Investment Protection and the EU after *Achmea*

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A. Introduction

Intra-EU investment disputes between an investor from one EU Member State and another EU Member State on the basis of bilateral investment treaties (intra-EU BITs) and – to a larger extent – the Energy Charter Treaty (ECT)[1] have reached a considerable number over the last years. Out of 29 cases Spain alone is currently facing at the International Centre for Settlement of Investment Disputes (ICSID), 28 have been initiated by investors from other EU countries.[2] The same is true for the seven ICSID cases currently pending against Italy. Many more intra-EU investment claims have

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1 2080 UNTS 95.

2 ICSID maintains a comprehensive online database of all pending and concluded arbitrations under the ICSID Arbitration Rules as well as the ICSID Additional Facility Rules, the (core) details of which are available here: https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx (04/06/2018).

been brought – both within and outside the ICSID framework. As the *2016 UNCTAD Review of Developments in Investor-State Dispute Settlement* brought to light, the 'overall number of known intra-EU investment arbitrations […] totalled 147 by the end of 2016, i.e. approximately 19 per cent of all known cases globally'.[3]

The compatibility of such proceedings with EU law has been the subject of significant debate.[4] On 6 March 2018, the Court of Justice of the European Union (CJEU) rendered its therefore much-anticipated judgment in the *Achmea* case (the *Achmea* decision).[5] Based on a preliminary reference request under Art. 267 TFEU by the German Federal Court of Justice, the Bundesgerichtshof (BGH),[6] the CJEU found that the investor-state arbitration clause in the bilateral investment treaty applicable between the Netherlands and the Slovak Republic[7] (the 1991 BIT) was contrary to EU law. According to the CJEU, the clause established a dispute settlement mechanism that conflicted with the autonomy of the EU legal order, in particular because EU Member State courts could not necessarily exercise sufficient control over arbitrations based on that clause.[8] This reasoning was reinforced by the Court's finding that investment tribunals in intra-EU disputes could not themselves request preliminary rulings from the CJEU under Art. 267 TFEU.[9]

With that decision, the CJEU added its authoritative interpretation of EU law to the debates about the legality of intra-EU investment arbitration. The Court's ruling, however, will not put an end to these debates, as it raises more questions than it answered. As will be shown, the *Achmea* decision is likely to bring about more chaos

3 UNCTAD IIA Issues Note, Issue 1 (May 2017), *Investor-State Dispute Settlement: Review of Developments in 2016*, at 2, http://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d1_en.pdf (04/06/2018), p. 2.

4 See only *Wehland*, Schiedsverfahren auf der Grundlage bilateraler Investitionsschutzabkommen zwischen EU-Mitgliedstaaten und die Einwendung des entgegenstehenden Gemeinschaftsrechts, SchiedsVZ/German Arbitration Journal 39/2, 2008, p. 224; *Burgstaller*, European Law and Investment Treaties, Journal of International Arbitration 26/2, 2009, p. 182; *Tietje*, The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States, Beiträge zum Transnationalen Wirtschaftsrecht, Issue 78, 2008; *Tietje*, Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaten (Intra-EU BITs) als Herausforderung für das Mehrebenensystem des Rechts, Beiträge zum Transnationalen Wirtschaftsrecht, Issue 104, 2011; *Dimopoulos*, The validity and applicability of international investment agreements between EU Member States under EU and international law, Common Market Law Review 48/1, 2011, p. 63; *Hindelang*, Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Settlement Mechanisms Provided for in Inter-se Treaties?, Legal Issues of Economic Integration 39/2, 2012, p. 179; *Engel*, Investitionsschutzstreitigkeiten in der Europäischen Union, SchiedsVZ / German Arbitration Journal 22/4, 2015, p. 218; *Kokott & Sobotta*, Investment Arbitration and EU Law, Cambridge Yearbook of European Legal Studies, Issue 18, 2016, p. 3; *Basener*, Investment Protection in the European Union, 2017; *Rösch*, Intraeuropäisches Investionsrecht, 2017.

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

6 BGH, decision of 03/03/2016, I ZB 2/15.

7 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 2242 UNTS 205.

8 CJEU, *Achmea*, (fn. 5), paras 56–59.

9 Ibid., para. 49.

than rest to the field of intra-EU investment disputes in the short-term. In the long-term, only a political solution might bring about clarity.

The present contribution seeks to analyse the *Achmea* decision as follows: First, an introduction to the background of the *Achmea* case, the arbitral tribunal's decision as well as the German court proceedings will be provided (A.). In a second step, the main parts of the CJEU's judgment – along with Advocate General Wathelet's Opinion (the Wathelet Opinion)[10] – will be explained (B.). The decision will then be discussed (C.) and its consequences for intra-EU investment disputes evaluated (D). The contribution ends with a brief outlook on the impact the *Achmea* decision might have on investor-state dispute settlement (E.).

B. The *Achmea* Case and Its Background

I. The Arbitration

At the same time as the Slovak Republic acceded to the European Union in 2004, it also initiated reforms to liberalise its health insurance market, primarily aimed at addressing the deficit accumulated until then by the public insurance system in place.[11] The Dutch insurance company Eureko invested in the Slovak health insurance market in March 2006.[12] After the Slovak parliamentary elections in June 2006, however, the newly formed government decided to introduce measures that amended the health insurance market liberalisation of the previous years. In 2008, Eureko initiated arbitral proceedings based on the 1991 BIT against the Slovak Republic with regard to these measures.

The arbitration first led to an Award on Jurisdiction, Arbitrability and Suspension in 2010 (the "2010 Award").[13] In 2012, the tribunal then issued its Final Award in favour of the Dutch company, which had by then changed its name into Achmea.[14] It awarded Achmea an amount of € 22.1 million plus interest as well as a reimbursement of legal fees and costs.[15]

Already during the jurisdictional phase of the proceedings, the Slovak Republic sought to rely on the objection that its accession to the EU and the EU Treaties would prevent the tribunal from hearing the case.[16] This objection ultimately became the subject matter of the CJEU's *Achmea* decision. The Slovak Republic contended that the 1991 BIT had been impliedly terminated under Art. 59 of the Vienna Convention

10 Opinion of AG Wathelet, case C-284/16, *Achmea*, ECLI:EU:C:2017:699 [hereinafter: *Wathelet Opinion*].
11 PCA, case No. 2008-13, *Eureko B.V. v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26/10/2010, paras 51 f.
12 PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), paras 57 f.
13 Ibid.
14 PCA, case No. 2008-13, *Achmea B.V. (formerly known as "Eureko B.V.") v. Slovak Republic*, Final Award, 07/12/2012.
15 PCA, *Achmea B.V. v. Slovak Republic*, (fn. 14), para. 352.
16 PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 59.

on the Law of Treaties (VCLT)[17] upon its accession to the EC Treaty.[18] According to Art. 30 VCLT, the arbitration clause in the BIT could, the Slovak Republic argued further, no longer be considered applicable since its accession to the EC Treaty.[19] Additionally, it contended that the tribunal lacked jurisdiction because the 1991 BIT's arbitration clause – Art. 8 – was incompatible with the EC Treaty as well as the principles of autonomy and primacy of EU law.[20] On that basis, the Slovak Republic finally argued that the dispute was, consequently, also not arbitrable under German law, which was the applicable *lex arbitri*.[21]

The tribunal, however, rejected all these arguments in its 2010 Award.[22] Before reaching that conclusion, the tribunal had not only been briefed by the parties. It had also received a non-disputing party submission from the Dutch government and an *amicus curiae* submission from the EU Commission (the Commission).[23]

II. The Challenge Proceedings before the German Courts

Since Frankfurt was the seat of the arbitration, the Slovak Republic first challenged the 2010 Award before the local Higher Regional Court (the Frankfurt Court). It repeated the arguments raised in the arbitral proceedings, namely that the BIT's arbitration clause was invalid due to incompatibility with EU law, especially Arts. 344, 267 and 18 TFEU, and hence the tribunal did not have jurisdiction over the dispute. Following this unsuccessful challenge[24] and the Final Award in the arbitration, the Slovak Republic filed another application with the Frankfurt Court to have the Final Award set aside. This application rested largely on the same bases as the one against the 2010 Award, but additionally relied on the argument that the Final Award's recognition and enforcement also resulted in a violation of public policy.[25]

In December 2014, the Higher Regional Court rejected all these arguments.[26] With regard to EU law, it decided that, first, the 1991 BIT's arbitration clause did not conflict with Art. 344 TFEU, which reads:

> 'EU Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

17 1155 UNTS 331.
18 For the tribunal's accounts of the parties' arguments on the matter, see PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), paras 63-126.
19 See PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), paras 127–131.
20 Ibid., paras 132–142.
21 Ibid., paras 143–150.
22 Ibid., paras 230 f.
23 Regarding the submissions by the Dutch government and the Commission, see ibid., paras 154–211.
24 Higher Regional Court Frankfurt, decision of 10/05/2012, 26 SchH 11/10.
25 See Higher Regional Court Frankfurt, decision of 18/12/2014, 26 Sch 3/13, paras 29 f.
26 Ibid., paras 46 f.

To the contrary, the Frankfurt Court pointed out that the EU Treaties did not provide for any mechanism to settle disputes between Member States and individuals.[27] The Frankfurt Court, relying on the CJEU's jurisprudence regarding commercial arbitration, then concluded that arbitration clauses do not *per se* conflict with Art. 267 TFEU – even absent a possibility for arbitral tribunals' to request preliminary rulings under Art. 267 TFEU.[28]

Finally, with regard to the argument of discrimination advanced by the Slovak Republic, the Frankfurt Court did not interpret Art. 18 TFEU, the EU Treaties' general non-discrimination provision, as prohibiting the existence of BIT arbitration clauses. The Court instead assumed that the arbitration clause could, potentially, also be extended to investors from other EU Member States to uphold its validity.[29] Interestingly, it also rejected the argument of a potential discrimination on the additional basis that all EU nationals always had access to local courts, which would need to be seen as a no lesser treatment as the one granted by the arbitration clause.

While the Frankfurt Court had relied on the *acte claire* doctrine and refrained from requesting a preliminary ruling under Art. 267 TFEU, the Bundesgerichtshof – as the last-instance court – decided differently in March 2016. It, hence, provided the CJEU with an opportunity to take a position on this highly disputed matter. Nevertheless, the Bundesgerichtshof, in its decision, endorsed the Frankfurt Court's position.[30]

C. The Proceedings before the CJEU

I. The Wathelet Opinion of September 2017

On 19 September 2017, Advocate General Wathelet delivered his opinion on the matter. He, in many ways similarly to the positions of the German courts, proposed that no incompatibility existed between the 1991 BIT – and intra-EU investment arbitration in a broader sense – and EU law.

According to the Wathelet Opinion, intra-EU BIT arbitration did not constitute discrimination on the ground of nationality, prohibited by Art. 18 TFEU, as that provision was 'intended to apply independently only to situations governed by EU law for which the Treaty lays down no specific prohibition of discrimination'.[31] Intra-EU investment disputes were, however, not within the scope of the Treaties' *ratione materiae*.[32] He further relied on the comparable case of bilateral taxation treaties, which the CJEU had already confirmed were not incompatible with EU law.[33]

With regard to Art. 267 TFEU, the Advocate General departed from the stance that had been taken by the German courts. Supported by an extensive analysis, he took

27 Ibid., para. 51.
28 Ibid., paras 53–55.
29 Ibid., para. 57.
30 BGH, (fn. 6), para. 22, expressly also in para. 36.
31 *Wathelet Opinion*, (fn. 10), para. 55.
32 Ibid., paras 56 f.
33 Ibid., paras 66 f.

the position that 'an arbitral tribunal constituted in accordance with Art. 8 of the BIT is a court or tribunal within the meaning of Art. 267 TFEU, common to two Member States, namely the Kingdom of the Netherlands and the Slovak Republic, and is therefore permitted to request the Court to give a preliminary ruling'.[34] Hence, from his perspective, no incompatibility existed. He further reasoned 'that automatically means that there is no incompatibility with Art. 344 TFEU, which forms the subject matter of the first question'.[35]

Referring *inter alia* to the *Mox Plant* decision,[36] which the *Achmea* tribunal also relied on when dismissing the objection on the basis of Art. 344 TFEU,[37] the Advocate General further found that investment arbitration under the 1991 BIT was, in any event, not within the scope of Art. 344, which was concerned with disputes between EU member states.[38] Additionally he opined that an arbitral tribunal under the 1991 BIT would not have to deal with the interpretation or application of the Treaties. The Advocate General opined:

> 'in the first place, the jurisdiction of the arbitral tribunal is confined to ruling on breaches of the BIT and, in the second place, the scope of that BIT and the legal rules which it introduces are not the same as those of the EU and FEU Treaties'.[39]

Ultimately, the Wathelet Opinion also expressed the position that intra-EU investment disputes based on provisions such as Art. 8 of the 1991 BIT could affect neither the allocation of powers fixed by the EU Treaties nor, therefore, the autonomy of the EU legal order. The Advocate General based this finding on the possibility for domestic courts, at least in non-ICSID cases, to review investment arbitral awards in challenge and enforcement proceedings.[40] Even in the absence of such possibility of review by local courts, hence also for ICSID cases, he observed, Arts. 258 and 260 TFEU would allow the Commission to bring an action against the relevant Member State. Therefore, the effectiveness of the EU judicial system would remain intact.[41]

II. The Grand Chamber's Decision of 6 March 2018

The CJEU, due to the importance of the case, allocated it to a Grand Chamber. This Grand Chamber followed neither the Bundesgerichtshof's nor the Advocate General's arguments. Contrary to usual practice, the judgment does not reference the Wathelet Opinion at all in its consideration of the Bundesgerichtshof's questions. The CJEU's engagement with the Bundesgerichtshof's reasoning can, in turn, be described as limited at best. Its entire reasoning only spans over 31 paragraphs. This brevity is likely

34 Ibid., para. 85.
35 Ibid., paras 85, 133.
36 CJEU, case C-459/03, *Commission v. Ireland*, EU:C:2006:345.
37 PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 276.
38 *Wathelet Opinion*, (fn. 10), paras 138–159.
39 *Wathelet Opinion*, (fn. 10), para. 173; for the Advocate General's argument in this regard, see paras 174–228.
40 Ibid., paras 283–250.
41 Ibid., para. 255.

due to the difficulties the judges of the Grand Chamber will have encountered in reaching a consensus with regard to this controversial case.

Addressing the Bundesgerichtshof's first and second questions, the compatibility of the 1991 BIT's dispute settlement mechanism with Art. 267 and 344 TFEU, the Grand Chamber recalled at the outset the importance of the judicial system established by the Treaties for the operation of the EU legal order's autonomy.[42] The preliminary reference mechanism under Art. 267 TFEU, the Court reiterated, was the 'keystone' to 'securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.[43]

From the CJEU's perspective, the first question to answer in this respect was 'whether the disputes which the arbitral tribunal mentioned in Art. 8 of the BIT is called on to resolve are liable to relate to the interpretation or application of EU law'.[44]

Even though tribunals under the 1991 BIT were only tasked to determine possible infringements of that treaty, the CJEU found that – under the treaty's applicable law clause (Art. 8(6)) – they were also obliged to 'take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties'.[45] As EU law, due to its primacy and direct effect, formed 'part of the law in force in every Member State and as deriving from an international agreement between the Member States',[46] the CJEU found that arbitral tribunals acting under the 1991 BIT 'may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital'.[47] It was satisfied with the abstract possibility that EU law could play a role in the arbitral proceedings and did not investigate the particular role EU law could play any further.

Instead, the Court moved on to the second step of its analysis. It addressed the question whether an investment arbitral tribunal under the 1991 BIT could be considered a court or tribunal of a Member State under Art. 267 TFEU, thereby enjoying the right to make preliminary reference requests to the CJEU.[48]

To make this determination, the Court distinguished the arbitral tribunal under the 1991 BIT from the one that it had considered eligible under Art. 267 TFEU in the *Ascendi* case.[49] While it noted that the tribunal in that case had been 'as a whole […] part of the system of judicial resolution of tax disputes provided for by the Portuguese constitution itself', this was – in the Grand Chamber's view – not the case with regard to the *Achmea* tribunal.[50] In the words of the Court, it was 'precisely the exceptional

42 CJEU, *Achmea*, (fn. 5), paras 32–35.
43 Ibid., para. 37.
44 Ibid., para. 39.
45 CJEU, *Achmea*, (fn. 5), para. 40.
46 Ibid., para. 41.
47 Ibid., para. 42.
48 Ibid., paras 43 f.
49 Ibid., para. 44; see CJEU, case C-377/13, *Ascendi*, EU:C:2014:1754.
50 Ibid., paras 44–45.

nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Art. 8 of the BIT'.[51]

The CJEU then also distinguished the *Achmea* tribunal from the Benelux Court of Justice. With regard to that institution, it had previously found that there was 'no good reason why a court common to a number of Member States […] should not be able to submit questions to the Court for a preliminary ruling in the same way as the courts or tribunals of any one of the Member States'.[52] Yet, as the Court held, the Benelux Court's task was to ensure the uniform application of the legal rules common to the three Benelux States. Additionally, its decisions were integrated into 'proceedings before the national courts leading to definitive interpretations of common Benelux legal rules'.[53] The *Achmea* tribunal, to the contrary, had no such links with the judicial systems of the Member States in the CJEU's view.[54] On the basis of this brief examination, the Grand Chamber concluded that the investment tribunal under the 1991 BIT was not entitled to request a preliminary reference from the CJEU.[55]

As the ultimate step in its analysis, the Grand Chamber then assessed the extent to which an intra-EU investment arbitral award under the 1991 BIT was 'subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling'.[56]

Since, under the 1991 BIT, the arbitral tribunal was mandated to determine its seat and thereby the *lex arbitri* itself, the Grand Chamber affirmed that it was only the tribunal's choice of Frankfurt 'which enabled the Slovak Republic […] to seek judicial review of the arbitral award' in Germany, an EU member. It further pointed to the limited review of arbitral awards for which the German *lex arbitri* provides.[57] In this regard, the Grand Chamber considered investment disputes distinct from commercial arbitrations.[58] With regard to these, the CJEU had previously found such limited review justified to ensure efficient arbitral proceedings, provided the fundamental provisions of EU law can be examined and be the subject of a reference under Art. 267 TFEU.[59] It held:

51 Ibid., para. 45.
52 Ibid.; see CJEU, case C-337/95, *Parfums Christian Dior*, EU:C:1997:517, para. 21 and CJEU, case C-196/09, *Miles and Others*, EU:C:2011:388, para. 40.
53 CJEU, *Achmea*, (fn. 5), para. 48.
54 CJEU, *Achmea*, (fn. 5), para. 48.
55 Ibid., para. 49.
56 Ibid., para. 50.
57 Ibid., para. 53. It should be noted here that the German *lex arbitri* is based on the UNCITRAL Model Law, which, at the time of the finalisation of this contribution, had been adopted by 80 States in a total of 111 jurisdictions; cf. UNCITRAL, Status of the UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (04/06/2018).
58 CJEU, *Achmea*, (fn. 5), para. 55.
59 Ibid., referring to CJEU, case C-126/97, *Eco Swiss,* EU:C:1999:269, paras 35-36 and 40; CJEU, case C-168/05, *Mostaza Claw,* EU:C:2006:675, paras 34-39.

> 'While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law […], disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT'.[60]

The CJEU, on that basis, concluded:

> 'Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT […], it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law'.[61]

Nevertheless, the CJEU felt the need to stress that an 'international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law'.[62] Yet, any such agreement must, according to the CJEU, ensure that 'the autonomy of the EU and its legal order is respected'.[63] As the Court observed, however, the situation is different for agreements entered into by EU Member States and not the EU itself.[64] Further, the 1991 BIT's arbitration clause had an 'adverse effect on the autonomy of EU law',[65] as it allowed for 'the possibility of submitting those disputes to a body which is not part of the judicial system of the EU'.[66] Therefore, it called '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'.[67]

D. Discussion of the Judgment: Autonomy over Cooperation and a Multi-Institutional Rule of Law

The *Achmea* decision, as noted at the beginning of this contribution, comes after long debates in academia and practice. The Commission has, over the last years, constantly intervened in intra-EU investment disputes, using the role of an *amicus curiae* to argue

60 Ibid.
61 CJEU, *Achmea,* (fn. 5), para. 56.
62 Ibid., para. 57.
63 Ibid.
64 Ibid., para. 58.
65 Ibid., para. 59.
66 Ibid., para. 58.
67 Ibid.

the respective tribunal lacked competence to entertain the claims.[68] It did so even in cases where the respondent had not sought to rely on this objection. The Commission's approach has been characterised quite frankly by the tribunal in *Electrabel v. Hungary*:

> 'In effect, far from exercising the traditional role of an "amicus curiae", the Commission became a second respondent more hostile to Electrabel than Hungary itself. If accepted by the Tribunal, the Commission's submissions would have been fatal to Electrabel's case'.[69]

Until today, no investment tribunal has been persuaded by its arguments or the respective respondent's reliance on the intra-EU objection. To the contrary, as the tribunal in *RREEF v. Spain* held, 'in all published or known investment treaty cases in which the intra-EU objection has been invoked by the Respondent, it has been rejected'.[70] Even though the respective procedural order is not public, it is likely that the *RREEF* tribunal even rejected the Commission's second application to intervene in that case[71] – after a first application had been rejected as premature[72] – on that basis.

The *Achmea* decision and the prior jurisprudence of investment tribunals appear like ships that pass in the night. Their diverging results are, however, hardly surprising in light of their different perspectives on the question. While investment tribunals are to approach jurisdictional objections – such as the intra-EU objection – on the basis of their constituent international legal instrument,[73] the relevant BIT or the ECT, the CJEU is to interpret EU law.

Nevertheless, mindful of these circumstances, the *Achmea* tribunal had still considered itself 'an *ad hoc* German arbitration tribunal subject to German law and not an international tribunal'.[74] It further expressed its appreciation for the fact that, 'like all courts and tribunals in the EU, it must take proper account of that relationship' it had with the EU institutions.[75] This led the tribunal to reaffirm that it would 'organise

68 In addition, the Commission also initiated infringement proceedings against five member states (Austria, the Netherlands, Romania, Slovakia and Sweden) and requested them to bring the intra-EU BITs between them to an end. See, e.g., *European Commission*, Press release IP/15/5198, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18/06/2015.

69 ICSID, case No. ARB/07/19, *Electrabel S.A. v. Hungary*, Award, 25/11/2015, para. 234; other tribunals, such as the one in *Micula v. Romania*, felt the need to reaffirm that 'the European Community shall act as *amicus curiae* and not as *amicus actoris vel rei.* In other words, the non-disputing party shall remain a friend of the court and not a friend of either Party.', see ICSID, case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, Award, 11/12/2013, para. 13 (emphasis in the original).

70 ICSID, case No. ARB/13/30, *RREEF Infrastructure (GP) Limited and RREEF Pan European Infrastructure Two Lux S.à r.l. v. Spain*, Decision on Jurisdiction, 06/06/2016, para. 89.

71 Ibid., para. 32.

72 Ibid., para. 20.

73 See, for a reflection of this position in the *Achmea* tribunal's decision, PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 287.

74 PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 224.

75 Ibid., para. 286.

its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions'[76] – an approach well suited for the multi-level pluralism that characterises today's system of international dispute settlement.[77]

The CJEU, quite to the contrary, ignored the *Achmea* tribunal's outstretched hand. In striking similarity to its previous rulings on the EEA Court,[78] the European Patent Court[79] and, most recently, the European Court of Human Rights,[80] it favoured autonomy over cooperation. Ironically, the Court cites exactly these decisions for its proposition that 'according to settled case-law of the Court, an international agreement providing for the establishment of a court […] whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law'.[81]

In light of the cooperative remarks in the 2010 Award, the CJEU's reasons for refusing a tribunal under Art. 8 of the 1991 BIT the right to request a ruling under Art. 267 TFEU seem surprisingly few. The Court has followed a rather stringent approach to the determination of which institutions are to be considered 'a court or tribunal' in the sense of Art. 267 in other cases. In *Merck Canada*, the CJEU most recently listed the pertinent conditions:

> '[A]ccording to settled case-law of the Court, in order to determine whether a body making a reference is a "court or tribunal" within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.[82]

The Wathelet Opinion had provided an extensive analysis according to these criteria.[83] Academic writings also advocated for the inclusion of investment tribunals in

76 Ibid., para. 292.
77 See for a critique of the *Achmea* decision from that perspective, *Lang*, Autonomie „über alles": Eine Kritik des Achmea-Urteils des EuGH, https://www.juwiss.de/24-2018/ (04/06/2018).
78 ECJ, opinion 1/91, *EEA Agreement – I*, ECLI:EU:C:1991:490.
79 CJEU, opinion 1/09, *Agreement creating a unified patent litigation system*, ECLI:EU:C:2011:123.
80 CJEU, opinion 2/13, *Accession to the ECHR*, ECLI:EU:C:2014:2454.
81 CJEU, *Achmea*, (fn. 5), para. 57.
82 CJEU, case C-555/13, *Merck Canada*, ECLI:EU:C:2014:92, para. 16.
83 *Wathelet Opinion*, (fn. 10), paras 84–131.

the scope of Art. 267.[84] Any structured assessment is, however, completely absent from the *Achmea* decision, underlining its character as a political decision.[85]

Disappointing from the perspective of international investment law and arbitral tribunals is the CJEU's complete disregard of the discussions of the relationship between EU law and international investment law in arbitral jurisprudence. Many tribunals have, in one way or another, advanced the view that this relationship was one of complementarity due to the investment treaties wider scope of protection, not one of incompatibility.

To give only two examples, first, EU law does not provide for a similar degree of protection for foreign investors against expropriation as investment treaties offer. Art. 345 TFEU expressly provides that 'the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. The CJEU's own jurisprudence highlighted this deficiency in the *Annibaldi* case:

> 'Finally, given the absence of specific Community rules on expropriation and the fact that the measures relating to the common organization of the agricultural markets have no effect on systems of agricultural property ownership, it follows from the wording of Article 222 of the Treaty that the Regional Law concerns an area which falls within the purview of the Member States'.[86]

Admittedly, Article 17 of the EU Charter of Fundamental Rights[87] protects the right to property. Yet, under the Charter's Article 51 (1), this protection only extends to acts of the 'institutions and bodies of the Union […] and to the Member States only when they are implementing Union law.' Despite the CJEU's broad understanding of these terms,[88] the factual circumstances of the *Achmea* case itself show that harmful conduct by EU Member States towards foreign investors does not necessarily fall within the Charter's scope of application. The Slovak measures with regard to which the Dutch insurance provider had initiated the arbitration were not motivated by EU law. 'A considerable amount of actions' taken by EU Member States are, therefore, not governed by the Charter but only by the respective 'national constitutions and potential fundament rights guaranteed therein.'[89]

84 *Basedow*, EU Law in International Arbitration: Referrals to the European Court of Justice, Journal of International Arbitration 32/4, 2015, p. 367; *von Papp*, Clash of 'autonomous legal orders': Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ, Common Market Law Review 50/4, 2013, p. 1039. See also *Paschalidis*, Arbitral tribunals and preliminary reference to the EU Court of Justice, Arbitration International 33/4, 2016, p. 1, discussing *Merck Canada* and *Ascendi* in this regard.

85 See also *Hess*, The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice, Max Planck Institute Luxembourg for Procedural Law Research Paper Series, No. 3, 2018, p. 5: 'Ultimately, *Achmea* is a political judgment, which must be read from the perspective of European Union law.'.

86 CJEU, case C-309/96, *Annibaldi*, ECLI:EU:C:1997:631, para. 23.

87 OJ C 326/391 of 26/10/2012.

88 CJEU, case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21.

89 *Basener*, (fn. 4), p. 127.

As the *Achmea* tribunal further pointed out, there is also a difference in the extent of substantive protection offered under the 1991 BIT:

> 'While it certainly overlaps with the right to property secured by Article 17 of the EU Charter of Fundamental Rights (and the First Protocol to the ECHR, as applied under EU law), the BIT provision on expropriation is not obviously co-extensive with it. Both the considerable body of jurisprudence on indirect takings that has emerged in the context of BITs, and also the fact that the BIT protects "assets" and "investments" rather than the arguably narrower concepts of "possessions" and "property" protected by the EU Charter on Fundamental Rights, give rise to the possibility of wider protection under the BIT than is enjoyed under EU law.'[90]

Secondly, EU law does not provide for a right of direct action for an individual against a Member State in a neutral, international forum. The *Achmea* tribunal summarised this point as follows:

> 'An essential characteristic of an investor's rights under the BIT is the right to initiate UNCITRAL arbitration proceedings against a State party (as the host State) under Article 8 of the BIT. Such a consensual arbitration under well-established arbitration rules adopted by the United Nations, in a neutral place and with a neutral appointing authority, cannot be equated simply with the legal right to bring legal proceedings before the national courts of the host state; and, moreover, the *locus standi* of an investor under the BIT, with its broad definition of "indirect" investments under Article 1, is unlikely to be replicated under the court procedures of an EU Member State.'[91]

These two deficiencies, together with others, had already been highlighted, *inter alia*, by the tribunal in *Eastern Sugar v. Czech Republic*, one of the first to deal with the question:

> 'While it is true that European Union law deals with intra-EU crossborder investment, say between the Netherlands and the Czech Republic, as does the BIT, the two regulations do not cover the same precise subject-matter.
> The European Union guarantees the free movement of capital. […]
> By contrast, the BIT provides for fair and equitable treatment of the investor during the investor's investment in the host country, prohibits expropriation, and guarantees full protection and security and the like. The BIT also provides for a special procedural protection in the form of arbitration between the investor and the host state and, especially arbitration of a "mixed" or "diagonal" type between the investor and the host state, as in the present case'.[92]

The *Achmea* decision, however, effectively places the consistency of the application of EU law and its autonomy over a multi-institutional rule of law – despite the EU's own commitment to the rule of law as one of its foundational values according to Art. 2 TEU. If applied to all intra-EU investment treaties, it had the potential to strip intra-EU investors of the right to have recourse to a neutral dispute resolution forum.

90 PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 261.
91 PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 264.
92 SCC, case No. 088/2004, *Eastern Sugar v. Czech Republic*, Partial Award, 27/03/2007, paras 160–161, 164.

As the debates that started after the judgment was rendered have already shown, this case brought about a high degree of legal uncertainty in terms of its implications for other investment treaties.[93]

As a final point, it is noteworthy that the CJEU decided to take this stance in a case where the characteristics for which it declared Art. 8 of the 1991 BIT incompatible with EU law were not present. The CJEU was, first, only confronted with the *abstract possibility* for the tribunal to apply EU law (which the *Achmea* tribunal did not do at all). Secondly, the *Achmea* case was one where the CJEU itself ultimately could have ensured that 'the autonomy of the EU and its legal order is respected'.[94] The Dutch insurance provider now has to suffer the consequences from its reliance on a treaty provision that could potentially lead to results which – in the CJEU's view – endangered the EU legal order's autonomy.

No such danger had, however, materialised in the *Achmea* case.[95] It was therefore harsh for the CJEU to not reverse the retroactive applicability of its decision in deference of legal certainty and the protection of trust.[96] Had it done so, however, the broader effect of its judgment on intra-EU investment arbitration, which will be discussed in the following, might have developed differently.

E. The Judgment's Implications for intra-EU Investment Arbitration

It seems certain that the judgment's impact is limited for concluded arbitral proceedings. As long as the losing party has not challenged the relevant award within the statutory time limits, it would violate considerations of legal certainty and good faith to allow for a belated challenge. Yet, recently concluded cases such as the SCC arbitration in *Novenergia v. Spain* show that exceptions exist. The tribunal in that case rendered its final award[97] in mid-February 2018. Spain, in turn, has already initiated setting-aside proceedings before the Svea Court of Appeal in Stockholm.[98] However, the *Novenergia* case was conducted on the basis of the ECT, which – as will be explained below – must be considered separately from other intra-EU investment treaties, more precisely intra-EU BITs. Most likely, also the compatibility of ECT-based intra-EU investment arbitration with EU will soon come before the CJEU, since

93 In Germany, the legal insecurity resulting from the *Achmea* decision has already led, among other factors, to a proposal for a resolution by the *Bundestag*, initiated by the Liberal Party (FDP); see *German Bundestag*, Printed Matter 19/1694, 17/04/2018, http://dipbt.bundestag.de/doc/btd/19/016/1901694.pdf (04/06/2018).

94 CJEU, *Achmea*, (fn. 5), para. 57.

95 Similarly *Hess*, (fn. 85), p. 11.

96 The CJEU, admittedly, only rarely makes use of this possibility, and generally not with regard to the case leading to the preliminary reference. See, however, ECJ, case C-228/92, *Roquette Frères*, ECLI:EU:C:1994:168.

97 SCC, case No. V 2015/063, *Novenergia v. Spain*, Final Award, 15/02/2018.

98 Svea Court of Appeal, case No. T 4658-18, *Spain v. Novenergia*. Spain had first tried to have the final award corrected. The tribunal, however, rejected this request; cf. SCC, case No. V 2015/063, *Novenergia v. Spain*, Procedural Order No. 7, 09/04/2018.

Spain has asked the Stockholm court to also request a ruling under Art. 267 TFEU on that matter.[99]

The *Achmea* decision has – on the other end of the spectrum – also not stopped EU investors from initiating new claims based on intra-EU BITs.[100] Reportedly, an investor from Luxembourg recently served Poland with a notice of dispute based on the Benelux-Poland BIT.[101] Further, a little less than two weeks after the *Achmea* decision, another ICSID tribunal was constituted in one of the most-recently initiated intra-EU cases.[102] For such newly initiated but also for pending proceedings, it is likely that tribunals under both intra-EU BITs (I.) and the ECT (II.) will take note of the *Achmea* decision when deciding on their jurisdiction. This does not mean, however, that tribunals will or must apply the judgment's reasoning when making their determinations.

I. Pending Proceedings under intra-EU BITs

Pending proceedings under intra-EU BIT, at a first glance, seem to be the most-directly affected by the CJEU's judgment. Preliminary reference decisions by the CJEU under Art. 267 are, generally, binding between the parties to the proceedings as well as the courts involved in the relevant case.[103] For the particular case of *Achmea*, it is now for the Bundesgerichtshof to decide how to implement the Grand Chamber's ruling. As *Hess* illustrates in one of the first substantial publications on the judgment, the Bundesgerichtshof could endorse the ruling in two ways: It could set aside the award because there was no valid arbitration agreement or because the award's recognition or enforcement was incompatible with German public policy (§ 1059(2) No 1(a) or No 2(b) ZPO).[104]

99 *Global Arbitration Review*, Spain asks for ECJ to rule on ECT, 31 May 2018, https://globalarbitrationreview.com/article/1170107/spain-asks-for-ecj-to-rule-on-ect/ (04/06/2018).

100 It has, however, been reported that one claim against Poland was withdrawn by the investor, Airbus, at an early stage of the arbitration because of the *Achmea* decision. Cf. *Global Arbitration Review*, Airbus withdraws treaty claim against Poland, 22 May 2018, https://globalarbitrationreview.com/article/1169853/airbus-withdraws-treaty-claim-against-poland/ (04/06/2018).

101 *Investment Arbitration Reporter*, Poland faces another intra-EU BIT case, but also signals its intent to rely on recent European Court ruling in an effort to elude losses, 4 April 2018, https://www.iareporter.com/articles/poland-faces-another-intra-eu-bit-case-but-also-signals-its-intent-to-rely-on-recent-european-court-ruling-in-an-effort-to-elude-losses/ (04/06/2018).

102 ICSID, case No. ARB/17/37, *Addiko Bank v. Croatia*. The tribunal was constituted on 19/03/2018.

103 *Kotzur*, in: Geiger/Khan/Kotzur, European Union Treaties, 2015, Art. 267 TFEU, para. 37; see also *Karpenstein*, in: Grabitz/Hilf/Nettesheim (eds), AEUV, Art. 267, paras 101 f.; *Wegener*, in: Calliess/Ruffert (eds), EUV/AEUV (5th ed. 2016), Art. 267, para. 49; *Gaitanides*, in: von der Groeben/Schwarze/Hatje (eds), Europäisches Unionsrecht (7th ed. 2015), Art. 267, para. 89.

104 *Hess*, (fn. 85), p. 7.

The Bundesgerichtshof is in an odd position now. It is confronted with the request by the Slovak Republic – backed by the CJEU – to annul an arbitral award because of a public policy violation. The award, in turn, had been rendered on the basis of a treaty that was intended to shield investors from harm inflicted precisely through the implementation of changes in policy. Additionally, as outlined above, the violation of public policy in the present case would only be due to the hypothetical possibility that the tribunal could have escaped the control by EU courts – which it did not.[105] In light of these circumstances, it would be understandable if the Bundesgerichtshof was leaning toward a different decision. Most importantly, the *Achmea* decision now raises doubts about the protection of trust in treaty guarantees and legal certainty, which are not reflected in the CJEU's judgment. Yet, if it was to follow this path, the Bundesgerichtshof cannot avoid the obligation to request another preliminary reference from the CJEU on that issue.[106]

Further, the effect of a preliminary references ruling by the CJEU extends, at least *de facto*, beyond the reference's underlying proceedings.[107] Other courts within the EU will now also consider the *Achmea* decision when deciding on the recognition and enforcement or challenge of intra-EU investment awards in non-ICSID proceedings.[108] It should be noted, however, that the CJEU's decision in *Achmea* rests on the specifics of the dispute resolution provision in the 1991 BIT. The Grand Chamber specifically held that clauses 'such as Article 8'[109] of the 1991 BIT were incompatible with Art. 267 and Art. 344 TFEU. The determination by Member State courts whether non-ICSID awards before them comply with EU law or not will therefore depend on each specific clause and the extent to which it allows for a review of any arbitral award by EU courts. The application of the judgment to other BIT dispute resolution provisions can, therefore, by far not be considered an *acte claire* scenario. It is likely that more references to the CJEU will follow.

With regard to ICSID awards, to the contrary, the courts have no choice but to enforce them. The Washington Convention's Art. 54 simply does not allow for any review by domestic courts.[110] Challenge proceedings can, in any event, only take place

105 It must be noted here that, even though the *Achmea* tribunal explained in the 2010 Award that 'the Tribunal determined Frankfurt, Germany to be the place (seat) of the arbitration' (para. 16), it can be inferred from other parts of the award that this determination was made on the basis of the parties agreement; cf., e.g., PCA, *Eureko B.V. v. Slovak Republic*, (fn. 11), para. 138: 'Respondent […] pointed out that if the parties had agreed to a seat of arbitration outside of the ECJ, such as Switzerland, there could be no referral to the ECJ.'.

106 This would be permissible; cf. *Kotzur*, (fn. 103), para. 37; *Gaitanides*, (fn. 104), para. 89 (with further case references).

107 See only *Kotzur*, (fn. 103), para. 38.

108 If such a court wanted to render a ruling departing from *Achmea*, in particular, again considering and protecting the legitimate expectations of a party that obtained an intra-EU investment award, it would also be obliged to request a preliminary ruling by the CJEU. See, for a comparable situation, BVerfG, Decision of 10/12/2014 – 2 BvR 1549/07.

109 CJEU, *Achmea*, (fn. 11), operative part.

110 575 UNTS 159; Art. 54(1) 1st sentence reads: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.' See on this also *Hess*, (fn. 85), p. 14.

before an ICSID annulment committee.[111] ICSID proceedings are, hence, generally unaffected by the CJEU's decision.

As *Hess* suggests, investment tribunals should – after the *Achmea* decision – nevertheless readjust their approach to jurisdictional determinations in intra-EU disputes.[112] From the perspective of these arbitral tribunals, however, the implications of the judgment depend on the language of the applicable treaties, which the *Achmea* decision has not changed. The intra-EU BITs, for now and until their termination, remain valid as a matter of public international law.[113] Consequently, the vital question is whether the particular clause a tribunal bases its jurisdiction on allows EU law – and, in particular, its primacy – to play a role. In most instances, this will not be the case. Even if the relevant treaty contains an applicable law clause, which is as broad as Art. 8(6) of the 1991 BIT, that does not mean EU law governs the tribunal's jurisdictional determinations. *Schreuer* illustrates this as follows:

> 'Tribunals have held consistently that questions of jurisdiction are not subject to the law applicable to the merits of the case. Questions of jurisdiction are governed by their own system which is defined by the instruments containing the parties' consent to jurisdiction'.[114]

This is particularly true for ICSID arbitrations,[115] on the one hand, where the tribunal is not subject to any domestic *lex arbitri*. Many non-ICSID intra-EU proceedings, on the other hand, will also not be conducted under an EU Member State's *lex arbitri*. Instead, they have their seat in, for instance, Switzerland. The remaining intra-EU non-ICSID investment disputes with a seat within the EU are, to a large extent, ECT arbitrations conducted under the auspices of the Stockholm Chamber of Commerce's Arbitration Institute.

111 Cf. Art. 52 of the Washington Convention.

112 *Hess*, (fn. 85), pp. 12 f.

113 The Dutch government, however, has already announced that it felt required to terminate its twelve intra-EU BITs – and also to analyse which measures to take regarding the ECT – as a result of the *Achmea* decision; cf. Letter from the Dutch Minister for Foreign Trade and Development Cooperation to the Chairman of the Second Chamber of the Dutch Parliament of 26 April 2018, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2018/04/26/kamerbrief-over-investeringsakkoorden-met-andere-eu-lidstaten/kamerbrief-over-investeringsakkoorden-met-andere-eu-lidstaten.pdf (04/06/2018).

114 *Schreuer*, Jurisdiction and Applicable Law in Investment Treaty Arbitration, McGill Journal of Dispute Resolution 1/1, 2014, p. 3 (with further references).

115 See, in this regard, *Schreuer et al.*, The ICSID Convention: A Commentary (2nd ed. 2009), Art. 42, paras 3-4, confirming for the interplay of the relevant investment treaty with the ICSID Convention: 'Art. 42 addresses only the substantive law to be applied, not procedure. […] Similarly, Art. 42 does not govern questions of the tribunal's jurisdiction under Art. 25.'.

II. Pending Proceedings under the ECT

The ECT, in turn, presents a special case of an intra-EU investment treaty,[116] mainly because it is not a mere intra-EU treaty at all. It has been concluded by all EU Member States,[117] the EU and additional partners, totalling 53 contracting parties.[118] As a consequence, in addition to the EU Member States, the EU itself and its institutions (including the CJEU) are also bound by the ECT under Art. 216(2) TFEU.[119] From that perspective, it seems hardly arguable that an award by an arbitral tribunal operating under the ECT was in violation of the European *ordre public*. In particular, also the ECT – as all 'international agreements concluded by the European Union pursuant to the provisions of the Treaties'[120] – is an act of the EU institutions under EU law.[121] As such, also from the perspective of EU law, they are presumed valid and lawful 'until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality'[122].

The Commission has, in its *amicus* submissions, tried to tackle this issue by relying on the argument that the ECT contained an implicit disconnection clause, rendering its dispute settlement provision – Art. 26 – inapplicable in intra-EU relations. The argument has, however, rightly been rejected by arbitral tribunals.[123] It lacks any support in the ECT's text, especially considering that the treaty contains an express disconnection clause in Art. 4 for the WTO Agreement. For the time being, arbitral tribunals operating under the ECT have no reason to decline jurisdiction in intra-EU cases, not even if they applied EU law.

In this spirit, the tribunal in the first intra-EU arbitration after the *Achmea* decision that reached an award, *Masdar v. Spain*, deemed the judgment irrelevant to its jurisdiction under the ECT:

116 See also *Hess*, (fn. 85), pp. 15 f.
117 Only Italy has meanwhile terminated its membership again.
118 A list of all ECT member states is available at https://energycharter.org/who-we-are/members-observers/ (04/06/2018).
119 Art. 216(2) TFEU reads: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'.
120 CJEU, case C-266/16, *Western Sahara Campaign UK*, ECLI:EU:C:2018:118, para. 45.
121 Ibid.
122 CJEU, case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para. 52.
123 See recently SCC, case No. V 062/2012, *Charanne v. Spain*, Final Award, 21/01/2016, paras 433-439; ICSID, *RREEF v. Spain*, (fn. 70), paras 82–85; ICSID, case No. ARB/14/3, *Blusun v. Italy*, Award, 27/12/2016, para. 280 (3) & (4); ICSID, case No. ARB/13/36, *Eiser v. Spain*, Award, 04/05/2017, para. 207; SCC, *Novenergia v. Spain*, (fn. 93), para. 459; ICSID, case No. ARB/14/1, *Masdar v. Spain*, Award, 16/05/2018, paras 310-313 (quoting for that position also from the so far unpublished decision in PCA, case No. 2012-14, *PV Investors v. Spain*, Preliminary Award on Jurisdiction, 13/10/2018, para. 183). Further on this topic *Berman*, ECT and European Union Law, in: Scherer (ed.) International Arbitration Energy in the Energy Sector, 2018, p. 203, paras 9.23 f.; *Tietje*, The Applicability of the Energy Charter Treaty, (fn. 4), pp. 10 f.

> 'The *Achmea* Judgment is of limited application – first, and specifically, to the Agreement on encouragement and reciprocal protection of investment between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic and, second, in a more general perspective, to any "*provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic.*" The ECT is not such a treaty. Thus, the *Achmea* Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party.'[124]

The *Masdar* tribunal further stressed that the CJEU had not addressed the ECT at all, even though the Wathelet Opinion had done so:

> 'Had the CJEU seen it necessary to address the distinction drawn by the Advocate General between the ISDS provisions of the ECT and the investment protection mechanisms to be found in bilateral investment treaties made between Member States within the ambit of its ruling, it had the opportunity to do so. In fact, the Tribunal notes that the CJEU did not address this part of the Advocate General's Opinion, much less depart from, or reject, it. The *Achmea* Judgment is simply silent on the subject of the ECT. The Tribunal respectfully adopts the Advocate General's reasoning on this matter, and it relies in particular upon the observation in the final sentence cited above from his Opinion.'[125]

The above-mentioned *Novenergia* setting-aside proceedings before the Svea Court of Appeal now might present the opportunity for the CJEU to reveal whether it considers that the ratio of its *Achmea* decision also extends to the ECT's Art. 26. The CJEU, however, will only be able to answer that question again from the perspective of EU law. It cannot invalidate a treaty to which the EU itself is a party due to its binding character towards third states.[126]

In any event, any decision the CJEU could take regarding the ECT would not affect its validity from a public international law perspective. Most importantly, from that perspective, the ECT takes precedence over any other legal treaty framework by virtue of its Art. 16.[127] This provision mandates that, in cases where the disputing parties are subject to another international agreement that overlaps with the ECT's investment protection and disputes settlement provisions, the regime granting the more

124 ICSID, *Masdar v. Spain*, (fn. 123), para. 679.
125 ICSID, *Masdar v. Spain*, (fn. 123), para. 682.
126 CJEU, *Western Sahara Campaign UK*, (fn. 120), para. 50. See also CJEU, case C-402/05 P, *Kadi*, ECLI:EU:C:2008:461, para. 286.
127 See for arbitral jurisprudence on this matter already *RREEF v. Spain*, (fn. 70), paras 201 f.

favourable treatment to investors prevails.[128] As has already been outlined above and by, *inter alia*, *Tietje*,[129] the protection granted by investment treaties, including the ECT, is broader in its scope and thereby more favourable to investors than EU law. This is also not changed by the operation of Art. 30(4) VCLT, on which *Hess* relies to argue that ECT tribunals should consider EU law and Art. 344 TFEU as the *lex posterior* to the ECT in light of the *Achmea* decision. Art. 30 VCLT is simply not applicable in ECT disputes, since Art. 16 ECT operates as *lex specialis*.[130]

III. The Consequence: Chaos Rather than Rest

It therefore seems unlikely that arbitral tribunals in intra-EU disputes will change their approach to the intra-EU objection as a result of the *Achmea* decision. Admittedly, the CJEU has lent the Commission and respondent states in these proceedings its support in form of its authoritative interpretation of EU law. Yet, similarly to the CJEU, which could reach that conclusion rather easily because of its mandate to secure the uniform interpretation of EU law, intra-EU investment tribunals would also merely operate methodically correct if they continued to reject the intra-EU objection.

In light of this disintegration of positions, which the CJEU's judgment only furthers, the field of intra-EU investment will likely experience more chaos than rest in the short-term: The courts of EU Member States will probably begin to reject the enforcement of intra-EU BIT awards, while the prevailing party in the arbitration will most likely try to enforce the award abroad.[131] Further, arbitral tribunals might be inclined – if they were to fix their seat themselves – to do so outside the EU. Similarly, investors from EU Member States will be examining options to restructure their investment. In order to obtain treaty protection, they might invest in EU Member States through, e.g., a Swiss subsidiary. From the public international law perspective, this

128 Art. 16 reads: 'Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,
(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,
where any such provision is more favourable to the Investor or Investment.'.

129 *Tietje*, Bilaterale Investitionsschutzverträge, (fn. 4), pp. 12–15.

130 Cf. *Odendahl*, in: Dörr/Schmalenbach (eds), The Vienna Convention on the Law of Treaties: A Commentary, 2012, Art. 30, para. 16: 'The provisions laid down in Art. 30 are residuary rules; if a treaty contains special clauses regulating its relation to other treaties (conflict clauses, savings clauses or compatibility clauses), Art. 30 does not apply.'.

131 Enforcement proceedings are already underway in US courts with regard to intra-EU awards, e.g. in the *Micula* case. As *Hess*, (fn. 85), p. 14, cautions, this could lead to a repetition in other cases of the Commission's argument, as advanced in the *Micula* proceedings, that the payment of any award equals illegal state aid under Art. 107 TFEU.

behaviour would generally be permissible.[132] The *Achmea* decision, in the end, could induce situations which it considered to be the reason why the 1991 BIT's arbitration clause violated EU law.

F. Outlook: A Political Solution Is Necessary

What is now necessary for the future of intra-EU investment disputes is a political solution. Projects such as the non-paper on 'Intra-EU Investment Disputes',[133] which had been jointly authored by Austria, Finland, France, Germany and the Netherlands in April 2016, need to be developed further. Until this has been realised and the EU is able to provide its cross-border investors with a sufficient degree of protection, the above-described chaos is likely to continue. In the short-term, the development that the CJEU's judgment probably triggers can, hence, only be viewed as disconcerting. This is equally true from the perspective of legal certainty for intra-EU investors as well as the Commission's desire to maintain uniform standards for all market actors within the EU.

On a different note, the *Achmea* decision can be seen as disconcerting not only with regard to the future of investment dispute settlement within the EU context but also beyond. The stance taken by the CJEU – the EU could only enter into international agreements under the oversight of an international court 'provided that the autonomy of the EU and its legal order is respected'[134] – might well turn into an obstacle for the EU's external economic policy.[135] Rightly so, the EU's treaty partners may not want to submit themselves to treaties which grant the EU's legal order such an elevated status. The CJEU would, therefore, be well-advised to take a more modest approach when it comes to the EU's trade and investment agreements. Ultimately, it seems the Court is not yet ready to embrace the external impact of the autonomy of the EU's legal order and its supranational characteristics: On the international plane, the EU, especially in areas of its exclusive competence, acts more akin to – if not completely

132 Cf. PCA, case No. 2012-12, *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, 17/12/2015, paras 535 f.; see on this also the case comment by *Happ/Wuschka*, SchiedsVZ/German Arbitration Journal 14/4, 2016, pp. 226-233.

133 Intra-EU Investment Disputes, Non-Paper of 7 April 2016, https://www.bmwi.de/Redaktion/DE/Downloads/I/intra-eu-investment-treaties.html (04/06/2018).

134 CJEU, *Achmea*, (fn. 5), para. 57.

135 On this issue, see *Boysen*, Außenhandel und europäischer ordre public – Investitionsschiedsgerichtsbarkeit im Rahmen internationaler Handelsabkommen, in: Kadelbach (ed.): Die Welt und Wir – Die Außenbeziehungen der Europäischen Union (2017), 85, 102–106.

like – a state, not to an international organisation.[136] This, however, also comes with the pertinent consequences, in particular that its own internal law cannot – and should not be considered to – trump international norms in any international forum.[137]

136 Interestingly, with its *Achmea* decision, the CJEU seems to take the same conceptual stance EU-internally as the Commission, which already propones the position in international legal proceedings that the EU member states' relations between each other equal those of federal states; see *Micula v. Government of Romania*, US Court of Appeals for the Second Circuit, Brief for *Amicus Curiae* – The Commission of the European Union in Support of Defendant-Appellant, 15–3109–cv, p. 28: 'The situation here is no different to that in which New York and California conclude a bilateral investment treaty between themselves, which would be impermissible under federal law. The U.S. would consider an attempt by an E.U. domestic court to enforce an award under that illegal interstate bilateral investment treaty an interference with its sovereignty. The same applies here.'.

137 Cf. Art. 27 VCLT and Art. 27(2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543.