanying me through studies and practice until today. It is with respect, fondness, and wholehearted gratitude that I dedicate this article to Torsten Stein.

A. A History of the Decision of the German Federal Court of Justice

The point of departure can be traced back to 1 October 2008, when a Dutch insurance company – then called "Eureko B.V." – sent its notice of arbitration to the Slovak Republic to initiate arbitration proceedings under the 1992 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Dutch-Slovak-BIT).[1] By the time the tribunal, which was seated in Germany, rendered its final award on 7 December 2012, Eureko B.V. had changed its name to "Achmea B.V.". It was also with the rendering of the final award that the dispute excited the arbitration domain and became subject to review by both national and international courts.

1 *Achmea v. Slovak Republic*, Award of 7 December 2012, PCA Case No. 2008–13.

I. The Referral by the German Federal Court of Justice

After the award was rendered, the Slovak Republic requested annulment of the *Achmea* award before the Frankfurt Higher Regional Court. The Frankfurt Higher Regional Court was competent to rule on the annulment based on Sec. 1059 (2) no. 1 lit. a) of the German Code for Civil Procedure (ZPO), which was applicable as the *lex loci arbitri*. This provision allows German courts to set aside an arbitral award if the arbitration agreement is invalid.

On 10 May 2012, the Frankfurt Higher Regional Court handed down the first decision by a national court in the *Achmea* saga.[2] In its decision, the Frankfurt Higher Regional Court rejected the request for annulment of the award by the Slovak Republic, as it found the arbitration clause in the Dutch-Slovak-BIT to be compatible with Art. 344 of the Treaty on the Functioning of the European Union (TFEU).[3] Art. 344 TFEU ensures that the ECJ ultimately has "the last word" on the interpretation of EU law within the judicial system of the EU and its Member States.

When the decision was appealed by the Slovak Republic, the German Federal Court of Justice (BGH) referred the question of compatibility to the ECJ pursuant to Art. 267 (3) TFEU.[4]

II. *Achmea* Decision by the European Court of Justice

Contrary to the opinion of the Frankfurt Higher Regional Court, the ECJ established in its *Achmea* decision on 6 March 2018 that provisions in intra-EU BITs providing for Investor-State Dispute Settlement (ISDS) are incompatible with the TFEU, in particular with Art. 344 and Art. 267.[5] In the view of the ECJ, intra-EU investment arbitration agreements would "call 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".[6]

The ECJ held that the principle of mutual trust is only preserved if the Court remained the final authority on the interpretation of EU law through the referral mechanism in Art. 267 TFEU.[7] It was the ECJ that had established in its own jurisprudence that arbitral tribunals are no "tribunals or courts of a Member State" in the meaning of Art. 267 TFEU.[8] Consequently, without the possibility to refer

2 Frankfurt Higher Regional Court, Decision of 10 May 2012, 26 SchH 11/10.
3 Ibid., paras. 73 et seqq.
4 BGH, Decision of 19 September 2013, II ZB 37/12.
5 ECJ, case C-284/16, *Slovak Republic v. Achmea*, ECLI:EU:C:2018:158.
6 Ibid., para. 58.
7 Ibid.
8 ECJ, case C-102/81, *Federal Republic of Germany et al. v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG et al.*

questions on the interpretation of EU law to the ECJ, the EU institutions would have no way to ensure the consistent application of EU law.[9]

III. The *Achmea* Decision of the Federal Court of Justice

On 31 October 2018, the BGH ruled on the annulment application of the Slovak Republic, taking into account the ECJ jurisprudence. Hence, the BGH recognized a ground for setting aside the *Achmea* arbitral award for lack of an effective arbitration agreement. Since the ZPO did not provide for any further appeal mechanism, the decision by the BGH became effective and the *Achmea* award was eventually annulled.

IV. Discussion and Developments among the Member States

On 15 January 2019, 22 Member States signed the "Declaration of the Member States on the legal consequences of the *Achmea* judgment and on investment protection".[10] In a second declaration of 16 January 2019,[11] signed by Finland, Luxembourg, Malta, Slovenia, and Sweden, the respective Member States opined that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with EU law of the intra-EU application of the Energy Charter Treaty (ECT). A third declaration of 16 January 2019[12] was issued by Hungary, which expressed the view that the *Achmea* decision was silent on the ISDS provision in the ECT, and that it does not concern any pending or prospective arbitration proceedings initiated under the ECT.

On 5 May 2020, 23 Member States eventually signed the "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union".[13] However, the Member States explicitly stated in recital no. 10 of the termination agreement that it did not cover intra-EU proceedings on the basis of Art. 26 ECT.

9 ECJ, case C-284/16, *Slovak Republic v. Achmea*, ECLI:EU:C:2018:158, para. 58.

10 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, available at: https://finance.ec.europa.eu/publications/declaration-member-states-15-january-2019-legal-consequences-achmea-judgment-and-investment_en (24/8/2023).

11 Declaration of 16 January 2019 on the Enforcement of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union (Finland, Luxembourg, Malta, Slovenia, and Sweden).

12 Declaration of 16 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union (Hungary), available at: https://finance.ec.europa.eu/system/files/2021-09/190116-bilateral-investment-treaties-hungary_en.pdf (24/8/2023).

13 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union of 5 October 2020, available at: https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en (24/8/2023).

On 24 June 2022, the ECT's signatory states reached an "Agreement in Principle" on the modernization of the ECT and its provisions relevant for the protection of the environment, climate action and sustainable development.[14] This coordinated effort envisioned a comprehensive system of investment protection on the one hand but also a push towards sustainable development and corporate social responsibility on the other hand. The United Nations Conference on Trade and Development commented that the modernization of the ECT is "of systemic relevance for IIA reform and climate action".[15]

The European Commission (EC) followed this lead and informed the ECT signatory states, including the EU, EURATOM, and all EU Member States, about its "modernization package" on 19 August 2022. However, the EU Member States did not manage to adopt a common position regarding the modernization of the ECT, so that the attempt to find a common ground at the Energy Charter Conference on 22 November 2022 failed. The decision was again deferred at the ad hoc meeting of the Energy Charter Conference at the end of April 2023. Subsequently, seven EU Member States[16] announced their withdrawal from the ECT. On 7 July 2023, the European Commission proposed a "coordinated EU withdrawal from the Energy Charter Treaty".[17] This probably marks the end for any reformation efforts lead by the EU or EU Member States regarding the ECT.

The EC addressed in its modernization proposal the sunset clause in Art. 47 (3) ECT, according to which the provisions of the ECT continue to apply for a period of 20 years from the date of withdrawal. In the EC's view, Art. 47 (3) ECT would have no impact on intra-EU disputes, "to which the ECT has never, does not and will never apply".[18] Naturally, this raises the question why a withdrawal from the ECT would be necessary in the first place.

V. Subsequent Decisions by the European Court of Justice

After the ECJ's decision in 2018, the implications of the *Achmea* decision on the ECT and investment contracts were heavily disputed not only amongst EU Member States. It took several years until new referrals for preliminary determination reached the ECJ for the Court to further elaborate on the extent of its *Achmea* decision.

On 2 September 2021, the ECJ decided in the case of *Moldova v. Komstroy* that the ISDS mechanism provided for by Art. 26 ECT is not applicable to intra-EU dis-

14 Available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf (24/8/2023).

15 *UNCTAD*, The International Investment Treaty Regime and Climate Action, IIA Issues Note of September 2022, Issue 3, p. 13 available at: https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf (24/8/2023).

16 Namely: France, Germany, Luxembourg, The Netherlands, Poland, Spain and Slovenia. Italy had already announced its withdrawal from the ECT in 2016.

17 *European Commission*, Proposal for a Council decision on the Union withdrawal from the Energy Charter Treaty of 7 July 2023, COM(2023) 447 final.

18 Ibid., p. 6.

putes.[19] On 26 October 2021, the ECJ handed down its judgment in *Republic of Poland v. PL Holdings Sàrl*, in which it ruled that EU Member States are prohibited from entering into ad hoc arbitration agreements with EU-based investors, where such agreements would replicate the content of an arbitration agreement in a BIT deemed incompatible with EU law.[20]

With each decision, the ECJ further closed fallback positions for investors intending to rely on ISDS in the intra-EU context.

VI. Subsequent Reactions by Arbitral Tribunals

Following the *Achmea* decision, tribunals initially did not give much weight to the jurisprudence of the ECJ. Although respondent states raised intra-EU objections, tribunals generally rejected them, since most intra-EU cases were based on the ECT. This made it rather easy for tribunals to distinguish their respective cases from the underlying facts of the *Achmea* decision.

This changed ever so slightly after the ECJ's *Komstroy* decision, which extended the ECJ's reasoning to the ECT. However, ECT arbitration tribunals still concluded that they are not part of the EU legal order, but their role and authority is (solely) established by an international treaty.[21] The unconditional consent once given by the signatory states could not be altered by applying principles that are grounded in a separate legal system of international law.[22] Hence, nothing in the ECT could be construed to grant a tribunal the right to disregard or modify its explicit provisions.[23]

The only exception was made by the tribunal in *Green Power v. Spain*, which applied EU law by way of systematic integration provided for by Art. 31 (3)(c) of the Vienna Convention on the Law of Treaties (VCLT), without explicitly referring to

19 ECJ, case C-741/19, *Republic of Moldova v. Komstroy*, ECLI:EU:C:2021:655.

20 ECJ, case C-109/20, *Republic of Poland v. PL Holdings*, ECLI:EU:C:2021:875.

21 *Mathias Kruck and others v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Principles of Damages of 14 September 2022, ICSID Case No ARB/15/23, paras. 81 et seq.; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, Decision on the Intra-EU Jurisdictional Objection of 29 June 2019, ICSID Case No. ARB/17/14, para. 146; *Blusun S.A. et al. v. Italian Republic*, Final Award of 27 December 2016, paras. 302–303; *Cavalum v. Spain*, ICSID Case No. ARB/15/34.

22 *Cavalum v. Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020, ICSID Case No. ARB/15/34, para. 332.

23 *Infracapital v. Kingdom of Spain*, Decision on Respondent Request for Reconsideration regarding the Intra-EU Objection and the Merits of 1 February 2022, ICSID Case No. ARB/16/18, para. 113.

the notion.[24] However, the arbitration in this case took place in Sweden, subjecting it to mandatory provisions of Swedish law, including EU law.[25]

Overall, arbitral tribunals show the trend to view the system of international law established by investment treaties as autonomous, unphased by the jurisprudence of the ECJ.

VII. The Decisions of the German Federal Court of Justice of 27 July 2023

On 27 July 2023, the BGH rendered in total three decisions regarding the admissibility of arbitration proceedings in intra-EU investment disputes.[26] In the decisions in the proceedings of *Uniper v. Netherlands* and *RWE v. Netherlands*, the BGH primarily focused on procedural aspects of the appeal under Sec. 1032 (2) ZPO. In *Mainstream Renewable Power et al. v. Germany*, however, the BGH further elaborated on its understanding of the hierarchy between EU law and the ICSID Convention.[27]

This decision by the BGH is interesting for two reasons: First, the Court assumed jurisdiction over a total of three cases in which the tribunals were not seated in Germany but operated under the autonomous system of the ICSID Convention. Second, the Court held that the "supremacy of EU law" even extended to the ICSID Convention.

1. Summary

The BGH decided that on arbitration proceedings under the ICSID Convention, which do not have a place of arbitration, the German courts have international jurisdiction for an application under Sec. 1032 (2) ZPO by analogous application of Sec. 1025 (2) ZPO.[28]

The Court acknowledged that, in general, an application under Sec. 1032 (2) ZPO is not admissible, as arbitral tribunals under Art. 41 (1) ICSID Convention have the primary competence to decide on its competence (so-called *Kompetenz-Kompetenz*).[29]

However, the Court found an exception to this rule for ICSID arbitration proceedings in the special constellation of intra-EU investor-state arbitration proceedings. In the view of the BGH, such an interpretation was mandated by the principle

24 *Green Power Partners K/S, SCE Solar Don Benito APS v Kingdom of Spain*, Award of 16 June 2022, SCC Case No. 2016/135, para. 477.
25 *Landesbank Baden-Württemberg et al. V. Kingdom of Spain*, Decision on the Respondent's Application for Reconsideration of the Tribunal's Decisions of 25 February 2019 and 11 November 2021 Regarding the "intra-EU" Jurisdictional Objection, para. 49.
26 BGH, Decision of 27 July 2023, I ZB 74/22 (*Uniper*); BGH, Decision of 27 July 2023, I ZB 75/22 (*RWE*); BGH, Decision of 27 July 2023, I ZB 43/22 (*Mainstream*).
27 BGH, Decision of 27 July 2023, I ZB 43/22 (*Mainstream*).
28 Ibid., paras. 22 et. seqq.
29 Ibid., paras. 52 et. seqq.

of the primacy of application of Union law – also over international law – by taking into account the EU law's principle of effectiveness (*effet utile*).[30]

This time, the BGH did not see the need to refer the case for preliminary determination to the ECJ pursuant to Art. 267 TFEU. The Court held that it was clear from previous decisions of the ECJ that its jurisprudence is also applicable to arbitration proceedings under the ICSID Convention.[31] The Court also stated that the ECJ did not act *ultra vires* in its decisions on the invalidity of arbitration agreements in bilateral and multilateral investment protection treaties.[32]

2. Jurisdiction and Merits

In detail, the BGH considered the jurisprudence of the ECJ and concluded that, in the intra-EU context, a state-court review of an ICSID award is mandatory.[33] This review could only be bindingly anticipated by means of the advance state court control made possible by the German legislator with Sec. 1032 (2) ZPO.[34] Notably, the Court qualified ICSID awards as "neither national nor foreign awards, but as awards sui generis", thereby extending the jurisprudence of German courts to all "non-foreign" awards.[35]

Regarding the merits of the case, the BGH followed the *Komstroy* jurisprudence of the ECJ and concluded that the application under Sec. 1032 (2) ZPO was well-founded. The respective arbitration proceedings were found to be inadmissible for lack of an effective arbitration agreement.[36] The conclusion of a valid arbitration agreement was precluded by the fact that the arbitration clause in Art. 26 ECT violated EU law. Due to the incompatibility in particular with Art. 267 and 344 TFEU, the BGH opined that there is no effective consent and thus no offer by the applicant EU Member States to conclude an arbitration agreement.[37]

However, the BGH also held that Sec. 1032 (2) ZPO is not applicable in constellations in which was no concrete arbitration agreement has been concluded yet. If merely a potential arbitration agreement looms, with arbitration proceedings potentially arising therefrom, anticipated review is not admissible.[38]

Regarding the effects of the decision, it must be noted that the decision by a national court, such as the BGH, is not binding upon other states. However, if a decision by a German court is rendered regarding the determination of the inadmissibility of the arbitral proceedings pursuant to Sec. 1032 (2) ZPO, this decision later

30 Ibid., para. 75.
31 Ibid., paras. 111 et. seq.
32 Ibid., paras. 114 et. seq.
33 Ibid., paras. 71 et seqq.
34 Ibid., para. 48.
35 Ibid., para. 30.
36 Ibid., para. 95.
37 Ibid., para. 100.
38 BGH, Decision of 27 July 2023, I ZB 74/22 (*Uniper*), para. 47.

prevents any declaration of enforceability of an ICSID arbitral award in Germany due to the binding effect of this decision.

3. Reception by the Tribunal in *Mainstream Renewable Power et al. v. Germany*

The tribunal in *Mainstream Renewable Power et al. v. Germany* was requested by the claimants to order the respondent to stop any motions in national courts to hinder the arbitration proceedings. In (accurate) anticipation of the later decision of the BGH of 27 July 2023, the tribunal promulgated its opinion on the admissibility of German court decisions under international law in its Procedural Order (PO) 8 of 17 July 2023.

In PO 8, the Tribunal relied on the "clear and unequivocal language of Art. 26 of the ICSID Convention", which generally excludes that any proceedings are brought in any other forum.[39] Therefore, any claims pursuant to the ICSID Convention and ECT, including the question of jurisdiction, would "appear potentially" to be in breach of Art. 26 ICSID Convention.[40]

The tribunal, however, did not openly challenge the jurisprudence of the BGH and the ECJ by ordering Germany as the respondent state to stop any motions in national courts, as it found that the application lacked the necessary urgency and necessity for a preliminary measure.[41]

B. Relation and Hierarchy between EU Law and International Investment Law

The underlying conflict between systems of international law found its starting point on 1 December 2009, when the Member States of the EU concluded the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Under this treaty, the EU assumed exclusive competence over foreign direct investments.[42] Hence, these amendments created the current EU law system, which now rivals the much older investment law.

I. Autonomy of International Law

In general, no hierarchy exists between different systems of international law, if the respective signatory states have not concluded otherwise or a provision can be qualified as *jus cogens*.[43] Needless to say, this is rarely the case. The natural consequence

39 *Mainstream Renewable Power et al. v. Germany*, PO 8 of 17 July 2023, para. 57.
40 Ibid., paras. 57, 61.
41 Ibid., paras. 70, 75.
42 Art 206, 207 TFEU; see also *Dolzer/Schreuer*, p. 11; *Tietje*, Essays on Transnational Economic Law 2008/78, p. 14.
43 *Shelton*, AJIL 2006/2, p. 299. See for example Art. 104(1) NAFTA, which provides for a priorisation of environmental and conservation agreements over obligations under the NAFTA.

of this circumstance is that diverse systems of international treaties stand side by side without a clear hierarchy.

To avoid a clash of systems and to ease tensions, Art. 31 (3) (c) VCLT, as a representation of *jus cogens* in international law, stipulates the principle of systematic integration. The application of this principle has been observed also in the context of international investment law.[44] For example, investment tribunals took into account international human rights obligations when considering whether a respondent state violated protective standards granted under investment treaties.[45]

Notably, the autonomy of international law was also the understanding of some of the German courts, even after the ECJ's *Achmea* decision.[46]

II. Supremacy of EU Law

The ECJ views the ECT itself as an act of EU law.[47] Thereby, it needs to be interpreted in light of the principles of EU law. EU law, in turn, is characterized *inter alia* by the fact that it stems from an independent source of law and by its primacy over the laws of the Member States.[48] The *effet utile* principle requires all national institutions to give full force and effect to EU law,[49] thereby, establishing a hierarchy between EU law and all other regimes of international law.

Another pillar of the ECJ's argument is Art. 344 TFEU, which provides that Member States cannot submit a dispute concerning the interpretation or application of EU law to any other dispute resolution mechanism outside the judicial system of the EU.[50] This provision aims to create a judicial system that ensures consistency and uniformity in the interpretation of EU law.[51] Consequently, the ECJ opines that the EU and its Member States simply lack the competence to conclude an international agreement containing a provision which removes a dispute concerning EU

44 More recently *Green Power Partners K/S, SCE Solar Don Benito APS v Kingdom of Spain*, SCC Case No. 2016/135, Award of 16 June 2022, para. 475.

45 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, Award of 8 December 2016, ICSID Case No ARB/07/26 (right to water); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Award of 12 January 2011 (indigenous peoples). See also *Dupuy*, in: Dupuy et al. (eds.), p. 49.

46 Regarding the Dutch-Slovak BIT: Frankfurt Higher Regional Court, Decision of 10 May 2012, 26 SchH 11/10; regarding the ICSID-Convention: Berlin Higher Regional Court, Decision of 28 April 2022, 12 SchH 6/21.

47 ECJ, case C-741/19, *Republic of Moldova v. Komstroy,* ECLI:EU:C:2021:655, paras. 23, 49.

48 ECJ, case C-284/16, *Slovak Republic v. Achmea,* ECLI:EU:C:2018:158, para. 33.

49 ECJ, case C-741/19, *Republic of Moldova v. Komstroy,* ECLI:EU:C:2021:655, paras. 65 et seq.

50 ECJ, case C-284/16, *Slovak Republic v. Achmea,* ECLI:EU:C:2018:158, para. 32.

51 Ibid., para. 35.

law from the EU's judicial system of the EU in a way that the full effectiveness of that law is not guaranteed.[52]

From a German perspective, the BGH justifies this supremacy as the ECT and the ICSID Convention only hold the rank of a federal law, as international treaties require a transitional law in order to be ratified and become part of the German legal order.[53]

Some arbitral tribunals, however, viewed EU law not as an autonomous system of international law at all but rather as a "regional legal system" much alike municipal law.[54] If qualified as such, Art. 46 VCLT stipulates that a state may not invoke provisions of its internal law to justify a breach of international obligations. Although it was acknowledged that EU law contributed to the development of *jus cogens* in international law, it was not perceived to have dispositive legal force, altering international law obligations undertaken by states.[55] Thus, EU law was given only a subordinate role in the context of international law by arbitral tribunals, effectively switching the perspective and turning the hierarchy between the two systems around.

The BGH, however, held that by joining the Union the Member States have limited their power of disposition under international law and have waived among themselves the exercise of rights under international treaties which conflict with EU law. Accordingly, customary international law, such as the provisions of the VCLT, contrary to EU law could not exist between Member States in the Court's opinion.[56]

III. Is a Hierarchy Necessary?

Is it necessary to establish a hierarchy? The ECJ seems to answer this question positively. However, it must be kept in mind that – as of now – there has not been a conflicting decision between investment tribunals and EU courts.[57] Conflicts may

52 Ibid., para. 58; ECJ, case C-741/19, *Republic of Moldova v. Komstroy,* ECLI:EU:C:2021:655, para. 62.

53 BGH, Decision of 27 July 2023, I ZB 43/22 (*Mainstream*), para. 55.

54 *Mathias Kruck and others v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Principles of Damages of 14 September 2022, ICSID Case No ARB/15/23, para. 81; *Blusun S.A. et al. v. Italian Republic*, Final Award of 27 December 2016, para. 283; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic,* Award of 11 October 2017, PCA Case No. 2014–03, para. 160; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan,* Award of 1 November 2013, ICSID Case No. ARB/10/16, paras. 7.6.5–7.6.6.

55 *Mathias Kruck and others v. Kingdom of Spain*, Decision on Jurisdiction, Liability and Principles of Damages of 14 September 2022, ICSID Case No ARB/15/23, para. 81.

56 BGH, Decision of 27 July 2023, I ZB 43/22 (*Mainstream*), para. 123. Notwithstanding that such an understanding may contrast with the very meaning of *jus cogens*, being "a peremptory norm of general international law", see *Shelton*, AJIL 2006/2, p. 298.

57 As noted by *Blusun S.A. et al. v. Italian Republic*, Final Award of 27 December 2016, para. 287, the only friction point being the ECJ's decision in "European Food" of 25 January 2022, case C-638/19 P, concluding the "Micula saga".

arise in particular with regard to state subsidies, which would be illegal under EU law, that are paid "through the backdoor" to investors by means of ISDS.[58] Similarly, arbitral decisions can potentially interfere with EU competition law.[59] However, this is often a moot argument. Many intra-EU disputes in recent years concerned investments in the renewable energy sector. While some respondent states raised the intra-EU objection, the subsidies allegedly promised in the respective cases were perfectly legal under EU law and there was no conflict between EU law and investment law.[60] Hence, it may be argued that friction between EU law and international investment law is – as of now – more of a theoretical issue.

The Frankfurt Higher Regional Court seemed to have a similar opinion. In its decision of 10 May 2012, the court considered that the uniform interpretation of EU law could nonetheless be ensured through the enforcement proceedings.[61] Since an award needs in most jurisdictions a declaration of enforceability, a review of the award regarding its compatibilitywith EU law can still be reached at the enforcement stage. The national court may then make a reference to the ECJ if need be.[62] Of course, this may force a respondent to defend itself in multiple enforcement proceedings at the same time, while annulment of the award would make it unenforceable. On the other hand, it would allow a more subtle approach in cases in which concerns regarding the compatibility with EU law are warranted.

It is also notable that the ECJ omitted any explanation of the EU law's primacy that would stem from general principles of public international law. Indeed, such prevalence can hardly be satisfied from a public international law perspective.[63] If ICSID tribunals were also to find a "principle of effectiveness" in the ICSID Convention, where would this lead? Two isolated, partly overlapping systems of international law, both claiming supremacy over each other, based on principles stemming from their respective regimes. Such a "clash" of systems can hardly be justified by the principle of systematic integration provided for by Art. 31 (3) (c) VCLT – a principle that reflects *jus cogens* in international law. From the viewpoint of public international law, it can be questioned whether such an "egocentric" application of

58 *Bermann*, in: Scherer (ed.), p. 213.
59 *Bonafé/Mete*, JWELB 2016/9, p. 181.
60 See inter alia *Vattenfall AB and others v. Federal Republic of Germany,* Decision on the Achmea Issue of 31 August 2018, ICSID Case No. ARB/12/12, para. 212; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain,* Award of 16 May 2018, ICSID Case No. ARB/14/1, paras. 337–340; *Novenergia II – Energy & Environment (SCA), SICAR v. The Kingdom of Spain*, Award of 15 February 2018, SCC Case No. V 2015/063, para. 462; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain,* Award of 4 May 2017, ICSID Case No. ARB/13/36, para. 199; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain,* Decision on Jurisdiction of 6 June 2016, ICSID Case No. ARB/13/30, para. 79; *Charanne and Construction Investments v. Spain,* Award of 21 January 2016, SCC Case No. V 062/2012, paras. 444–445; *Isolux Netherlands, BV v. Kingdom of Spain*, Final Award of 17 July 2016, SCC Case V2013/153, para. 654; *Electrabel S.A. v. Republic of Hungary,* Award of 25 November 2015, ICSID Case No. ARB/07/19, para. 4.146.
61 Frankfurt Higher Regional Court, Decision of 10 May 2012, 26 SchH 11/10, para. 81.
62 Ibid.
63 *Ishikawa*, EILAR 2017/2, pp. 298, 299.

internal principles is desirable. Additionally, Art. 6 VCLT stipulates that every state possesses capacity to conclude treaties and is bound by those obligations pursuant to the principle of *pacta sunt servanda*.[64] Reservations must be made at the time of conclusion of the international obligation. However, the potential incompatibility of ISDS with EU law is such a novel topic that traditionally no such reservations have been made in investment treaties.

Lastly, one may argue that the TFEU itself was drafted with systematic integration in mind: Art. 351 (1) TFEU explicitly grants an exception to the supremacy of EU law for treaties that were concluded before 1 January 1958.[65] However, this date precedes the ECT and any intra-EU BIT. While it can be argued that this provision should analogously apply to the ECT regardless of the time scope,[66] the ECJ has held multiple times that Art. 351 (1) TFEU must be applied restrictively.[67]

C. Implications for Investment Treaty Arbitration

The implications of the ECJ's and subsequently the BGH's firm stand against intra-EU ISDS are far-reaching. However, they may not expand outside the EU's borders. Given the ECJ's unique understanding of the hierarchy between EU law and other systems of international law, its jurisprudence may not be accepted outside its domain.

I. Within the EU

The BGH assumed in its most recent decision that awards rendered in conflict with the jurisprudence of the ECJ would not be enforceable in Germany or within the EU.[68] Indeed, any applications for recognition and enforcement of awards ignoring the ECJ's opinion on the supremacy of EU law will most likely be met with the public policy defense by Member States. Similarly, awards rendered by tribunals in ISDS proceedings with their seat of arbitration located within the EU, are highly likely to be annulled, if the *lex loci arbitri* allows for such a remedy.[69]

Although the application of national law to ECT/ICSID arbitrations can be criticized,[70] the jurisprudence of the ECJ and national courts demonstrates that such critique will not be heard. As a result, awards concerning intra-EU disputes will most likely not be enforced within the domain of the EU.

64 *Crawford*, p. 377; also acknowledged by *Blusun S.A. et al. v. Italian Republic*, Final Award of 27 December 2016, para. 283.
65 *Crawford*, p. 378.
66 *Köster*, p. 176 et. seq.
67 Only recently: ECJ, case C-435/22 PPU, paras. 119 et seq., 126.
68 BGH, Decision of 27 July 2023, I ZB 43/22 (*Mainstream*), paras. 92 et seq.
69 As implied by *Green Power Partners K/S, SCE Solar Don Benito APS v Kingdom of Spain*, SCC Case No. 2016/135, Award of 16 June 2022, para. 475.
70 *Tietje*, Essays on Transnational Economic Law 2008/78, p. 17.

II. Outside the EU

Whereas the stance of the ECJ and national courts is rather clear regarding the enforceability of intra-EU awards, the same cannot be said about states which are not EU Member States.

If a tribunal is seated within the EU and the respective Member State eventually annuls the award, any enforcement under the New York Convention is barred. The same cannot be said for awards rendered under the ICSID Convention. Art. 52 (1) ICSID Convention is – at least in an extra-EU context – the only way to annul an award rendered by an ICSID tribunal. EU Member States may still refuse to enforce such an award based on public policy. However, the award should be enforceable in any other signatory state of the ICSID Convention.

Therefore, one option for European investors considering a cross-border investment within the EU may be to resort to nationality planning. Nationality planning requires that one or more subsidiaries of an investor are based outside of the EU in their investment structure.[71] This way, investors may secure protection under extra-EU BITs, signed between the state of incorporation of the subsidiary and the target state. Such an approach is not risk-free and must be considered early in the investment stage of a project.

III. Alternatives to Investment Arbitration

Against this background, alternatives for the current system of ISDS must be explored.

1. Multilateral Investment Court

A state-funded Multilateral Investment Court (MIC) may have the potential to bring peace to the worlds of ISDS and EU law.[72] At least, if the MIC was vested with the competence to refer a preliminary question regarding EU law to the ECJ.[73] However, in order to create a judicial body that has the potential to solve investment law conflicts, an enormous joint effort by both EU Member States and non-EU Member States would be essential. Given the fractured views on ISDS, the failed modernization attempt of the ECT, and the ever-growing skepticism towards ISDS among states that had to defend themselves regularly against investors, it seems unlikely that such an effort would be made.

71 *Dolzer/Schreuer*, p. 11.
72 *Scheu*, in: Scheu (ed.), p. 27.
73 *Borgdorf*, in: Scheu (ed.), p. 288.

2. Substantive and Procedural Protection under EU Law

The question can be raised whether EU law is capable of replacing the current system of ISDS. The assumed supremacy of EU law over ISDS could hinder investors to rely on the investment protection standards established by bilateral and multilateral investment treaties within the EU. However, to properly justify a hierarchy, one may assume that EU law offers a similar if not stronger investment protection. This, however, is debatable.

EU law and investment law have different *modi operandi*. EU law lacks a specific and comprehensive regulatory system regarding "investments".[74] Rather, provisions with protective effects are spread among primary and secondary EU law. For example, some degree of investment protection is reached by basic principles governing EU law, such as the prohibition of discriminatory actions by Member States regarding citizens of other EU Member States.[75] Moreover, sources of investment protection under EU law can be the European Charter of Fundamental Rights, national law and the European Charter of Human Rights.[76]

While EU law covers some aspects of common investment protection standards, such as the principle of no expropriation without proper compensation, the fair trial principle, or the notion of legitimate expectations, the EU lacks a comprehensive protection system.[77]

D. Summary and Outlook

In hindsight, the ECJ's *Achmea* decision was groundbreaking. The ECJ shook and reformed any views on investment law in the intra-EU context.

The inability of EU Member States to find a common stance towards the modernization of the ECT and some Member States' solo effort to withdraw from the ECT draw a telling picture of the status of intra-EU ISDS. These uncoordinated actions cause uncertainty for states and investors alike. A coordinated multinational effort to successfully implement a comprehensive modernization of the ECT would probably be most desirable for all parties involved. Modernization would allow the Member States to address the EC's and ECJ's concerns regarding compatibility with EU law and would still offer investment protection. A stable and secure legal

74 *Fecák*, p. 54.
75 *Bermann*, in Scherer (ed.), p. 208.
76 *Fecák*, p. 55.
77 Finding no overlap between EU law and investment law and hence no conflict: *Novenergia II – Energy & Environment (SCA), SICAR v. The Kingdom of Spain,* Award of 15 February 2018, SCC Case No. V 2015/063, para. 465, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain,* Award of 4 May 2017, ICSID Case No. ARB/13/36, para. 204; *Blusun S.A. Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* Award of 27 December 2016, ICSID Case No. ARB/14/3, paras. 289, 303; *Charanne and Construction Investments v. Spain*, Award of 21 January 2016, SCC Case No. V 062/2012, para. 438; *Electrabel S.A. v. Republic of Hungary*, Award of 25 November 2015, ICSID Case No. ARB/07/19, para. 4.176.

environment for investors in the energy sector is not only sound from an economic but also from an ecologic standpoint, to align the ECT with other international treaties, such as the Paris Agreement.

The ongoing developments raise the question of what will be left of ISDS in the EU after the conclusion of the *Achmea* saga. Even more important will be the question of whether EU law will be able to fill the void left by those terminated bilateral and multilateral investment agreements.

There is a true danger that the noise of the discussions described in this article drown out the acknowledgment that the system of investment protection is a true historical achievement, and it should not be carelessly abandoned. The current geopolitical developments show the importance of public international law as a means for peace keeping. This has been emphasized by Torsten Stein from the earliest days of his professional life and we should listen to his voice in these turbulent times.

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