

## Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective

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*It seemed that Court of Justice of the European Union wanted to make it short and sweet: It took the Grand Chamber in its Achmea judgement less than fifteen pages to conclude that Investor-State dispute settlement in an intra-EU context is incompatible with EU law.*

*The Judgement is noteworthy in terms of both the conceptualisation as well as the application of the principle of autonomy of EU law. In terms of conceptualisation of the principle, what we witness in Achmea, read in conjunction with another decision, could be a first subtle attempt to enrich the principle with notions of the rule of law. In terms of application, the Court further strengthens legal equality, its judicial monopoly, and – perhaps even more importantly – the role of the Member States' courts, understood as "traditional permanent State courts", in the judicial dialogue.*

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## A. Introduction

The Court of Justice of the European Union (hereafter “CJEU” or “Court”)'s recent judgement in *Slovak Republic v. Achmea* (hereafter “*Achmea*”)<sup>1</sup> was received with a great deal of interest.<sup>2</sup> The Court found investor-State dispute settlement (hereafter “ISDS”) in an intra-European Union (hereafter “EU”) context incompatible with EU law (below B.).

Since then a good part of the arbitration community has been in uproar. Some even felt themselves reminded of a “Black Tuesday”<sup>3</sup>. To a certain degree, such reactions might become more comprehensible if one looks at the bare figures: Roughly 20 percent of all ISDS cases stem from intra-EU investment disputes; 40 plus x cases against Spain alone.<sup>4</sup> Hence, some practitioners may simply worry about the sustainability of their business case. This shrillness aside, there are, however, concerns which should not be dismissed too quickly. These relate to the lack of respect for the rule of law in certain EU Member States. After the CJEU handed down its judgement in *Achmea*, businesses came forward criticizing a peculiar oblivion of the EU institutions of ill-equipped, overstrained, sometimes even corrupted domestic judicial systems within parts of the European Union.<sup>5</sup> Absent access to investor-State arbitration, investors are left with such courts.<sup>6</sup> However, putting an end to “old-style” investor-State arbitration within the EU may not only to be seen negatively. It actually strengthens the equal application of EU law. It bans those adjudicative bodies which displayed an impressive esprit de corps in their unsurpassable hostility towards EU law.

Indeed, the implications of the *Achmea* judgement seem to be multidimensional. Two facets are particularly noteworthy. First, a discussion of the *Achmea* judgement should be linked to the said rule of law-context. In that regard, however, not all appears to be bleak. In fact, there are glimpses of hope. In a series of judgements<sup>7</sup> – among others the one in *Associação Sindal dos Juizes Portugueses*<sup>8</sup> – the Court seized the opportunity to recognise the Union’s problem of dealing with the challenges posed to the rule of law in some Member States. The Court apparently takes the lead where other EU institutions are struggling with the rather cumbersome “art.7 TEU procedure”.<sup>9</sup> The CJEU aims at more strongly pro-

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<sup>1</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158.

<sup>2</sup> For recent comments cf., e.g. P. Koutrakos, “Editorial: What is the Principle of Autonomy About?” (2018) 43 E.L. Rev. 1; idem., “Editorial: But Seriously, What is the Principle of Autonomy Really About?” (2018) 43 E.L. Rev. 293; J Lee, “The Empire Strikes Back: Case Note on the CJEU Decision in *Slovak Republic v. Achmea BV*, March 6, 2018” (2018) 11 Contemp. Asia Arb. J. 137; A. Pinna “The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, *Slovak Republic v Achmea BV* (2018) Les Cahiers de l'Arbitrage 73; C. I. Nagy, “Intra-EU Bilateral Investment Treaties and EU Law After *Achmea*: ‘Know Well What Leads You Forward and What Holds You Back’” (2018) 19 G.L.J. 981; B. Arp (2018) 112 Am. J. Int'l L 466.

<sup>3</sup> N. Lavranos, “Black Tuesday: the end of intra-EU BITs” (7 March 2018) Thomson Reuters’s Practical Law Arbitration Blog, available at <https://tinyurl.com/yd33z2by> (last access on 30 June 2018); see also S. Wilske, L. Markert, and L. Bräuninger, “Entwicklungen in der internationalen Schiedsgerichtsbarkeit im Jahr 2017 und Ausblick auf 2018” (2018) SchiedsVZ 134; J. P. Gaffney, *Slovak Republic v. Achmea: A Disproportionate Judgement?*, Kluwer Arbitration Blog, 14 September 2018, available at <https://tinyurl.com/yb48r84t> (last access on 13 October 2018).

<sup>4</sup> UNCTAD IIA Issues Note (May 2017), available at [http://investmentpolicyhub.unctad.org/Upload/Documents/di-aepcb2017d1\\_en.pdf](http://investmentpolicyhub.unctad.org/Upload/Documents/di-aepcb2017d1_en.pdf) (last access on 30 June 2018); UNCTAD, Spain as respondent State, available at <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/197?partyRole=2> (last access on 30 June 2018).

<sup>5</sup> S. Wernicke, “Autonomie und Häresie - Investitionsschiedsgerichte in der Rechtsunion” (2018) NJW 1644; P. Stöbener de Mora, “Das *Achmea*-Urteil zum Intra-EU-Investitionsschutz” (2018) EuZW 363; see also Commission, “The 2018 EU Justice Scoreboard”, available at [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2018\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf) (last access on 30 June 2018).

<sup>6</sup> Cf. Commission, “Commission asks Member States to terminate their intra-EU bilateral investment treaties”, Press Release, available at <https://tinyurl.com/ya5cksjl> (last access on 30 June 2018). However, so far negotiations on a mediation mechanism have gone nowhere.

<sup>7</sup> Cf. C. III. below.

<sup>8</sup> *Associação Sindal dos Juizes Portugueses* (C-64/16), EU:C:2018:117.

<sup>9</sup> Cf. for EU’s efforts in respect of the so-called “art.7 TEU procedure” against Poland, e.g. Commission, “Proposal for a council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law” COM(2017) 835

protecting that part of the European judicial system against illegitimate outside influence, which is technically run by the EU Member States: their courts. Interestingly, in *Achmea* the Court frequently cites its ruling in *Associação Sindal dos Juizes Portugueses*. This triggers the question of whether we will witness a partial *re-conceptualisation* of the principle of autonomy of EU law from one of self-assertion to one enriched with notions of the rule of law. It might be with this idea in mind, that the Court in *Achmea* chose to root the constitutional principle of the autonomy of EU law in particular in art.344 TFEU (below C.).

Second, in terms of *application* of the principle of autonomy of EU law in *Achmea*, the Court seems to further toughen its stance on what is an impermissible encroachment upon its judicial monopoly; but also, the position of the Member States' courts understood as "traditional permanent State courts" within the so-called judicial dialogue enshrined in art.267 TFEU is bolstered. Furthermore, the judgement's reasoning seems not to be limited to bilateral investment treaties between the Member States, but will most likely also apply to the Energy Charter Treaty (hereafter "ECT") in an intra-EU context. While *Achmea* hardly seems to provide new insight with respect to the compatibility of the investor-State dispute settlement mechanisms in EU agreements with third countries, such as the one in the Comprehensive Economic and Trade Agreement between Canada, of the one part, and, the European Union and its Member States of the other part (hereafter "CETA"), this does not mean that they are beyond dispute (below D.).

Overall, in terms of equal application of EU law, the Court's decision in *Achmea* is to be welcomed. Possible positive effects of a hinted enrichment of the principle of autonomy by notions of the rule of law would materialise only in the medium or long run anyway. This calls for interim solutions addressing the most obvious deficits in legal protection afforded by courts in certain EU Member States. In light of the current political situation, this seems to require some creativity (below E.).

## B. A brief genesis of the *Achmea* case

The CJEU's *Achmea* judgement<sup>10</sup> originates in a request for preliminary ruling of the Bundesgerichtshof (German Federal Supreme Court) (hereafter "BGH")<sup>11</sup> in May 2016. In the German court proceedings, the Slovak Republic challenged a 2012 arbitral award rendered on the basis of the 1992 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic<sup>12</sup> (hereafter "NCS BIT")<sup>13</sup>. Ruling in favour of the Dutch investor, the investment tribunal held that the Slovak Republic was in breach of its substantive obligations under the NCS BIT when partly reversing the liberalisation of the private health insurance. In consequence, it awarded damages to the investor. The Slovak Republic has consistently argued that the investment tribunal lacks jurisdiction: As a result of the State's accession to the EU, recourse to an investment tribunal provided for in the NCS BIT was incompatible with EU law.

On 6 March 2018, the CJEU essentially confirmed this view. In doing so, it deviated not only from the results reached by the investment tribunal and the Oberlandesgericht Frankfurt (Higher Regional Court

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final. The European Parliament is calling for a "art.7 TEU procedure" also in respect of Hungary, cf. European Parliament, "Fundamental rights in Hungary: MEPs call for triggering Article 7", available at <https://tinyurl.com/y9rok4bk> (last access on 30 June 2018).

<sup>10</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158.

<sup>11</sup> BGH Beschluss (decision) (docket no. I ZB 2/15) 03 March 2016, available at <https://tinyurl.com/yawg8v6c> (last access on 30 June 2018).

<sup>12</sup> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, available at <https://tinyurl.com/yal3nhy8> (last access on 30 June 2018).

<sup>13</sup> *Achmea v Slovak Republic* (PCA Case No. 2008-13), available at <https://tinyurl.com/y7ro8fhh> (last access on 30 June 2018).

Frankfurt) (hereafter “OLG Frankfurt”)<sup>14</sup>. It also completely side-lined Advocate General (hereafter “AG”) *Wathelet’s* opinion<sup>15</sup>, who could not find any incompatibility with EU law.

The CJEU concluded that “*art.267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as art.8 of the [NCS BIT], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*”<sup>16</sup>.

### C. Achmea and the conceptualisation of the principle: towards enriched autonomy?

Guaranteeing legal equality is the mandate and obligation of all EU institutions, but the foremost responsibility for defending this equality is allocated to the Court.<sup>17</sup> To secure the uniform interpretation and equal application of EU law throughout its territories, the Union has vested the CJEU with a monopoly in authoritatively determining the content and meaning of EU law and controlling its lawful application. To protect this jurisdictional monopoly, the CJEU has developed the principle of autonomy of EU law.<sup>18</sup>

#### I. The starting point: autonomy as a constitutional principle of self-assertion

Hardly surprising, this *constitutional principle of self-assertion*<sup>19</sup> became centre stage when answering the question of whether ISDS in an intra-EU context was compatible with EU law. The principle of autonomy of EU law has been developed in a series of decisions and opinions<sup>20</sup> and is still very much in flux. It displays a degree of ambiguity which allows for flexibly emphasising certain aspects in dif-

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<sup>14</sup> OLG Frankfurt, Beschluss (decision) (docket No. 26 SchH 11/1010) 10 May 2012, available at <https://tinyurl.com/yysazv88> (last access on 30 June 2018).

<sup>15</sup> *Achmea* (C-284/16) ECLI:EU:C:2017:699, Opinion of AG Wathelet 19 September 2017.

<sup>16</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [62].

<sup>17</sup> Cf. art.19 para.1, subs.1, 2nd sentence TEU.

<sup>18</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [35].

<sup>19</sup> S. Hindelang, “Repellent Forces: The CJEU and Investor-State Dispute Settlement” (2015) 53 AVR 68-89. See also on the principle of autonomy I. Pernice, “Autonomy of the EU Legal Order – Fifty Years After Van Gend”, in: Court of Justice of the European Union (ed), *50<sup>th</sup> Anniversary of the Judgement Van Gend en Loos 1963 2013* (Luxembourg: European Union, 2013) p.61; B. de Witte, “European Union Law: How Autonomous is its Legal Order?” (2010) 65 *Zeitschrift für Öffentliches Recht* 141; C. Contartese, “The autonomy of the EU legal order in the ECJs external relations case law: From the essential to the specific characteristics of the Union and back again” (2017) 54 C.M.L. Rev. 1627; M. Klamert, “The Autonomy of the EU (and of EU Law): Through the Kaleidoscope” (2017) 42 E.L. Rev. 815; R. Barents, “The Autonomy of Community Law” (The Hague: Kluwer Law International, 2004); R. A. Wessel and S. Blockmans (eds), *Between Autonomy and Dependence* (The Hague: Asser Press, 2013); M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law* (Oxford and Portland: Hart Publishing, 2013); J. Odematt, “The Principle of Autonomy: an Adolescent Disease of EU External Relations Law?” in: M. Cremona (ed), *Structural principles in EU external relations law* (Oxford and Portland: Hart Publishing, 2018), p.291.

<sup>20</sup> Cf. esp. *ECJ Opinion 1/91* on the draft of an agreement between the Community on the one hand and the countries of the European Free Trade Association on the other hand about the establishment of the Economic Area (hereinafter “*ECJ Opinion 1/91*”) ECLI:EU:C:1991:490 [35]; *ECJ Opinion 1/00* on the draft of a convention between the European Community and third countries about the establishment of a European Common Aviation Area (hereinafter “*ECJ Opinion 1/00*”), ECLI:EU:C:2002:231 [11-12]; *CJEU Opinion 1/09* on a draft agreement on the creation of a unified patent litigation system – European and Community Patents Court (hereinafter “*CJEU Opinion 1/09*”) ECLI:EU:C:2011:123 [77 et seqq.]; *CJEU Opinion 2/13* on a draft of an agreement on accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “*CJEU Opinion 2/13*”, ECLI:EU:C:2014:2454; *Paul Miles e.a. v Écoles européennes* (C-196/09) ECLI:EU:C:2011:388; *Achmea* (C-284/16) ECLI:EU:C:2018:158.

ferent situations, as for example when it comes to dispute settlement mechanisms contained in agreements of the EU with third countries<sup>21</sup>, or when Member States jointly, as in the case of bilateral investment agreements (hereafter “BITs”)<sup>22</sup>, pose a challenge to the CJEU’s central role in preserving the unique characteristics of EU law.

With respect to its unique characteristics, the CJEU typically refers to EU law as forming an independent source of law, enjoying primacy over the laws of the Member States, as well as having the capacity to exert direct effect.<sup>23</sup> The scope of the principle of autonomy of EU law is, however, not limited to these characteristics: It comprises the whole EU legal order, “which each Member State shares with all other Member States”<sup>24</sup>. It is this common set of rights and obligations flowing from the Treaties which shall be shielded from competing interpretations and/or contradictory obligations which might threaten EU law’s equal (and effective) application.

## II. Locating the principle: moving towards art.344 TFEU?

In *Achmea*, when locating the principle of autonomy of EU law in the Treaties, the Court cited art.344 TFEU as its central provision.<sup>25</sup> To some, this might have come as a bit of a surprise. The majority of the views in the literature<sup>26</sup>, shared by AG *Wathelet*<sup>27</sup>, and also some Member States’ courts like the OLG Frankfurt<sup>28</sup>, did not attribute such a fundamental role, if any, to this norm. Rather, art.344 TFEU was perceived as only applying to disputes between Member States for which the infringement proceedings in accordance with art.259 TFEU are stipulated in the TFEU. This perception surely had its roots in the (rather typical) fragmentary nature of the Court’s case law<sup>29</sup> and in the cursory treatment in the literature where the provision of the TFEU has so far been perceived as marginal.

Now, the Court clarified that the Member State’s duty enshrined in art.344 TFEU<sup>30</sup> would most likely extend to all types of proceedings, in any event to the preliminary reference procedure in accordance

<sup>21</sup> Cf. S. Hindelang, “Repellent Forces: The CJEU and Investor-State Dispute Settlement” (2015) 53 AVR 68-89.

<sup>22</sup> Cf. S. Hindelang, “Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration” (2012) 39 Legal Issues of Economic Integration 179, 179 et seqq.

<sup>23</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [32-34].

<sup>24</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [33].

<sup>25</sup> “That principle is enshrined *in particular* in Article 344 TFEU” [emphasis added], cf. *Achmea* (C-284/16) ECLI:EU:C:2018:158 [32].

<sup>26</sup> A cursory examination of the literature shows that the majority of opinions in the literature takes the view that art.344 TFEU is supposed to only be applied to disputes between Member States which corresponds to the infringement proceeding. For example: T. Eilmansberger, “Bilateral Investment Treaties and EU Law” (2009) 46 C.M.L. Rev. 383, 404; A. Dimopoulos, “The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law” (2011) 48 C.M.L. Rev. 63, 87; C. Tietje, “Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedsstaaten (intra-EU BITs) als Herausforderung des Mehrebenensystems des Rechts” (Halle: Beiträge zum Internationalen Wirtschaftsrecht, 2011), p.17; H. Wehland, “Intra-EU Investment Agreements and Arbitration: is European Community Law an Obstacle?” (2009) 58 ICLQ 297, 319; C. Herrmann, in: R. Streinz (ed) *EUV/EGV*, 2nd edn (Munich: Beck, 2012), art.344, para.1; M. Athen / O. Dörr, in: E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV*, 63th edn (Munich: Beck, 2017), art.344, para.2; B. Wegener, in: C. Calliess, M. Ruffert (eds), *EUV/AEUV*, 5th edn (Munich: Beck, 2016), art.344, para.1; H. Lenk, “Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?” (2017) 28 European Business Law Review, 135, 159.

<sup>27</sup> *Achmea* (C-284/16) ECLI:EU:C:2017:699, Opinion of AG *Wathelet* of 19 September 2017.

<sup>28</sup> OLG Frankfurt, Beschluss (decision) (docket No. 26 SchH 11/1010) 10 May 2012, available at <https://tinyurl.com/ycsazv88> (last access on 30 June 2018); perceiving the questions as open BGH Beschluss (decision) (docket no. I ZB 2/15) 03 March 2016, available at <https://tinyurl.com/yawg8v6c> (last access on 30 June 2018) [para.24 et seqq.].

<sup>29</sup> Art.344 TFEU was touched upon in: *ECJ Opinion 1/91* ECLI:EU:C:1991:490 [35]; *ECJ Opinion 1/00* on the draft of a convention between the European Community and third countries about the establishment of a European Common Aviation Area (hereinafter “*ECJ Opinion 1/00*”), ECLI:EU:C:2002:231 [15-17]; *Reynolds Tobacco e.a. v Commission* (C-131/03 P) (hereinafter “*Reynolds*”) ECLI:EU:C:2006:541 [97-99]; *European Commission v Ireland Mox Plant* (C-459/03) (hereinafter “*Mox Plant*”) ECLI:EU:C:2006:345 [80 et seqq.]; *Czech Republic v European Commission* (T-465/08) ECLI:EU:T:2015:746 [101-103]; *CJEU Opinion 2/13* ECLI:EU:C:2014:2454 [201 et seqq.]; *Achmea* (C-284/16) ECLI:EU:C:2018:158.

<sup>30</sup> All those dispute settlement methods are covered that are to be resolved by means of a “neutral third party” and thus not by means of direct negotiations between two parties. Cf. e.g. D. Dittert, in: H. von der Groeben, J. Schwarze / A. Hatje (eds),

with art.267 TEU. Overarching the different types of proceedings, art.344 TFEU protects all of them against the impairment by the EU Member States.

## 1. Case law

When looking at the Court’s previous case law<sup>31</sup> – *Opinion 1/91*<sup>32</sup> and particularly *Opinions 1/09*<sup>33</sup> and *2/13*<sup>34</sup> – within the context of the decisions hitherto made with regards to art.344 TFEU, it becomes apparent that the CJEU has always found a violation of art.344 TFEU when there was the danger that a Member State could be submitted to a decision of a court or an investment tribunal regarding the application and interpretation of EU law without having involved the CJEU. The crucial point of the CJEU in these decisions is the prevention of threats to unity of the EU legal system. Indeed, as it will be shown further below<sup>35</sup>, if one looks at dispute resolution mechanisms as they can be found in investment protection agreements, then in this context, too, there is the risk that a Member State will be bound to an interpretation differing from the one made by the CJEU.

## 2. Doctrinal construction

Irrespective of the Court’s treatment of art.344 TFEU in jurisprudence and the majority view in literature, a doctrinal construction of the provision in terms of wording, context, and telos actually supports a broad reading of art.344 TFEU as protecting in particular the EU judicial system against Member States’ interference.

Art.344 TFEU reads: “*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.*” Taking a closer look at the wording, it becomes apparent that a limitation to disputes between two Member States cannot conclusively be interfered from the wording. The provision does not speak of “disputes *between* the Member States”. It also does not stipulate an obligation to submit disputes in a “certain manner to a certain court”, but it obliges Member States more broadly to *not* submit it to “any [other] *method* of settlement” than “*those*” provided for in the Treaties.

The German language version is even more revealing. It obliges the Member States “*Streitigkeiten über die Auslegung oder Anwendung der Verträge nicht anders als hierin vorgesehen zu regeln*”. The German text uses the broad term of “to regulate”: The Member States may not regulate dispute settlements differently than provided in the Treaties. While this can allude to the actual settlement of a certain dispute between two parties, it can, however, just as well convey another understanding: The Member States in their *legislative or executive capacity* may not, in domestic and international law, “regulate” judicial proceedings contradicting their obligations flowing from EU law. Thus, any domestic legal provision relating to the establishment of courts and tribunals and their rights and duties of referral to the CJEU in accordance with art.267 TFEU, for example, would be covered by art.344 TFEU. Likewise, any international agreement regulating certain dispute mechanisms between the Member States as well as between the Member States and private individuals would fall within the scope of application of art.344 TFEU. Even executive instructions to domestic courts – as far as these instructions are even

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*Kommentar zum EU-/EG-Vertrag*, 7th edn (Baden-Baden: Nomos, 2015), art.344, para.5. The term “agreements” is to be understood broadly and comprises any law of the European Union. Cf. B. Wegener, in: C. Calliess, M. Ruffert (eds), *EUV/AEUV*, 5th edn (Munich: Beck, 2016), art.344, para.1.

<sup>31</sup> Cf. Case law cited above in footnote 29.

<sup>32</sup> *Mox Plant* (C-459/03), ECLI:EU:C:2006:345.

<sup>33</sup> *ECJ Opinion 1/91*, ECLI:EU:C:1991:490.

<sup>34</sup> *CJEU Opinion 2/13* ECLI:EU:C:2014:2454 [344 et seqq.].

<sup>35</sup> See below D.

imaginable in a democracy – would represent a “regulation” in the sense of art.344 TFEU. Of course, any regulation must somehow relate to the interpretation or application of EU law.

Furthermore, when looking at the provision’s context, art.344 TFEU is *not* placed in the TFEU’s section on the “Court of Justice of the European Union” (art.251 TFEU et seqq.). Rather, it is found in Part Seven of the TFEU, entitled “General and Final Provisions”. This suggests that art.344 TFEU is *not* supposed to merely refer to *one* specific type of proceeding before the CJEU. Art.344 TFEU is situated amidst provisions dealing with questions of “delimitation of competences” between the Member States and the EU, such as art.345 or art.346 TFEU. Art.344 TFEU can thus be understood as a *general rule protecting the competence of the Court of Justice of the European Union* as defined in art.19 (1) TEU, which covers the *entire* instruments granted for carrying out its functions.

Also, the telos of the provision supports a broad reading. Those who want to apply art.344 TFEU to infringement proceedings only, typically perceive the rationale of the provision as protecting the exclusive competence of the CJEU<sup>36</sup>, in order to safeguard the effectiveness and the uniform interpretation and application of EU law.<sup>37</sup> Why, then, is it only the infringement proceedings that are supposed to be a part of this “protection”, when there would be a comparable situation of danger for the EU legal system in the event of any “impairment” of any other type of proceedings by the Member States? The preliminary ruling procedure, for example, “*is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all Member States of the Community*”<sup>38</sup>. In this context, too, and especially therein, the CJEU protects the unity of EU law by way of the Court’s power to render the final and conclusive decision on the scope and content of EU law.

Considering the above, the Court’s approach of giving art.344 TFEU a broad reading appears to be sound and convincing. Art.344 TFEU is to be understood as the legal basis for the Member States’ obligation not to impair the judicial system established by the Treaties by means of own measures. In particular, the preservation of the Court’s judicial monopoly on conclusively determining questions of applicability and interpretation of EU law is central for the CJEU’s role as a guarantor of legal equality within the EU. It is such an understanding which also corresponds to the view, shared by the CJEU<sup>39</sup>, that art.344 TFEU is an expression of the general loyalty obligation of the Member States towards the EU in accordance with art.4 (3) TEU.

### III. Enriching the principle: self-assertion plus notions of the rule of law?

An appreciation of a broadly interpreted art.344 TFEU as *a* central provision within the principle of autonomy of EU law may, in the future, allow for focusing more strongly on the Member States’ *obligations* regarding the EU judicial system. This system, it is recalled, does not only consist of the CJEU, but also of the Member States’ courts; the preliminary reference procedure in art.267 TFEU being the “keystone”<sup>40</sup> to bind both together in “dialogue”<sup>41</sup>.

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<sup>36</sup> C. Herrmann, in: R. Streinz (ed), *EUV/EGV*, 2nd edn (Munich: Beck, 2012), art.344, para.1.

<sup>37</sup> Cf. for ex. Smit and P. Herzog (eds), *The Law of the European Union* (New York City: LexisNexis, 1989) art.219, p.6 et seqq.; see also T. Lock, “The European Court of Justice and International Courts” (Oxford: Oxford University Press, 2015), p.81-84.

<sup>38</sup> *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (C-166/73) ECLI:EU:C:1974:3 [2].

<sup>39</sup> *Mox Plant* (C-459/03), ECLI:EU:C:2006:345 [Guiding Principles, 4th point para.169, 171]; *Achmea* (C-284/16) ECLI:EU:C:2018:158 [34].

<sup>40</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [37].

<sup>41</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [37].

There are cautious hints in *Achmea* that the Court may conceptualise the principle of autonomy of EU law enshrined in art.344 TFEU – in conjunction with art.19 TEU and art.4 (3) TEU – not only as an instrument of self-assertion vis-à-vis or against other dispute settlement bodies. Rather, the CJEU potentially allows Member States’ courts – as a functional part of the *European* legal system – to more substantially participate in the principle’s protective scope by interlinking and enriching it with some notions of the rule of law.

In this respect, it is worthwhile having a closer look at the references to other cases which the Court chose to provide in *Achmea*. Eye-catchingly, the CJEU frequently cites its ruling in *Associação Sindal dos Juizes Portugueses*.<sup>42</sup> In this judgement the Court, among other things, states that the “*very existence of effective judicial review [at Member State level] designed to ensure compliance with EU law is of the essence of the rule of law. It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. [...] The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions.*”<sup>43</sup>

Based on art.19 (1) TEU – rather than art.47, 51 (1) of the Charter of Fundamental Rights of the European Union (hereafter “CFR”)<sup>44</sup> – the CJEU stipulates procedural and institutional safeguards for the Member States’ courts. These institutions of the *EU* legal system are tasked to refer questions for preliminary ruling to the CJEU and, more broadly, enforce citizens’ rights and duties vested in EU law within the Member States on a daily basis.

Apparently, by hinting towards a connection between the principle of autonomy of EU law and the rule of law, the Court in *Achmea* might not only simply seek to secure its “final say” on interpretation and application of EU law, but could aim at enriching the principle in the long-run. A more substantial reading of the principle of autonomy of EU law would secure that the “entry points” of the preliminary reference procedure and the daily administration of EU justice by Member States’ courts is not corrupted; or at least increasingly less corrupted.

Indeed, in light of a lack of decisive action by the EU Commission, it is the Court which is currently creating the instruments for the Member States’ judiciary to protect itself against illegitimate outside influence. Of course, these instruments will only be effective if actually used by the Member States’ courts. Nonetheless, a warm invitation has been issued.

Seen against this broader background, *Achmea*, therefore, should not be read in isolation as a decision which would “take away legal protection” from those in desperate need of such, in those Member States having – in terms of the rule of law – a dysfunctional domestic court system. Rather, read in conjunction with the frequently cited ruling in *Associação Sindal dos Juizes Portugueses*<sup>45</sup>, what we might see

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<sup>42</sup> *Associação Sindal dos Juizes Portugueses* (C-64/16), EU:C:2018:117.

<sup>43</sup> *Associação Sindal dos Juizes Portugueses* (C-64/16), EU:C:2018:117 [36, 39, 44] (References omitted).

<sup>44</sup> Art.19 (1) TEU may arguably broaden the scope of review beyond the scope of art.47, 51(1) CFR. See L. Pech and S. Platon, “Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindal dos Juizes Portugueses*” (13 March 2018) EU Law Analysis, available at <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> (last access on 30 June 2018).

<sup>45</sup> See also the Court ruling on *Minister for Justice and Equality v LM* (C-216/18) ECLI:EU:C:2018:586.

emerging here is the Court's response to the criticism rightfully voiced in respect of the lack of effort in certain Member States to secure the independence and efficiency of their domestic courts.

While the general obligation for Member States to guarantee and protect judicial independence as stipulated in *Associação Sindal dos Juizes Portugueses* might be developed with Poland and other EU Member States<sup>46</sup> in mind, such obligation may equally be utilised to secure and/or improve independence and efficiency of Member States' judiciary more generally. Thus, we may just observe the beginning of a more proactive jurisprudence of the Court in more substantially forming and protecting that part of the EU legal system which is technically run by the Member States. This does not immediately address the problems (foreign) investors face in certain Member States.<sup>47</sup> In the long run, however, it might lead to more effective legal remedies for all investors inside – not outside – the EU legal system and the Member States' courts.

With respect to the principle of autonomy, it is too early to say whether the Court further substantiates its subtle hints to enrich the principle with notions of the rule of law. After *Achmea*, however, it cannot be ruled out anymore.

#### **D. Achmea and the application of the principle: Towards a broader monopoly of the CJEU (and the EU Member States' Courts)?**

Turning from a possible future partial “re-conceptualisation” of the principle of autonomy of EU law to the principle's actual application in *Achmea*, the Court – again – lived up to its name as the keeper of the Grail of legal equality. By opening up the possibility to bypass the EU's judicial system, the NCS BIT unacceptably puts at risk the “consistency and uniformity in the interpretation of EU law”.<sup>48</sup> The Court arrived at this conclusion in three consecutive steps. First, the CJEU established that the investment tribunal's adjudicative exercise is liable to relate to the interpretation or application of EU law<sup>49</sup> (below I.) and, second, may result in conflicting interpretations (below II.). Essentially by denying intra-EU investment tribunals access to the preliminary reference procedure, third, such conflict cannot be resolved in the judicial dialogue prescribed for by the Treaties (below III.).

##### **I. Application and interpretation of EU law**

Referring to the dual nature of EU law, i.e. forming part of the law of the Member States and also derived from a source of public international law, the CJEU in *Achmea* held that the investment tribunal “*may be called on to interpret or indeed to apply EU law*”<sup>50</sup>.

Undeniably, it was about time to shatter the myth championed by some investment tribunals<sup>51</sup> that intra-EU investment arbitration would not deal with EU law. In the case at hand, the Tribunal was, by virtue of art.8 (6) NCS BIT, directly obliged to apply EU law as “*the law in force of the Contracting Party concerned*” as well as “*other relevant agreements between the Contracting Parties*”.

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<sup>46</sup> See Commission, “Proposal for a council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law” COM(2017) 835 final.

<sup>47</sup> Also linking *Achmea* and the problematic state of the rule of law in some Member States, though drawing different conclusions than this paper W. Sadowski, “Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?” (2018) 55 C.M.L. Rev. 1025.

<sup>48</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [35].

<sup>49</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [39].

<sup>50</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [42].

<sup>51</sup> Cf. for ex. s. IV.114 of the Statement of Claim, *EUREKO B.V. [now Achmea] v. Slovak Republic*, UNCITRAL Arbitration PCA (Case No. 2008/12), 16 June 2009, see also s. IV 90, *ibid*.

This finding, moreover, extends beyond the somewhat particular applicable-law-clause at issue in *Achmea*. Other intra-EU tribunals would have to apply EU law at least as “other relevant agreements in public international law” between the parties to the intra-EU BIT.<sup>52</sup> In the context of the Energy Charter Treaty (ECT)<sup>53</sup>, which also contains an ISDS clause, EU law must also be applied as (international) law.<sup>54</sup> The relevant provision in art.26 (6) reads: “*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*”

Only in a third country context can it be safely said that EU law would typically not be applied *as law* but might be interpreted and considered *as fact*. With regards to the latter, an engagement with EU law as a preliminary question could, for example, occur when an investment tribunal considers – e.g. within the context of indirect expropriation or the fair and equitable treatment standard – the factual question of whether a certain Member State or EU measure under review was in compliance with superior EU law.

## II. Avoiding conflicting obligations – securing legal equality de jure and de facto?

In *Achmea*, the Court did not comment extensively on possible conflicts between EU law and the NCS BIT. It merely referred to “*the fundamental freedoms, including freedom of establishment and free movement of capital*”<sup>55</sup> which the tribunal *may* consider in its reasoning.

A careful reading of the respective paragraphs in the Court’s judgement seems to suggest that the CJEU does not limit its reasoning to situations in which an investment tribunal technically “*applies*” EU law; it seems sufficient that it “*interprets*” it.<sup>56</sup> This, in turn, suggests that the Court’s approach is not a formalistic one. It rather seems, that the Court wants to avoid that the Member States are *potentially* subjected to *conflicting obligations* flowing from a BIT and EU law, which may impair the effective application of the latter.<sup>57</sup> Such conflicting obligations may not only occur in cases in which the tribunal “*applies*” EU law as law *sensu stricto* but, more broadly, when a tribunal’s decision may touch upon and impact EU law, which may occur when the BIT and EU law cover similar subject areas.

Indeed, irrespective of the status of EU law in an investment arbitration, the tribunal can handle the situation in two ways: It decides the dispute *without any reference to EU law*. In this situation, the question of reconcilability of BIT and EU law remains unanswered. The host State might face competing obligations flowing from EU law on the one hand and from the BIT on the other.<sup>58</sup> This situation would,

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<sup>52</sup> For the question of why EU law takes precedence over an intra-EU BIT and even the ECT in an intra-EU context see S. Hindelang, “Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration” (2012) 39 Legal Issues of Economic Integration 179, 185 et seqq., 191 et seqq.

<sup>53</sup> Energy Charter Secretariat, Consolidated Energy Charter Treaty, available at <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (last access on 30 June 2018)

<sup>54</sup> Of a different view G. M. Alvarez, “Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension” (2018) ICSID Review 1, 13 who holds that in the ECT “EU law bears limited relevance”. In the same direction W. Sadowski, “Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?” (2018) 55 C.M.L. Rev. 1025, 1050. This finding is, however, surprising as the CJEU held repeatedly that “[g]iven the nature and characteristics of EU law [...], that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.” [Emphasis added] Just recently *Achmea* (C-284/16) ECLI:EU:C:2018:158 [41].

<sup>55</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [42].

<sup>56</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [42].

<sup>57</sup> Critical towards such approach P. Koutrakos, “Editorial: But Seriously, What is the Principle of Autonomy Really About?” (2018) 43 E.L. Rev. 293, 294.

<sup>58</sup> See for a discussion of situations – e.g. in the context of State aid – in which such competing obligations can arise S. Hindelang, “Member State BITs – There’s Still (Some) Life in the Old Dog Yet – Incompatibility of Existing Member State BITs with EU Law and Possible Remedies”, in: K. Sauvants (ed) *Yearbook on International Law & Policy* (Oxford: Oxford University

however, be contrary to the principle of primacy/precedence of EU law<sup>59</sup> and threatens the uniform interpretation and application of EU law throughout the Union if the Member State executed an award contradicting EU law. The same awkward situation would be created if the investment tribunal decided the dispute, *inter alia*, on the basis of EU law without any preliminary reference to the CJEU. In case the tribunal's interpretation of EU law differs<sup>60</sup> from that of the CJEU, the Member State would face competing obligations. Again, if the Member State executed the arbitral award it would encroach on the principle of the primacy/precedence<sup>61</sup> of EU law and threatened uniform interpretation and application of EU law.

That such scenarios are not just hypothetical can be seen in a 2015 Commission Decision<sup>62</sup> on State aid prohibiting Romania to implement the award in *Micula et al v. Romania*.<sup>63</sup> Romania was previously found in violation of an intra-EU BIT and ordered to pay damages for revoking certain investment incentives, which were perceived by the Commission as incompatible with the EU rules on State aid. If Romania implemented the award – which it partly did – the investor would be placed in the same position as it had kept the illegal State aid in the first place; the looming threat to an equal application of EU State aid law is apparent.

The danger of unequal application of EU law may not only occur in intra-EU investment arbitration based on BITs as presented in *Achmea* though. In fact, intra-EU investment arbitration based on the ECT seem to produce exactly the same potential for conflicting obligations flowing from EU law and an arbitral award based on the ECT when EU Member States act as respondents.<sup>64</sup> The only difference between the situation in *Achmea* and arbitrations based on the ECT is that the EU is, alongside its Member States, also a party to the ECT. This however does neither appear to change the analysis nor render *Achmea*'s reasoning inapplicable to the ECT.<sup>65</sup>

Of course, politically and economically, the destiny of the ECT is a very sensitive question. According to UNCTAD<sup>66</sup>, investment disputes based on the ECT account for about 20 percent of all known investment arbitrations globally by the end of 2016. Many of these cases constitute intra-EU disputes and,

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Press, 2010-2011), pp.217 et seqq.; S. Hindelang, “Repellent Forces: The CJEU and Investor-State Dispute Settlement” (2015) 53 AVR 68, 74 et seqq.

<sup>59</sup> If one assumes that the fulfilment of the obligation towards the investor flowing from the intra-EU BIT requires some sort of domestic action and if this action is undertaken contrary to EU law, this action would violate the principle of primacy of EU law.

<sup>60</sup> Even if the investment tribunal and CJEU were to share the same view in respect of the incompatibility of an EU measure with superior EU law, if the investor approaches the investment tribunal, the illegal act would continue to exist within the EU. The CJEU's task to review EU measures for their legality would be restricted and the principle of primacy of judicial review of the EU measure with the view to declare it void in case of a violation of superior EU law, would be replaced by the principle of “endure and cash in”. See I. Pernice in: European Parliament (ed), *Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements*, Vol. 2-Studies (2014), pp.132 et seqq., p.147.

<sup>61</sup> *Ibid.*

<sup>62</sup> Commission Decision (EU) 2015/1470 (30 March 2015) on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* (11 December 2013), OJ L 232 (4 September 2015), p.43-70; challenged: *European Food and Others v Commission* (T-624/15); *Micula v Commission* (T-694/15); *Micula e.a. v Commission* (T-704/15), all pending.

<sup>63</sup> *Ioan Micula e. a. v Romania* (ICSID Case No. ARB/05/20), Award of 11 December 2013; available at <https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf> (last access on 30 June 2018); the award deals with the question of applicable law in paras.318 et seqq.

<sup>64</sup> Cautiously hinting towards this J. Kokott / C. Sobotta, “Investment Arbitration and EU Law” (2016) 18 Cambridge Yearbook of European Legal Studies 3, 7-8.

<sup>65</sup> B. Hess, “The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice” (2018) 3 MPILux Research Paper 16; A. Pinna “The Incompatibility of Intra-EU BITs with European Union law, annotation following ECJ, 6 March 2018, Case 284/16, Slovak Republic v Achmea BV (2018) Les Cahiers de l'Arbitrage 73, 91; different view J. Gundel, “Frischer Wind für den Investitionsschutz nach dem Energiecharta-Vertrag?” (2018) EWS 124, 128 et seqq.; A. Lang, “Die Autonomie des Unionsrechts und die Zukunft der Investor-Staat-Streitbeilegung in Europa nach Achmea” (Halle: Beiträge zum Transnationalen Wirtschaftsrecht, 2018), p.22 et seqq.

<sup>66</sup> UNCTAD IIA Issues Note (May 2017), available at [http://investmentpolicyhub.unctad.org/Upload/Documents/di-aepcb2017d1\\_en.pdf](http://investmentpolicyhub.unctad.org/Upload/Documents/di-aepcb2017d1_en.pdf) (last access on 30 June 2018).

more recently, often relate to the withdrawal of government support schemes for renewable energy. Spain in particular has been subject to over 40 claims<sup>67</sup> under this regime. The claim of the Swedish power company Vattenfall against Germany arising out of Germany's enactment of legislation to phase out nuclear power generation was also brought on the basis of the ECT.<sup>68</sup>

Despite the fact, that intra-EU arbitration based on the ECT should in effect not be treated differently from those addressed in *Achmea*, investment tribunals in ECT-based arbitrations appear simply to carry on with their business as though nothing had happened. Just recently, in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (hereafter "*Masdar Solar*")<sup>69</sup>, the arbitrators *Beechey, Born, and Stern* furnished impressive proof of their evident hostility towards EU law. To prove that the reasoning in *Achmea* had no bearing on the ECT, the tribunal<sup>70</sup> referred to the Advocate General's opinion in *Achmea*, who pointed out that, at the time of ratification, neither the EU nor a Member State had "*the slightest suspicion that [the ECT] might be incompatible with EU law*"<sup>71</sup>.

This is a bold reasoning, to say the least. If one dares to think this argument through, then the result would be just grotesque. If a rule maker's *perception* of lawfulness at the time of passing a rule were of any relevance for assessing the legality of this rule, courts and tribunals around the world would be pretty much superfluous. Typically, not even in rogue States, do law makers announce beforehand that they intended to enact an *illegal* rule. The Tribunal in *Masdar Solar* took the fact that the Court did not explicitly reject (but only disregarded) the Advocate General's specious argument as a free ride to "*respectfully adopt [...] the Advocate General's reasoning*"<sup>72</sup>.

When it comes to investment protection clauses in agreements of the EU *with third countries*, *Achmea* seems to be only of limited guidance. The Court in sibylline fashion remarked that an international agreement of the EU that provides 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, [...] provided that the autonomy of the EU and its legal order is respected*"<sup>73</sup>. However, the Court's treatment of dispute settlement bodies in international agreements in *Opinion 2/13*<sup>74</sup> on the EU's accession to the European Convention on Human Rights set the tone. As this was not overly conciliatory, some caution is warranted.<sup>75</sup>

Indeed, while in agreements like CETA, there is no legal mechanism compelling the CJEU to accept an investment tribunal's ruling, the CJEU might de facto have no choice other than to align the interpretation of EU law to that of the investment tribunal. This might be the case if, for example, a measure, compelling by EU law but pronounced contrary to the investment protection provisions in CETA, af-

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<sup>67</sup> UNCTAD, Spain as respondent State, available at <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/197?partyRole=2> (last access on 30 June 2018).

<sup>68</sup> *Vattenfall v Germany (II)* (ICSID Case No. ARB/12/12) pending. Note also the "Decision on the Achmea Issue" in *Vattenfall v Germany (II)* (ICSID Case No. ARB/12/12) dated 31 August 2018 where the tribunal, consisting of van den Berg, Brower, and Lowe, formulated a "rebuttal" to the CJEU's Achmea judgement. It is particularly striking that van den Berg and Lowe were both sitting on the *Achmea* investment tribunal.

<sup>69</sup> *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (ICSID Case No. ARB/14/1), Award of 16 May 2018. Of the view that the CJEU's Achmea judgement would be not binding on investment tribunals is J Lee, "The Empire Strikes Back: Case Note on the CJEU Decision in *Slovak Republic v. Achmea BV*, March 6, 2018" (2018) 11 *Contemp. Asia Arb. J.* 137, 147. Contrary: *Salumi* (Joined Cases 66, 127 and 128/79) ECLI:EU:C:1980:101 [9]; *Puligienica Facility Esco SpA* (Case C-689/13) ECLI:EU:C:2016:199 [3. Ruling].

<sup>70</sup> *Masdar* (ICSID ARB/14/1), para.681.

<sup>71</sup> *Achmea* (C-284/16) ECLI:EU:C:2017:699 [43], Opinion of AG *Wathelet* of 19 September 2017.

<sup>72</sup> *Masdar* (ICSID ARB/14/1), para.682.

<sup>73</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [57].

<sup>74</sup> *CJEU Opinion 2/13* ECLI:EU:C:2014:2454.

<sup>75</sup> In more detail S. Hindelang, "Repellent Forces: The CJEU and Investor-State Dispute Settlement" (2015) 53 *AVR* 68-89.

affected a large number of investors. The EU would risk several additional investment arbitrations – copycat cases – relating to the same regulatory measure. In such a situation, the EU might end up with a patchwork quilt of de facto exceptions to EU law for those investors successfully bringing claims on the basis of CETA and, thus, being compensated for compliance with EU law.<sup>76</sup> Even if the EU chose not to observe the tribunal’s ruling(s), the investor could enforce the award outside the EU<sup>77</sup> and, again, would be compensated for a measure the CJEU deemed in conformity with EU law. Hence, as long as the foreign investor is carrying on its business, the EU cannot keep the distortive effects of the tribunal’s ruling outside the Internal Market and would risk – when not adapting its law to this ruling – a de facto unequal “application” of its law. In contrast, the EU can maintain a measure which was held contrary to WTO law and accept the imposition of countermeasures<sup>78</sup> such as import duties, thereby better shielding itself from the spillover effects of a WTO dispute settlement ruling into the domestic legal order.<sup>79</sup> In further contrast with the WTO’s State-driven dispute-settlement system, the number of potential claimants is limited to the Organisation’s own members, whereas, in investor-State arbitration, the EU could face a multitude of claims by different corporations against a single regulatory measure with potential damage awards of billions of Euros. Also in contrast to the WTO<sup>80</sup>, the possibilities for resolving disputes through diplomatic negotiations are minimal.<sup>81</sup>

Viewed against the background of those significant potential spillover effects from the EU’s investment protection agreement, it cannot be ruled out that the CJEU might be inclined to find a violation of the principle of autonomy of EU law. One might object though that CJEU in *Achmea* stressed the principle of sincere co-operation in art.4 (3) TEU of which art.344 TFEU is an expression.<sup>82</sup> Certainly, when it comes to third country agreements of the EU, this principle is not expected to feature prominently and thus CETA might be found in conformity with the principle of autonomy of EU law. However, whether one can really draw conclusions on the conformity of third country agreements from the Court’s approach in *Achmea* is somewhat doubtful as the case was simply on an intra-EU context. In respect of third countries, the court might stress different facets of the principle of autonomy of EU law. *Opinion I/17*<sup>83</sup> on CETA will hopefully clarify this point.

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<sup>76</sup> S. Hindelang, “The Autonomy of the European Legal Order – EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-related Agreements”, in: M. Bungenberg and C. Herrmann (eds) *European Yearbook of International Economic Law, Special Issue: Common Commercial Policy after Lisbon* (Berlin: Springer, 2013) p.194 et seq.; see also I. Pernice in: European Parliament (ed), *Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements*, Vol. 2-Studies (2014), pp.132 et seqq, pp.146 et seq.

<sup>77</sup> Awards rendered pursuant to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID-Convention’) are enforceable in accordance with its art.53. Currently, however, the EU cannot become a party to the Convention as it is open to States only. Hence, awards against the EU will have to be enforced in accordance with 1958 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>78</sup> Cf. art.22.2 1994 Understanding on Rules and Procedures governing the Settlement of Disputes (‘WTO Dispute Settlement Understanding’ or ‘DSU’); see generally on retaliation in WTO law C. Bown and J. Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press, 2014).

<sup>79</sup> For example, the imposition of import duties by the complaining WTO Member in response to non-compliance with WTO commitments would *not* lead to a “factual non-application” or, perhaps more to the point, “monetary compensation” of the foreigner for the continuing application of a WTO non-conforming measure with the effect that the competitive level-playing field within the EU Internal Market would be distorted and the equal “application” of the law de facto be questioned. Rather, under WTO law, the competitive position of some EU exporters – probably not even those benefiting from the continued maintenance of the WTO non-conforming measure – would be affected on the market of the complaining WTO Member.

<sup>80</sup> art.3.7, 21.3, 22.2 DSU.

<sup>81</sup> Cf. art.27(1) ICSID-Convention; see also C. Trevino, “State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration under the same Treaty”, (2014) *J Int. Disp. Settlement* 199, 199 et seqq.; less sceptical C. Herrmann, “The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy”, (2014) *15 World Investment & Trade* 570, 582.

<sup>82</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [58].

<sup>83</sup> *CJEU Opinion I/17* on the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, pending.

### III. Securing dialogue in case of potential conflict

To the extent that there is a potential conflict of competing obligations in the sense just described above, which threaten the equal application of EU law, a dispute settlement mechanism can “acquit” itself from the looming accusation of being in contradiction with the principle of autonomy of EU law in two ways: It can either gain access to the preliminary reference procedure, or its arbitral decisions could otherwise be reviewed and referred to the CJEU. The preliminary reference procedure in accordance with art.267 TFEU is obviously only available in an intra-EU context, as the referring dispute settlement body must qualify as a “court or tribunal of a Member State”.

#### 1. Accessing the preliminary reference procedure: a toughened door policy

In *Achmea*, having arrived at the point where the investment tribunal established on the basis of the NCS BIT may “interpret or indeed [...] apply EU law”, the Court had effectively placed it under its scope of control.

Regarding the investment tribunal’s own access to the procedure under art.267 TFEU, the Court conceded that “joint Member State courts” such as the Benelux Court of Justice may also refer questions to the CJEU. However, while the Benelux Court of Justice formed an *integral* part of the domestic court systems of the Benelux countries, such integration in domestic procedure was missing with respect to the investment tribunal. Hence, such a tribunal could not be regarded as a (joint) Member States’ court allowed to refer questions for preliminary ruling to the CJEU.<sup>84</sup>

On this issue, the Court was strikingly brief. This is not all too surprising since there are good doctrinal arguments *not* to deny an investment tribunal established on the basis of an intra-EU BIT access to the preliminary reference procedure.<sup>85</sup> According to the jurisprudence of the CJEU, criteria characterising courts and tribunals within the meaning of art.267 TFEU include “*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*”.<sup>86</sup>

One had thought that the more challenging elements of the Court’s assessment would link to the criteria of “established by law”, “permanency”, and “compulsory jurisdiction”. These three criteria indeed pose some interpretative hurdles, but the Court could have overcome them in the following way: Firstly, for the element of “*establishment by law*” to be present, the Court would have come to perceive it as sufficient that an investment tribunal was established by an agreement between the State and the investor, formed on the basis of the intra-EU BIT, and the latter’s implementation in domestic legislation.<sup>87</sup> Secondly, the “*permanency*”-criterion would have to be established with reference to the pre-prescribed, typified jurisdiction of an arbitration institution-administered tribunal coupled with the procedural rules

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<sup>84</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [48].

<sup>85</sup> Arguing in favour see J. Basedow, “EU Law in International Arbitration: Referrals to the European Court of Justice” (2015) 32 J Int’l Arb 367, 378 et seq.; S. Hindelang, “Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration” (2012) 39 Legal Issues of Economic Integration, 179, 201 et seq.; K. 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” (2013) 50 C.M.L. Rev. 1039; arguing against A. Dimopoulos, “The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law” (2011) 48 C.M.L. Rev. 87 et seq.

<sup>86</sup> *Paul Miles e.a. v Écoles européennes* (C-196/09) ECLI:EU:C:2011:388 [37], with further references.

<sup>87</sup> J. Basedow, “EU Law in International Arbitration: Referrals to the European Court of Justice” (2015) 32 J Int’l Arb 367, 378 et seq.

on the establishment and functioning of a tribunal<sup>88</sup>. Third and finally, with regards to a “*compulsory jurisdiction*”, it could possibly have sufficed if the decision of the tribunal was binding on the disputing parties and its jurisdiction was pre-prescribed (for the respondent) in the intra-EU BIT.<sup>89</sup> Overall, there were good arguments for saying that the tribunal may actually refer questions for preliminary ruling to the CJEU in accordance with art.267 TFEU.

However, the CJEU did not want to go down this road. The CJEU supported its own argument that the tribunal is not a “court or tribunal of a Member State” and, thus, denied access to the preliminary reference procedure, with reference to its earlier *Miles* judgement.<sup>90</sup> However, it is questionable whether the reasoning in this case can support the Court’s argument in *Achmea*. In the *Miles* judgement, the dispute settlement body of the “European Schools” was “*a body of an international organisation which, despite functional links which it has with the Union, remains formally distinct from it and from the Member States*”<sup>91</sup>. Thus, the rulings of the European Schools’ dispute settlement body remain in its binding effect within the realm of this international organisation. This is the distinctive feature if compared to investment tribunals in an intra-EU context: the decisions of the latter tribunals directly bind the respondent Member State, and thus the tribunal decides in a binding fashion inter alia whether the exercise of governmental powers towards the investor was permissible or obligatory. Hence, in *Achmea* there is a stronger link between the investment tribunal and the Member State compared to the situation in the *Miles* judgement. In other words, intra-EU BITs do not establish an international organisation distinct from the two Member States to the intra-EU BIT and investment tribunals are not organs of such an organisation; instead, investment tribunals could have been perceived as “joint courts” of the said Member States.<sup>92</sup>

The CJEU did not seem overly eager to get into the questions that had followed from granting investment tribunals access to the preliminary reference procedure, in particular what to do when investment tribunals simply did not wish to refer questions to the CJEU although they would be bound to do so.<sup>93</sup> One can only speculate whether the CJEU would have taken a different stance, if investment tribunals had previously tried to enter into a dialogue by referring a question to the Court for preliminary ruling. The chances were numerous, but they were all missed. In light of this and considering such post-*Achmea* awards as *Masdar Solar* referred to above, it is not very surprising that the Court did not turn to some form of “pragmatic co-existence”. In fact, investment tribunals have not shown any pragmatism on their side either. Furthermore, it is not just the blunt hostility of investment tribunals towards EU law and the CJEU which is worrisome. There are also other problematic issues, relating to their procedural integrity, for example<sup>94</sup>, which might have called into question the meaningfulness of any dialogue.

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<sup>88</sup> S. Hindelang, “Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration” (2012) 39 *Legal Issues of Economic Integration*, 179, 196 et seq.; J. Basedow, “EU Law in International Arbitration: Referrals to the European Court of Justice” (2015) 32 *J Int’l Arb* 367, 378 et seq.

<sup>89</sup> *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (on behalf of Danfoss)* (C-109/88) ECLI:EU:C:1989:383 [7 et seq.]; *Merck Canada Inc. v Accord Healthcare Ltd e.a.* (C-555/13), ECLI:EU:C:2014:92 [18].

<sup>90</sup> *Miles* (C-196/09) ECLI:EU:C:2011:388.

<sup>91</sup> *Miles* (C-196/09) ECLI:EU:C:2011:388 [42].

<sup>92</sup> Also critical of the Court’s approach in *Achmea*, though with a global reference to the Member States’ “sovereign powers” to create courts and tribunal B. Arp, (2018) 112 *Am. J. Int’l L* 466, 470. The Member States’ sovereign powers, however, have been conditioned in several ways by the EU Treaties.

<sup>93</sup> In such a case, infringement proceedings as well as damages actions can still be initiated, albeit in a somewhat atypical form addressing joint liability of two Member States, if the tribunal does not refer questions to the CJEU.

<sup>94</sup> S. Hindelang, “Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law”, in: European Parliament (ed) *Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements*, Vol. 2-Studies (2014), pp.39 et seqq., p.96.

## 2. The long shadow of the preliminary reference procedure

In essence, the Court in *Achmea* stressed the paramount importance of the judicial dialogue between the Member States' courts – in the sense of “traditional permanent State courts” – and itself. It was not the first time that it placed considerable emphasis on a dialogue with “traditional permanent State courts”. In fact, a judicial dialogue understood in such a strict way might also affect the ability of the EU to enter into third country agreements containing dispute settlement clauses.

In *Opinion 1/09* on the European Patent Court the CJEU held that Member States “cannot confer the jurisdiction to resolve ... disputes on a court created by an international agreement which would deprive ... [national] courts of their task, as ‘ordinary’ courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in art.267 TFEU.”<sup>95</sup>

While there are differences between the original European Patent Court under review in *Opinion 1/09* and an investment tribunal established on the basis of an EU third country agreement in terms of applicable law and institutional settings<sup>96</sup>, in one respect they might be comparable: certain EU law issues would probably no longer be resolved in the Member States' national courts and, hence, not be referred to the CJEU by means of art.267 TFEU.

The original European Patent Court was intended to exercise *exclusive* jurisdiction over a certain subject area, which previously was part of the domain of the CJEU and the courts of the Member States. With the entry into force of CETA, domestic administrative and constitutional courts will be relegated to an *alternative* to investment tribunals for all disputes and remedies covered by CETA. It will be up to the investor to decide the course of law. If it opts for arbitration, domestic courts and the CJEU will potentially be deprived of part of the jurisdiction over the control of the interpretation and lawful application of EU law: In the context of arbitration based on CETA, on principle, only compensation and damages – i.e. secondary legal protection – may be claimed. Primary legal protection – i.e. the revocation or amendment of an administrative act or a law – may not be sought by an investor. Should an investor opt for the commencement of arbitral proceedings it is on principle barred from taking recourse to domestic courts. In all those cases, questions of interpretation and lawful application of EU law would not reach the CJEU by way of the preliminary reference procedure in accordance with art.267 TFEU. The judicial dialogue between the Member State courts and the CJEU would be deactivated.

It may be argued, though, that the investment tribunal would not apply EU law and, hence, no dialogue on EU law would exist which could be deactivated. The issue might, however, be more complex than that. The EU agreement opens up the possibility that, by choice of the investor, the responsibilities of the CJEU and the Member States' courts in the areas covered by the EU agreement's material scope, are handed over to investment tribunals. In this respect, for the CJEU's appreciation of such a dispute settlement mechanism in the light of the principle of autonomy of EU law, it might not make a difference that an investment tribunal does not apply EU law as law *sensu stricto* but treats it merely as facts in its analysis.<sup>97</sup> In such a situation, the CJEU might focus on the aspect that in such cases a tribunal's dam-

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<sup>95</sup> CJEU *Opinion 1/09* ECLI:EU:C:2011:123 [80].

<sup>96</sup> CJEU *Opinion 1/09* ECLI:EU:C:2011:123 [86-88].

<sup>97</sup> Note also art.8.31 (2) CETA which states “[...] For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.”

ages award, enforceable by an individual inside and outside the EU, might de facto impact interpretations and reviews for legality of EU measures in the light of superior EU law by the CJEU as explained above.<sup>98</sup>

### 3. Alternative routes to the CJEU?

Having no access to the preliminary reference procedure does not compellingly mean that a dispute settlement mechanism is automatically incompatible with the principle of autonomy of EU law. Such a mechanism is only incompatible, if there is no other way to contain potential disruptive effects on the uniform application of EU law flowing from an arbitral ruling.

In *Achmea*, the CJEU reasoned that, by its very purpose, an investment tribunal is largely placed outside the domestic court system of a Member State. The review of an arbitral award in a Member State's court, which then could refer questions on EU law for preliminary ruling to the CJEU, is typically limited in scope or sometimes even excluded.<sup>99</sup> Such a review, one should add, is also uncertain. Only if the seat of arbitration would be within the EU's territory, an award gets in reach of a Member State's court.

Furthermore, getting the CJEU involved on the level of enforcement of an arbitral award would also not suffice to secure the uniform interpretation and application of EU law: the ICSID-Convention does not provide for review of ICSID-arbitral awards by Member State courts on the level of enforcement. And again, there is no guarantee that the award will ever find its way into a Member State's court as it can be enforced outside the EU.

The suggestion<sup>100</sup> that it would suffice to involve the CJEU by way of infringement proceedings according to art.258 TFEU appears equally inappropriate. The structural incompatibility of the BIT dispute resolution mechanism with EU law does not become compatible with EU law just because the Commission has the chance to initiate infringement proceedings in the individual case. Moreover, even if there were a CJEU ruling, against the background of the principle of separation of powers and the preservation of the independence of the investment tribunal, it is doubtful that a Member State would be in the position to remove all legal and factual effects flowing from the tribunal's ruling.

#### E. Perspectives: near and far

The Court's reasoning in *Achmea* indeed largely deserves support. It is true that the foreseeable end of intra-EU investment arbitration will increase the risk that (foreign) investors might suffer from poorly developed domestic legal systems in some Member States. While this is certainly one of the *pressing* issues to be addressed by the EU today, one should also realise that the prize paid for intra-EU investment arbitration is not to be belittled either; quite to the contrary: Investor-State dispute settlement in an intra-EU context put at risk legal equality in the EU. Because the EU has been unable – or rather – unwilling to tackle rule of law issues in some Member States, it does not mean that we should throw away the champagne with the cork.

Intra-EU investment arbitration, as provided for in BITs and the ECT, actually meant an internationalisation of judiciary – i.e. removing the conflict from the community in which it arose and where it should

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<sup>98</sup> S. Hindelang, "Repellent Forces: The CJEU and Investor-State Dispute Settlement" (2015) 53 AVR 68, 74 et seqq. See also A. Lopéz Rodríguez, "Robbing Peter to Pay Paul? ISDS and ICS from an EU Law Perspective" (2017) 86 Nordic J. I. L. 470, 482 et seqq.; L. Ankersmit, "The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System" (2016) 13 J. E. E. P. L. 46.

<sup>99</sup> *Achmea* (C-284/16) ECLI:EU:C:2018:158 [52-53].

<sup>100</sup> T. Eilmansberger, "Bilateral Investment Treaties and EU Law" (2009) 46 C.M.L. Rev. 383, 406; probably also M. Burgstaller, "European Law and Investment Treaties" (2009) 26 J Int.'l Arb. 181, 191.

be settled in the first place. In fact, intra-EU investment arbitration may be viewed as just another element of an (increasing) inter-governmentalisation of the EU in an area where more supranationalisation would be needed, if all – not just foreign – investors shall benefit from an independent and efficient judiciary, which effectively guarantees, among others, the rights enshrined in EU law.

Nonetheless, interim solutions are required to address and to mitigate political risk in some Member States until we will see an improvement in Member States' courts for which the CJEU now has started to lay the foundation. The European Commission sought to address these issues by proposing a mediation mechanism.<sup>101</sup> Such instrument do not only lack the teeth of a court judgement or arbitral award, it also seems politically dead. Rather, alternatives to intra-EU BITs should be developed from existing functional equivalents in EU law, i.e. substantive standards of investment protection in EU law should be made more transparent by way of a “restatement” of the pertinent legal practice.<sup>102</sup> Furthermore, a “safety net” should be provided for foreign investors in case domestic courts fail to dispense justice. This “safety net” may take the form of an arbitral forum administered by the Permanent Court of Arbitration or that of a ‘Unified Investment Court’; both integrated in the EU legal system. Moreover, intra-EU investment insurances schemes for political risk may cover some of the most severe risks in terms of the rule of law in certain Member States.

In any event, the EU cannot afford to cower away from the rule of law. The rule of law constitutes one of its foundations. The EU is built on law and it hardly has more than law to make true one of its grand promises given to its citizens, i.e. a Europe-wide level playing field for their economic and increasing social activities. The Court seems not to have forgotten this.

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<sup>101</sup> Commission, “Commission asks Member States to terminate their intra-EU bilateral investment treaties”, Press Release available at [http://europa.eu/rapid/press-release\\_IP-15-5198\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5198_en.htm) (last access on 30 June 2018).

<sup>102</sup> T. Andersen and S. Hindelang, “The Day after: Alternatives to intra-EU BITs” (2016) 17 *Journal of World Investment and Trade* 984, 984 et seqq.