For Whom the Bell Tolls: Any Hope Left for Investment Arbitration After *Achmea*?

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Abstract On 6 March 2018, the European Court of Justice (ECJ) rendered its long-awaited judgment in Case C-284/16, better known as the *Achmea* decision. This judgment addressed the compatibility of the bilateral investment treaty concluded between the Netherlands and the Slovak Republic with European Union (EU) law. The ECJ ultimately held that the treaty's dispute settlement provisions infringe EU law. Although the ECJ only addressed this particular bilateral investment treaty, the judgment is widely considered to be a landmark decision with far-reaching implications. The decision sparked a vivid debate amongst scholars, politicians and practitioners as to the impact of the judgment, focussing in particular on whether *Achmea* puts an End to (intra-EU) Investor-state dispute settlement (ISDS) as a whole. This Chapter outlines the factual background of the *Achmea* decision and analyses its key findings. It then particularly explores the potential impact of the judgment on the status of other intra-EU bilateral investment treaties as well as the enforcement of awards that have already been rendered in ISDS proceedings. The Chapter further discusses the highly controversial question of the *Achmea* decision's impact on bilateral investment treaties between EU Member States and non-EU States as well as its impact on investment treaties the EU itself is a party to, such as the Energy Charter Treaty and the EU-Canada Comprehensive Economic and Trade Agreement. Finally, this Chapter also addresses the potential impact of the *Achmea* decision on commercial arbitration. This Chapter reflects the legal status and scholarly discussion in early 2019. To the extent necessary, further updates have been included regarding the most significant recent developments.

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1 General Introduction

In 2018, hardly any other decision of the European Court of Justice (ECJ) has caused as much turmoil amongst scholars and practitioners as the judgment of the ECJ in *Case C-284/16*, better known as the *Achmea* decision.[1] In the aftermath of this decision, the concept of 'Investor-State Dispute Settlement' (ISDS) appears to be under significant pressure.

The *Achmea* decision addresses an issue that has been the subject of a prolonged heated discussion: The compatibility of arbitration provisions in intra-EU Bilateral Investment Treaties (intra-EU BITs) with European Union (EU) law. Reportedly, there were 196 intra-EU BITs in force when the ECJ rendered its decision.[2] Besides, there are approximately 1200 BITs between EU Member States and Non-EU States.[3] Lastly, there are numerous investment treaties in which the EU itself is a party to, for example the Energy Charter Treaty (ECT), the Economic Partnership Agreement with Japan (EPA), the EU-Singapore Free Trade Agreement (EUSFTA), and the Comprehensive Economic and Trade Agreement with Canada (CETA). Whilst the provisions of the treaties just mentioned are of course not identical, there is a considerable consistency regarding their key features. Many investment treaties entitle investors to certain minimum standards of substantive protection. For this reason, they guarantee, for example, a fair and equitable treatment[4] as well as the absence of any discriminatory measures[5] or any measures depriving investors of their investment without compensation.[6] As a matter of procedural protection, investors can regularly seek compensation for breaches of the former guarantees before an arbitral tribunal.[7] The tribunals render final and binding awards.[8] Investors thus do not need to commence proceedings in the domestic courts of the host state.

This not only allows investors to settle disputes before well-suited arbitral tribunals, but also establishes a distinct justice system outside any national court system. In the context of the EU, arbitral tribunals thus—potentially—interpret EU law in a final manner. This final interpretation is, again, potentially only subject to limited review by domestic courts. Yet only the domestic courts are integrated in a uniform, European judicial system under the aegis of the ECJ. In light of this, there was an

[1] ECJ, Judgment of the Court in Case C-284/16 (*Achmea*), 6 March 2018 (ECLI:EU:C:2018:158) (hereafter 'ECJ, *Achmea*').

[2] ECJ, Press Release (2018).

[3] For the number, see e.g. Lavranos and Singla (2018, p. 351), and Woolcock (2010, p. 53).

[4] See e.g. Germany-China BIT, Art 3(1); Morocco-Dominican Republic BIT, Art 2(4); Netherlands-Slovakia BIT, Art 3(1).

[5] See e.g. Germany-China BIT, Art 2(3); Morocco-Dominican Republic BIT, Art 2(3); Netherlands-Slovakia BIT, Art 3(1).

[6] See e.g. Germany-China BIT, Art 4(2); Morocco-Dominican Republic BIT, Art 4(2); Netherlands-Slovakia BIT, Art 5.

[7] See e.g. Germany-China BIT, Art 8(2); Morocco-Dominican Republic BIT, Art 8(2); Netherlands-Slovakia BIT, Art 8(2).

[8] See e.g. Germany-China BIT, Art 8(6); Morocco-Dominican Republic BIT, Art 8(5); Netherlands-Slovakia BIT, Art 8(7).

intense debate whether the EU law allows this sort of 'judicial outsourcing' to arbitral tribunals. This is the core issue of the *Achmea* decision. In short, the *Achmea* decision is about the autonomy of EU law. In this regard, the ECJ decided that safeguarding the autonomy of EU law prevails over the arbitration provision in the intra-EU BIT at stake. The latter is thus incompatible with EU law.

This Chapter aims at illustrating the possible consequences for the system of ISDS pursuant to the *Achmea* decision. It firstly establishes the factual background of the *Achmea* decision (Sect. 2). The next section examines the *Achmea* decision and outlines the reasoning of the ECJ (Sect. 3). Subsequently, this contribution lays emphasis on providing an overview of the decision's consequences and of what is left of (investment) arbitration after *Achmea* (Sect. 4). In this regard, the immediate consequences for *Achmea* are the starting point (Sect. 4.1). This contribution will then examine the consequences for intra-EU BITs (Sect. 4.2), the perspectives for pending and future arbitration proceedings (Sect. 4.3) and the enforcement of arbitral awards rendered under intra-EU BITs (Sect. 4.4). As a next step, the future of BITs between EU Member States and third, non-EU States (Sect. 4.5) as well as the future of investment treaties concluded between the EU itself and third, non-EU States (Sect. 4.6) are to be examined. Finally, this Chapter briefly addresses the impact of the *Achmea* decision on commercial arbitration (Sect. 4.7) before concluding some final remarks (Sect. 5).

2 Factual Background of the *Achmea* Decision

In October 2008, the Dutch insurance company *Achmea* commenced arbitration against the Slovak Republic.[9] *Achmea*, previously known as '*Eureko*', claimed damages for the violation of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Netherlands-Slovakia BIT).[10]

As of 1 January 1993, the Slovak Republic is the Successor State to the Czech and Slovak Federal Republic.[11] The Slovak Republic acceded to the EU on 1 May 2004.[12] In the course of its accession, the government of the Slovak Republic decided to reform the health system. The government particularly opened the health insurance market to private sickness insurance services.[13] In the light of this, *Achmea* set up a Slovak subsidiary that offered private sickness insurance services on the market.

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[9] *Achmea B.V. v Slovak Republic*, PCA Case No. 2008–13, Final Award, 7 December 2012, https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf (hereafter '*Achmea*, PCA Case No. 2008–13 (2012)'), para 12.

[10] *Achmea*, PCA Case No. 2008–13 (2012), para 6.

[11] *Achmea*, PCA Case No. 2008–13 (2012), para 82.

[12] See Art 2(2) of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia.

[13] *Achmea*, PCA Case No. 2008–13 (2012), paras 87 et seq.

Shortly thereafter, the government attempted to reverse these reforms. By passing a law on 25 October 2007, the government particularly put a halt to the distribution of profits generated by private sickness insurance services.[14] However, the Constitutional Court of the Slovak Republic found this legislative action to be unlawful in 2011.[15] Following this court ruling, the government of the Slovak Republic permitted the distribution of profits again as of 1 August 2011.[16]

Achmea claimed that the revocation of the reforms violated various provisions of the Netherlands-Slovakia BIT and caused losses. *Achmea* thus invoked proceedings on the grounds of the Slovak Republic's violation of the Netherlands-Slovakia BIT provisions assuring a fair and equitable treatment, non-impairment by discriminatory or unreasonable measures, full protection and security, free transfer of profits and dividends, as well as the provision assuring protection against unlawful indirect expropriation.[17]

The ad hoc arbitral tribunal (seated in Frankfurt am Main, Germany) rendered a final award on 7 December 2012, affirming the Slovak Republic's violation of various provisions of the Netherlands-Slovakia BIT.[18] The arbitral tribunal awarded *Achmea*, *inter alia*, damages in the amount of EUR 22.1 million.[19] In turn, the Slovak Republic filed an application to have the final award set aside before the Oberlandesgericht Frankfurt am Main (Higher Regional Court).[20] The Slovak Republic objected to the jurisdiction of the arbitral tribunal. It based its objection on doubts as to the compatibility of the Netherlands-Slovakia BIT with Articles 18, 267 and 344 of the Treaty on the Functioning of the EU (TFEU).[21] The court dismissed this action with its judgment delivered on 18 December 2014 and rejected the arguments the Slovak Republic brought forward.[22] The Slovak Republic then appealed to the German Bundesgerichtshof (Federal Court of Justice). In its appeal, the Slovak Republic again contested the compatibility of Article 8 of the Netherlands-Slovakia BIT with Articles 18, 267 and 344 of the TFEU.[23] The German Federal Court of Justice expressed a

[14] *Achmea*, PCA Case No. 2008–13 (2012), para 96.

[15] *Achmea*, PCA Case No. 2008–13 (2012), para 115.

[16] *Achmea*, PCA Case No. 2008–13 (2012), para 119.

[17] *Achmea*, PCA Case No. 2008–13 (2012), para 7.

[18] *Achmea*, PCA Case No. 2008–13 (2012), paras 278–295.

[19] *Achmea*, PCA Case No. 2008–13 (2012), para 352 lit. (c).

[20] Higher Regional Court, Frankfurt am Main, Germany, Decision in Case 26 Sch 3/13, 18 December 2014 (ECLI:DE:OLGHE:2014:1218.26SCH3.13.0A) (hereafter 'Higher Regional Court, Frankfurt am Main, Germany, Case 26 Sch 3/13 (2014)'). Notably, after an objection to the tribunal's jurisdiction by the Slovak Republic, the tribunal rendered an Award on Jurisdiction, Arbitrability and Suspension on 26 October 2010. The Slovak Republic had already filed an application to have this earlier award on jurisdiction set aside. After the Final Award had been issued, this first proceeding before the Higher Regional Court of Frankfurt am Main was, however, terminated.

[21] Higher Regional Court, Frankfurt am Main, Germany, Case 26 Sch 3/13 (2014), para 29.

[22] Higher Regional Court, Frankfurt am Main, Germany, Case 26 Sch 3/13 (2014), paras 46 et seq.

[23] ECJ, *Achmea*, para 14.

tendency in favour of compatibility of the Netherlands-Slovakia BIT with EU law.[24] Before ruling on the appeal itself, the German Federal Court of Justice nonetheless submitted a reference for a preliminary ruling to the ECJ pursuant to Article 267(3) of the TFEU.[25]

3 The Decision and the Ruling of the ECJ in a Nutshell

Much has already been said about the sense or the drawbacks of the decision of the ECJ and its reasoning, opposing dispute settlement by arbitral tribunals in the context of ISDS.[26] Before analysing the decisions' consequences in detail, this section will briefly examine the ruling of the ECJ and its key findings to facilitate later discussions.

The decisive clause of the Netherlands-Slovakia BIT, Article 8, reads in its relevant parts as follows:

(1) All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.
(2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.
[…]
(5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).
(6) The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.
(7) The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.

In the light of this provision, the German Federal Court of Justice referred the following three questions to the ECJ for a preliminary ruling[27]:

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[24] German Federal Court of Justice, Reference for a Preliminary Ruling in Case I ZB 2/15, 3 March 2016, (ECLI:DE:BGH:2016:030316BIZB2.15.0) (hereafter 'German Federal Court of Justice, Case I ZB 2/15 (2016)'), paras 24 et seq.

[25] German Federal Court of Justice, Case I ZB 2/15 (2016), para 24.

[26] For some of the first analyses of the decision after it had been rendered, see, for example, Hess (2018), Hindelang (2018). For a detailed analysis of the reasoning of the ECJ, see also Hindelang (2019).

[27] ECJ, *Achmea*, para 23.

(1) Does Article 344 of the TFEU preclude the application of a provision in […] [an] intra-EU BIT under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting States, may bring proceedings against the latter State before one of the Contracting States acceded to the EU but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

(2) Does Article 267 of the TFEU preclude the application of such provision?

If Questions 1 and 2 are to be answered in the negative:

(3) Does the first paragraph of Article 18 TFEU preclude the application of such provision under the circumstances described in Question 1?

In its ruling, the ECJ did not strictly adhere to the standards-based reference of the German Federal Court of Justice. Instead, it first jointly addressed Questions 1 and 2.[28]

A key principle the ECJ relied on is the autonomy of EU law.[29] As a starting point, the ECJ summarised fundamental principles of EU law, as they were relevant to assessing the compatibility of Article 8 of the Netherlands-Slovakia BIT with EU law. First and foremost, the ECJ had emphasised on previous occasions that the 'autonomy of the EU legal system, observance of which is ensured by the Court' is one of the cornerstones of the EU.[30] According to the deciding judges, this is justified by the 'essential characteristics of the EU and its law' as the latter 'stems from an independent source of law, the Treaties', and enjoys primacy over the law of the Member States.[31] Article 344 of the TFEU serves as a safeguard to the said autonomy.[32] The characteristics of EU law led to a 'structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other'.[33] Such a system builds on common values among the Member States as set out in Article 2 of the Treaty on the European Union (TEU). The system implies mutual trust that those values and the legal order safeguarding those values will be respected. The ECJ then highlighted some of the means that oblige Member States to protect the autonomy of the EU legal system. In this regard, the ECJ referred to the judicial system established by the TEU and the TFEU. This system is meant to ensure consistency and uniformity

[28] ECJ, *Achmea*, paras 31–60.

[29] Amongst others, this finding was shared by Alvarez (2018, p. 151), Bodenheimer and Eller (2018, p. 787), and Glinski (2018, p. 49). Cf. Editorial Board of the Common Law Market Review (2018, p. 1329). For a analysis of the legal concept of the autonomy of EU law and the pitfalls of an extensive interpretation of the concept, see O'Sullivan (2018, p. 1 et seq.). She noted that the interpretation of the autonomous legal order as exercised by the court constitutes an 'expansionism that places the future relevance and viability of the CJEU's jurisprudence at risk' (p. 19).

[30] ECJ, *Achmea*, para 32.

[31] ECJ, *Achmea*, para 33.

[32] Cf. ECJ, *Achmea*, para 32.

[33] ECJ, *Achmea*, para 33.

in the interpretation of the EU law. The judicial system obliges 'national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States'.[34] In the context of the judicial system, the preliminary ruling procedure according to Article 267 of the TFEU is a cornerstone in guaranteeing the uniform interpretation and application of the EU law, its full effect and, finally, its autonomy.[35]

Having established these core principles of the EU law, the ECJ then turned to a three-stage examination of the compatibility of the Netherlands-Slovakia BIT with the said principles. As a first step, the ECJ affirmed that arbitral tribunals within the meaning of Article 8 of the Netherlands-Slovakia BIT 'may be called on to interpret or indeed to apply EU law'.[36] The fact that the arbitral tribunals were to rule on violations of the BIT only, was deemed to be irrelevant by the ECJ.[37] Since the scope of Article 8(6) of the Netherlands-Slovakia BIT covers the EU law, which particularly qualifies as part of the law in force in every EU Member State,[38] the decisions of an arbitral tribunal may potentially relate to EU law as well.[39]

In its second step, the Court rejected the stance that arbitral tribunals qualify as courts or tribunals of EU Member States within the meaning of Article 267 of the TFEU.[40] Instead, the 'exceptional nature of [a] tribunal's jurisdiction' is the very reason for their existence.[41] In this regard, the ECJ particularly compared the nature of arbitral tribunals to the role of 'court[s] common to a number of Member States'.[42] In earlier decisions, the ECJ addressed the role of the courts common to a number of Member States.[43] Such courts, for example the Benelux Court of Justice, are closely related to the judicial system of EU Member States: their proceedings form an element of the *domestic* court proceedings.[44] This does, however, not apply to arbitral tribunals. The role of arbitral tribunals is thus different.

As a third and final step, the ECJ concluded that arbitral awards are not subject to sufficient review by courts of EU Member States. It is true that the German Higher Regional Court of Frankfurt and the German Federal Court of Justice scrutinised the final award in the case at hand. However, this was deemed to be merely coincidental

[34] ECJ, *Achmea*, para 36.

[35] ECJ, *Achmea*, para 37.

[36] ECJ, *Achmea*, para 42.

[37] ECJ, *Achmea*, para 40.

[38] ECJ, *Achmea*, para 41.

[39] For criticism of this finding, see Wuschka (2018, p. 31), who observed that the ECJ did not further investigate the particular role EU law could play.

[40] ECJ, *Achmea*, paras 43 et seq. Notably, Advocate General Wathelet considered arbitral tribunals to qualify as a court or tribunal of one of the Member States as per Art 267 of the TFEU. See Advocate General Wathelet, Opinion on Case C-284/16 (*Achmea*), 19 September 2017 (ECLI:EU:C:2017:699) (hereafter 'Wathelet (2017)'), para 131.

[41] ECJ, *Achmea*, para 45.

[42] ECJ, *Achmea*, para 49.

[43] See e.g. for the Benelux Court of Justice: ECJ, Judgment of the Court in Case C-337/95 (*Parfums Christian Dior*), 4 November 1997 (ECLI:EU:C:1997:517), para 21.

[44] ECJ, *Achmea*, paras 47 et seq.

by the ECJ. Article 8(5) of the Netherlands-Slovakia BIT allows arbitral tribunals to determine their own procedure, including the choice of the seat of arbitration. The present tribunal chose Frankfurt am Main, Germany, as the seat of arbitration. It was for this reason that German law was applied as *lex arbitri* and was allowed for review by domestic courts.[45] An arbitral tribunal could nonetheless choose a seat outside of the EU, barring a uniform interpretation of the EU law by the ECJ.[46] In view of this, the ECJ held that there is no review mechanism that sufficiently safeguards the primacy of EU law.[47]

As a consequence of the abovementioned, the ECJ found the following:

> [The] Articles 267, 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the 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.[48]

In light of this finding, the ECJ did not address the third question.[49]

The present decision has made some other findings that are noteworthy. Firstly, the ECJ profoundly relied on and reaffirmed its prominent Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[50] This decision, *inter alia*, emphasised the paramount importance of the autonomy of the EU law and is thus key in understanding the *Achmea* decision of the ECJ. Secondly, the ECJ neither followed nor mentioned the arguments Advocate General Melchior Wathelet put forward in favour of the compatibility of such an intra-EU BIT with the EU law.[51] Thirdly, despite its potential impact, the judgment is remarkably brief and only encompasses 62 paragraphs.[52]

4 The Aftermath of *Achmea* or: What Is Now Left of (Investment) Arbitration?

As an aftermath, the *Achmea* judgment has stuck heated debate as to its impact on arbitration. However, the exact scope of such impact is yet to be seen. The following

[45] ECJ, *Achmea*, paras 52 et seq.

[46] Cf. ECJ, *Achmea*, paras 51 et seq.

[47] ECJ, *Achmea*, paras 50 et seq. For an opposing view, see German Federal Court of Justice, Case I ZB 2/15 (2016), paras 61 et seq.

[48] ECJ, *Achmea*, para 60.

[49] ECJ, *Achmea*, para 61.

[50] ECJ, Opinion 2/13 of the Court, 18 December 2014 (ECLI:EU:C:2014:2454).

[51] For a brief discussion of the arguments of AG Wathelet, see Wuschka (2018, p. 29 et seq.).

[52] See Glinski (2018, p. 49), who noted that the considerations of AG Wathelet were more extensive. Equally, see Wuschka (2018, p. 30), who noted that the 'entire reasoning only spans over 31 paragraphs'.

sections will analyse some of the early reactions to the decision as well as its potential consequences.

4.1 Immediate Consequences for the Achmea Case Itself

Firstly, the judgment of the ECJ has immediate consequences for the proceedings between *Achmea* and the Slovak Republic. Under EU law, judgments following a preliminary reference are binding to all courts that are involved in the particular case.[53] As the Slovak Republic appealed to the German Federal Court of Justice, it was for this court to effectuate the judgment of the ECJ.

By its decision on 31 October 2018, the German Federal Court of Justice[54] set the award aside according to Section 1059(2) No. 1 lit. (a) of the German Code of Civil Procedure (German *Zivilprozessordnung*).[55] The German Federal Court of

[53]ECJ, Judgment of the Court in Case 52-76 (*Benedetti*), 3 February 1977 (ECLI:EU:C:1977:16), para 26. See also Wuschka (2018, p. 39).

[54]German Federal Court of Justice, Decision in Case I ZB 2/15, 31 October 2018 (ECLI:DE:BGH:2018:311018BIZB2.15.0) (hereafter 'German Federal Court of Justice, Case I ZB 2/15 (2018)').

[55]Section 1059 of the German Code of Civil Procedure (Petition for reversal of an arbitration award):

(1) Only a petition for reversal of the arbitration award by a court pursuant to subsections (2) and (3) may be filed against an arbitration award.
(2) An arbitration award may be reversed only if:

1. The petitioner asserts, and provides reasons for his assertion, that:
   (a) One of the parties concluding an arbitration agreement pursuant to sections 1029 and 1031 did not have the capacity to do so pursuant to the laws that are relevant to such party personally, or that the arbitration agreement is invalid under the laws to which the parties to the dispute have subjected it, or, if the parties to the dispute have not made any determinations in this regard, that it is invalid under German law; or that
   (b) He has not been properly notified of the appointment of an arbitral judge, or of the arbitration proceedings, or that he was unable to assert the means of challenge or defence available to him for other reasons; or that
   (c) The arbitration award concerns a dispute not mentioned in the agreement as to arbitration, or not subject to the provisions of the arbitration clause, or that it contains decisions that are above and beyond the limits of the arbitration agreement; however, where that part of the arbitration award referring to points at issue that were subject to the arbitration proceedings can be separated from the part concerning points at issue that were not subject to the arbitration proceedings, only the latter part of the arbitration award may be reversed; or where the petitioner asserts, and provides reasons for his assertion, that
   (d) The formation of the arbitral tribunal or the arbitration proceedings did not correspond to a provision of this Book or to an admissible agreement between the parties, and that it is to be assumed that this has had an effect on the arbitration award; or if
2. The court determines that
   (a) the subject matter of the dispute is not eligible for arbitration under German law; or
   (b) The recognition or enforcement of the arbitration award will lead to a result contrary to public order.

Justice held that Article 8(2) of the Netherlands-Slovakia BIT is the only article that manifests the intent of the Contracting States to conclude an arbitration agreement.[56] Following the finding of an infringement of EU law, this provision was ruled to be inapplicable.[57] Absent any other proof that the Slovak Republic had intended to resort to arbitration, an arbitration agreement between *Achmea* and the Slovak Republic had not been concluded.[58] According to the German Federal Court of Justice, the absence of an arbitration agreement is equivalent to an arbitration agreement that is void.[59] This allows the award to be set aside pursuant to Section 1059(2) No. 1 lit. (a) of the German Code of Civil Procedure.

The court further rejected *Achmea*'s manifold objections to setting the award aside. In particular, it is immaterial that the arbitral tribunal did not apply EU law in the specific proceedings.[60] It is equally immaterial whether the Netherlands-Slovakia BIT remains valid under Public International Law. At least between EU Member States, the primacy of EU law mandates the inapplicability of the Netherlands-Slovakia BIT.[61] The Slovak Republic is also not barred from relying on the absence of an arbitration agreement by considerations of good faith. This is because the Slovak Republic did not give rise to any legitimate expectation to arbitrate after its accession to the EU[62] and it equally did not act contradictory in this regard.[63] The German Federal Court of Justice did not consider itself obliged to refer the proceedings to the German Federal Constitutional Court (*Bundesverfassungsgericht*).[64] As a last point, the German Federal Court of Justice held that *Achmea* enjoys sufficient legal protection as it may litigate its claims in the domestic courts of an EU Member State, the Slovak Republic.[65]

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(3) Unless the parties to the dispute agree otherwise, the petition for reversal must be filed with the court within a period of three (3) months. The period begins on the day on which the petitioner has received the arbitration award. In cases in which a petition has been filed pursuant to section 1058, the period shall be extended by at most one (1) month following receipt of the decision regarding this petition. The petition for reversal of the arbitration award may no longer be filed once a German court has declared the arbitration award to be enforceable.

(4) If the reversal has been petitioned, the court may remand the matter to the arbitral tribunal where appropriate, as petitioned by a party, while reversing the arbitration award.

(5) In cases of doubt, the reversal of the arbitration award will result in the arbitration agreement once again entering into force concerning the subject matter of the dispute.

[56] German Federal Court of Justice, Case I ZB 2/15 (2018), para 28.

[57] German Federal Court of Justice, Case I ZB 2/15 (2018), para 25.

[58] German Federal Court of Justice, Case I ZB 2/15 (2018), paras 25–28.

[59] German Federal Court of Justice, Case I ZB 2/15 (2018), para 15.

[60] German Federal Court of Justice, Case I ZB 2/15 (2018), para 32.

[61] German Federal Court of Justice, Case I ZB 2/15 (2018), paras 40 et seq.

[62] German Federal Court of Justice, Case I ZB 2/15 (2018), paras 44–53.

[63] German Federal Court of Justice, Case I ZB 2/15 (2018), paras 54–58.

[64] German Federal Court of Justice, Case I ZB 2/15 (2018), paras 60–71.

[65] German Federal Court of Justice, Case I ZB 2/15 (2018), para 72.

After having its arbitral award set aside, *Achmea* was left in a difficult position. In the course of the year-long proceedings, the company incurred considerable costs.[66] Following the setting aside of the arbitral award, it was left with few options. As proposed by the German Federal Court of Justice,[67] it could file a claim against the Slovak Republic in a domestic state court.[68] Such a claim could lead to questions of state liability that, in turn, might again lead to a reference to the ECJ. Yet even after the annulment of the arbitral award, there is another, albeit improbable, path for *Achmea*: the highly controversial enforcement of the award notwithstanding its annulment at the seat of arbitration in a state outside of the EU.[69]

4.2 The Future of Intra-EU BITs

Intra-EU BITs have been subject to increasing criticism for some time.[70] At first, the criticism was distinctly political and voiced by the European Commission.[71] In view of the recent decision of the ECJ, the criticism expands to a judiciary level that will arguably put an end to the existence of intra-EU BITs.

On 18 June 2015, the European Commission published a press release, asking the EU Member States to terminate their intra-EU BITs.[72] The European Commission confirmed that it had formally requested five EU Member States to terminate intra-EU BITs they concluded among each other. The European Commission issued these requests as the first stage of infringement procedures under the EU law.[73] It emphasised that the intra-EU BITs are regarded as incompatible with the EU law. In this context, the European Commission also announced the initiation of an administrative dialogue with all 21 EU Member States that were party to intra-EU BITs.

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[66] Achmea B.V. does not only have to bear its own costs but, for example, also the costs of the annulment proceedings, see the operative part of German Federal Court of Justice, Case I ZB 2/15 (2018).

[67] German Federal Court of Justice, Case I ZB 2/15 (2018), para 72.

[68] See De Sadeleer (2018, p. 370), who assumed that 'nothing prevents them [the investors] from invoking their rights before the national courts'. But see also Lavranos and Singla (2018, p. 353), who noted that 'there is no alternative system in place within the EU that can grant effectively the same investment protection and, therefore, because of *Achmea*, all European investors lost a significant benefit without gaining anything in particular'. Finally, see Ohler (2018, p. 517), who observed considerable gaps in the legal protection of investments, particularly in third countries outside the EU.

[69] See Bischoff (2018, p. 591), who suggested that in view of this option, the *Achmea* saga might continue. For a more general discussion on the enforcement of an arbitral award after it had been set aside in their place of origin, see Koch (2009, p. 267 et seq.).

[70] See Glinski (2018, p. 48), who observed that the treaties have 'come under fire in recent years'.

[71] See, for instance, European Commission (2015).

[72] European Commission (2015).

[73] See Art 258 of the TFEU.

The ECJ's decision could now potentially deprive intra-EU BITs from having any significance in the future.[74] It is true that the ECJ decided on one particular intra-EU BIT and found its dispute settlement mechanism to be incompatible with the EU law. Moreover, the ECJ's decision itself does not affect the *general* validity of any intra-EU BIT.[75] The decision equally does not render all clauses providing for dispute settlement by arbitration in other intra-EU BITs immediately void.[76]

These limited effects of the judgment have led to a vivid debate as to the impact of the ECJ's decision on ISDS. On the one hand, numerous scholars forthrightly announced that the judgment would nonetheless have an immediate effect on *all* intra-EU BITs that include arbitration clauses.[77] Or, to put it in more drastic words: 'After *Achmea*, there is no future for BITs concluded between EU Member States'.[78] There are indeed strong indicators that the judgment does not differentiate between the numerous intra-EU BITs. Firstly, the wording of the judgment is distinctly broad and general. The ECJ held that Articles 267 and 344 of the TFEU preclude

> *a* provision in an international agreement concluded between Member States, *such as* Article 8 of the BIT, under which an investor from one of those Member States may […] bring proceedings against […] [a] Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[79]

Secondly, in view of the rationale of the judgment, it is apparent that the ECJ intended to safeguard the autonomy of the EU law by ruling out arbitration under intra-EU BITs to the largest extent possible.[80] On the other hand, some scholars contemplate possibilities to safeguard intra-EU BITs at least from full termination. In particular, some propose an explicit, strict choice of law provision in intra-EU BITs excluding any application or consideration of the EU law as a potential solution.[81]

Yet *Achmea* not only alarmed the scholars, it also sparked off a debate as to whether Article 351 of the TFEU requires Member States to terminate or at least renegotiate their intra-EU BITs.[82] In the course of this debate, politicians have also responded to the judgment. This is prominently illustrated by the response of the

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[74] This presumption inspired scholars to distinctively despondent captions, announcing the decision, for example, to be the 'deathblow' to autonomous ISDS. This term was used by Thym (2018).

[75] See Wuschka (2018, p. 41), who noted that 'intra-EU BITs, for now and until their termination, remain valid as a matter of public international law'. See further Lavranos and Singla (2018, p. 350).

[76] See Lavranos and Singla (2018, p. 350), and further Stöbener de Mora (2018, p. 366). But see also Lang (2018, p. 16 et seq.). Lang emphasised that the binding effect of a ruling in a preliminary reference is not limited to the original case, but extends to comparable cases.

[77] See Glinski (2018, p. 63).

[78] Hess (2018, p. 9).

[79] ECJ, *Achmea*, para 60 (emphasis added).

[80] See Lang (2018, p. 17), Pinna (2018, p. 87).

[81] See e.g. Ohler (2018, p. 515), for a comparable approach. However, see also Hess (2018, p. 10), who stated that such a 'formalistic approach does not correspond to the concerns the ECJ expressed in *Achmea*'. Cf. Bodenheimer and Eller (2018, p. 791).

[82] See Lavranos and Singla (2018, p. 350), who noted that most intra-EU BITs were once concluded as extra-EU BITs in the 1980s and 1990s which '[a]rguably […] supports the view that Art. 351 TFEU is—at least analogously—applicable to intra-EU BITs'.

Dutch government following the judgment. On 26 April 2018, the Dutch Minister for Foreign Trade and Development Cooperation announced that the judgment left the government with no choice but to terminate the Netherlands-Slovakia BIT.[83] She further announced that the Dutch government intends to terminate 11 other intra-EU BITs that are still in force.[84] According to Article 54 of the Vienna Convention on the Law of Treaties (VCLT), the termination of a treaty requires the consent of all the signatories after consultation with the other Contracting States.[85] For the sake of 'clarity, speed and efficiency', the Dutch government intends to terminate the intra-EU BITs by concluding one single multilateral treaty.[86] Later, on 15 January 2019, the representatives of 22 Member States signed a declaration, concluding that all arbitration clauses contained in intra-EU BITs are incompatible with the EU law and thus inapplicable.[87] The representatives announced the termination of all intra-EU BITs, either by a multilateral treaty or by means of bilateral treaties. Indeed, on 24 October 2019, the European Commission announced that the EU Member States agreed on a plurilateral treaty for the termination of intra-EU BITs. [88] However, despite political efforts to effectuate the judgment, crucial questions remain unsettled.

Firstly, the extent of incompatibility between intra-EU BITs and the EU law is uncertain. It seems possible that *only* the arbitration clauses of such treaties infringe the EU law.[89] If courts or tribunals in the meaning of Article 267 of the TFEU settle investor claims based on an intra-EU BIT, the primacy of EU law seems far less to be at stake.[90] At the same time, intra-EU BITs regularly grant investors a substantive level of protection that exceeds the standard of protection under EU law.[91] This poses the risk of substantive incompatibility with Article 18 of the TFEU.[92] Unfortunately,

[83] See Kaag (2018).

[84] See also Kaag (2018). For a comment on the Dutch announcement, see Davoise and Burgstaller (2018). But despite this announcement, see Lavranos and Singla (2018, p. 350), who observed that 'to the best knowledge of the authors, no intra-EU BIT has been terminated post-*Achmea* so far' although, for instance, the Netherlands-Poland BIT could have been terminated by August 2018.

[85] See Hess (2018, p. 10), who also relied on Art 54 of the VCLT.

[86] See Davoise and Burgstaller (2018).

[87] Declaration of the Representatives of the Governments of the Member States (2019, p. 1). For a discussion of this declaration, see Power (2019).

[88] European Commission (2019). See also the Declaration of the Representatives of the Governments of the Member States (2019, p. 4). According to the latter declaration, the Member States promised to 'make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019'.

[89] This was e.g. proposed by Lang (2018, p. 15), with regard to the immediate consequences of the ECJ judgment.

[90] See Glinski (2018, p. 64), who assumed that 'substantive tensions with EU law are far less likely to materialise if the disputes were decided by regular courts'.

[91] Glinski (2018, p. 64) and Wathelet (2017, paras 179 et seq.).

[92] See Glinski (2018, p. 64). To the contrary, see also Stöbener de Mora (2018, p. 366), who assumed that the risk of an infringement appears far-fetched, given that an interpretation in conformity with European law seems feasible.

the ECJ did not address whether arbitration clauses infringe this provision.[93] In absence of any guidance by the ECJ whether or not another provision of the intra-EU BIT infringes Article 18 of the TFEU, one observation appears to be particularly relevant. The majority of the currently existing intra-EU BITs were concluded at a time when only *one* of its parties was a Member State to the EU.[94] The treaties were meant to set incentives for investing in third countries by 'offering reciprocal guarantees against political risks which might negatively affect those investments'.[95] As a consequence, the enlargement of the EU renders it doubtful if such guarantees remain in fact compatible with EU law and particularly with Article 18 of the TFEU.[96]

Secondly, the consequences of terminating intra-EU BITs remain to be ascertained.[97] So-called 'sunset clauses' are meant to protect an investor's legitimate expectation that a BIT would continue to remain in force. For instance, Article 13(3) of the Netherlands-Slovakia BIT reads as follows:

> In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.

Whether Contracting States are able to validly terminate a treaty inclusive of the sunset clause by mutual consent is disputed.[98] In view of this, Member States might still be subject to investor claims even if they terminate intra-EU BITs by consent according to Article 54 of the VCLT.

4.3 Perspectives for Pending and Future Arbitration Proceedings Under Intra-EU BITs

Whilst the fate of intra-EU BITs as treaties is one question, the fate of pending and future arbitration proceedings that arose from intra-EU BITs is another.[99] This relates to the question of to what extent arbitral tribunals will follow the *Achmea*

[93] ECJ, *Achmea*, para 61.

[94] European Commission (2015).

[95] European Commission (2015).

[96] However, see also Wathelet (2017, paras 49 et seq.), who suggested that Art 18 of the TFEU is not infringed.

[97] This issue was briefly addressed by Glinski (2018, p. 63).

[98] Regarding this controversy, see Zarowna (2017). Zarowna observed that it 'appears that this issue has not yet been tested by international arbitral practice'. For a less cautious assessment, see Stöbener de Mora (2018, p. 366), who suggested that for the sake of the protection of legitimate expectations, even mutual consent does not render sunset clauses inapplicable. By contrast, the sunset clauses were deemed equally inapplicable and without any effect by the representatives of 22 Member States, see the Declaration of the Representatives of the Governments of the Member States (2019, p. 1).

[99] It was reported, albeit without further reference, that there were 37 pending arbitrations under intra-EU BITs in 2018, cf. De Sadeleer (2018, p. 367).

decision of the ECJ. The view of the European Commission regarding this question is definite. It stated that 'any arbitration tribunal established on the basis of such clauses [from an intra-EU BIT] lacks jurisdiction due to the absence of a valid arbitration agreement'.[100]

It is however questionable if the current *status quo* is that obvious. As shown above, the binding effect of the judgment of the ECJ is limited.[101] Arbitral tribunals thus face a difficult decision: They would have to either terminate the pending proceedings by denying their jurisdiction or affirm their jurisdiction and decide on the merits of the case. If they decide to do the latter, it is advisable for the arbitral tribunals to thoroughly manifest their jurisdiction, as they are responsible for ensuring that arbitral awards are enforceable.[102]

Shortly after the judgment was handed down, Hess suggested that tribunals should refer to Article 30(3) of the VCLT in addressing this question.[103] In simple terms, Article 30(3) of the VCLT governs the relation between two treaties. According to this provision, if the parties to an earlier treaty are also parties to a later treaty, the earlier treaty applies only to the extent that its provisions are compatible with the later treaty. Hess understands the ECJ's decision to the effect that Article 344 of the TFEU constitutes a provision that applies to intra-EU investment arbitration and prevails over dispute resolution clauses in a BIT.[104] It remains to be seen if arbitral tribunals will follow Hess' suggestions in practice and terminate proceedings on this basis. Others suggested that it might be possible for arbitrators to successfully affirm their jurisdiction if the seat and the assets subject to enforcement are located in a non-EU jurisdiction and the domestic courts in the respective jurisdiction are willing to depart from the ECJ's ruling.[105]

So far, the de facto responses of companies and arbitral tribunals are inconclusive. Whilst there are reports about companies withdrawing treaty-based claims against EU Member States,[106] at the same time, there are also arbitral awards affirming an arbitral tribunal's jurisdiction under the ECT.[107]

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[100] European Commission (2018).

[101] See also Hartkamp (2018, p. 733 et seq.), Lee (2018, p. 147).

[102] For a detailed discussion of the duty of a tribunal to render an enforceable award, see Horvath (2001, p. 135 et seq.).

[103] Hess (2018, p. 13 et seq.).

[104] For a detailed discussion of this approach and a further analysis of Art 59 of the VCLT, see Hess (2018, pp. 12–14).

[105] Dimopoulos (2018).

[106] See e.g. Yong (2018).

[107] See *Vattenfall AB* et al. *v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf (hereafter '*Vattenfall AB*'); and *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award. 16 May 2018, https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf (hereafter '*Masdar Solar*'). Both cases will be discussed in more detail in the ECT section of this Chapter.

4.4 Enforcement of Intra-EU BIT Arbitral Awards

As demonstrated above, arbitrators will be facing difficult decisions in light of the *Achmea* judgment. Furthermore, the judgment will also affect already concluded arbitration proceedings because the findings of the ECJ have an impact on the enforcement of intra-EU BIT awards. When examining the enforceability of arbitral awards rendered in proceedings under an intra-EU BIT, there are two particularly relevant aspects. Firstly, the country in which a party seeks enforcement is relevant. Secondly, the rules which governed the preceding arbitration are relevant. Particularly if the arbitration was conducted under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), this facilitates the enforcement.

Regarding the first aspect, it would be appropriate to differentiate between enforcement proceedings inside and outside of the EU. If a party seeks enforcement of an arbitral award outside of the EU, the enforcing court may not consider, not to mention follow, the *Achmea* decision. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), does not allow for refusing enforcement of an award on this basis. Article V(2)(b) of the New York Convention provides for a public policy exemption. However, this exemption is interpreted narrowly.[108] An infringement of EU law does not, in general, violate national public policy of states outside of the EU.[109] For this reason, investors will presumably favour the enforcement of awards based on intra-EU BITs in jurisdictions outside of the EU.[110]

By contrast, if a party seeks enforcement of an arbitral award inside the EU, domestic courts will face a dilemma. Article 267(3) of the TFEU compels the courts of final instance to request further preliminary references if intra-EU BITs other than the Netherlands-Slovakia BIT are in question.[111] In light of the varying particulars of each intra-EU BIT, the *acte claire* doctrine is considered not to apply to the question of compatibility with EU law.[112] At the same time, the New York Convention obliges its Contracting States to recognise and enforce arbitral awards. Yet, in this scenario, Article V(2)(b) of the New York Convention could allow domestic courts of EU Member States to refuse recognition and enforcement of arbitral awards. Whilst the exact definition of the term 'public policy' remains disputed, the principle of autonomy of the EU and its legal order could constitute a matter of public policy.[113]

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[108] Solomon (2016, p. 143).

[109] De Sadeleer (2018, p. 368). Cf. Lavranos and Singla (2018, p. 354), for tribunals seated outside of the European Union. Cf. Lang (2018, p. 22).

[110] See Lavranos and Singla (2018, p. 354), Lee (2018, p. 149). Finally, see also Stöbener de Mora (2018, p. 366), who suggested that not only enforcement, but generally choosing arbitration in non-Member States might become more appealing.

[111] Cf. Wuschka (2018, p. 40), who assumed that it is 'likely that more references to the CJEU will follow'.

[112] Wuschka (2018, p. 40).

[113] Singla (2018).

In its decision in *Vincenzo Manfredi v Llyod Adriatico Assicurazioni SpA*, the ECJ regarded questions of EU Competition Law as 'a matter of public policy which must be automatically applied by national courts'.[114] This at least indicates that key elements such as the autonomy of the EU and its legal order could also be regarded as a matter of public policy by EU Member States.[115] At the very least, the *Achmea* decision renders enforcement of such arbitral awards in the EU less predictable, if not potentially unattainable.[116]

The above considerations apply to arbitrations conducted under rules other than the ICSID Convention. However, they do not hold true to ICSID proceedings.[117] The ICSID Convention does not provide for review of arbitral awards by domestic courts.[118] Article 53(1) of the ICSID Convention precludes any appeal other than that provided for in the Convention. Article 54(1) of the ICSID Convention obliges the Contracting States to recognise ICSID awards as binding. From the outset, this leaves domestic courts with no choice but to enforce the arbitral award.[119] Yet, tribunals in pending ICSID proceedings are well-advised to address the implications of the *Achmea* decision in future hearings. An insufficient examination of the implications increases the risk that the losing party commences annulment proceedings under Article 52 of the ICSID Convention.[120]

Despite this benefit of ICSID proceedings, 'in reality, the European Commission presents a formidable obstacle even to enforcement of ICSID awards'.[121] Notably, the England and Wales Court of Appeal affirmed a stay of the ICSID enforcement proceedings in *Viorel Micula* et al. *v Romania*.[122] This stay of proceedings was seen as a 'delicate balancing act […] between the UK's obligations under the ICSID Convention and its duties under EU law'.[123] The stay of the enforcement proceedings was

[114]ECJ, Judgment of the Court in Joined Cases C-295/04 to C-298/04, 13 July 2006 (ECLI:EU:C:2006:461), para 31.

[115]See Singla (2018), who advocated this conclusion.

[116]See Lavranos and Singla (2018, p. 353), who assumed that tribunals 'proceeding with a finding of jurisdiction under an intra-EU BIT, and possibly under the ECT, would render [the tribunals' awards] potentially unenforceable within the entire EU'.

[117]For authors who assumed that *Achmea* will not have an impact on ICSID awards, see e.g. Bischoff (2018, p. 591), Lee (2018, p. 146). But see also Hess (2018, p. 14), who cautiously stated that the 'situation of ICSID awards which have already been rendered is more complex'.

[118]Reed et al. (2010, p. 180 et seq.). See also Wuschka (2018, p. 40), and finally, Ohler (2018, p. 516), who stressed that the ICSID Convention does not even provide for court review in exceptional circumstances.

[119]This was generally affirmed by De Sadeleer (2018, p. 368), Hess (2018, p. 14) and Wuschka (2018, p. 40). But see Lang (2018, p. 21), for an opposing view. He assumed that EU law, particularly Art 4(3) of the TEU, might oblige Member States to reject enforcement of an ICSID award that infringes EU law.

[120]Cf. Hess (2018, p. 14).

[121]Lavranos and Singla (2018, p. 355).

[122]*Micula* et al. *v Romania*, England and Wales Court of Appeal (Civil Division), [2018] EWCA Civ 1801, 27 July 2018 (hereafter '*Micula*').

[123]Hawes (2018).

affirmed in light of the pending proceedings before the General Court of the EU.[124] The tribunal in *Viorel Micula* et al. *v Romania* awarded the Micula investors damages.[125] The European Commission subsequently declared that enforcement of this award would constitute State aid as per Article 107(1) of the TFEU.[126] The European Commission thus ordered Romania to refrain from paying any damages to the Micual investors and to recover any sum already paid.[127] The Micula investors successfully appealed against this decision before the General Court of the EU.[128] Although the Micula proceedings are not directly related to *Achmea*, these proceedings might allow some projections on enforcement proceedings pursuant to the *Achmea* decision.

Finally, the *Achmea* decision is considered not to have given reasons for annulment of awards that have not been challenged within the statutory time limits. Whilst the *Achmea* decision provides for considerations of fundamental importance, it does not prevent a challenge from being time-barred.[129]

4.5 The Future of BITs Between EU Member States and Third Countries

The *Achmea* judgment concerned an intra-EU BIT. Whilst the number of existing intra-EU BITs is already significant, the number of BITs between EU Member States and third countries (extra-EU BITs) clearly exceeds the former. The Netherlands alone is a party to 78 extra-EU BITs that were in force in 2018,[130] while France is a party to 84 BITs of this kind.[131] Reportedly, the EU Member States altogether concluded approximately 1200 extra-EU BITs.[132] The sheer numbers emphasise the significance of the question as to the impact of the *Achmea* judgment on extra-EU BITs.

To date, the future of extra-EU BITs is uncertain. Generally, extra-EU BITs are meant to remain in force until BITs or Free Trade Agreements concluded by the EU succeed them.[133] The ECJ did not address this issue expressly. Equally, the European

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[124] *Micula*, para 104.

[125] *Ioan Micula, Viorel Micula* et al. *v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

[126] European Commission, Decision (EU) 2015/1470, 30 March 2015, https://eur-lex.europa.eu/eli/dec/2015/1470/oj (hereafter 'European Commission, Decision (EU) 2015/1470'), Art 1.

[127] European Commission, Decision (EU) 2015/1470, Art 2(1).

[128] General Court, Judgment of the General Court in Cases T-624/15, T-694/15 and T-704/15, 18 June 2019 (ECLI:EU:T:2019:423).

[129] See Wuschka (2018, p. 38), who noted that anything else would 'violate considerations of legal certainty and good faith'.

[130] See Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/CountryBits/148.

[131] See Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA/CountryBits/72.

[132] For the number, see Lavranos and Singla (2018, p. 351), and Woolcock (2010, p. 53).

[133] See Regulation (EU) No 1219/2012 and further Lavranos and Singla (2018, p. 351).

Commission solely addressed intra-EU BITs and multilateral treaties, particularly the ECT, when expressing its views on the consequences of *Achmea*.[134] Does this silence indicate that extra-EU BITs are not affected by the *Achmea* decision?

In the *Achmea* decision, the ECJ expressly referred to 'international agreement[s] concluded between *Member States*' only.[135] Some scholars noted that this phrasing would consistently mandate that arbitration clauses in extra-EU BITs are compatible with EU law.[136] Pinna further noted that EU law seems to advocate this finding.[137] According to Article 351(1) of the TFEU, the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other hand, shall not be affected by the provisions of the Treaties of the EU. In view of the time limitation, reliance on Article 351(1) of the TFEU nonetheless only holds true for extra-EU BITs that were concluded prior to the relevant point in time. Nevertheless, another observation advocates the compatibility of arbitration clauses in extra-EU BITs: the opposite could lead to 'a dissymmetric offer to arbitrate'.[138] If an investor from the EU invests in a third country, the offer to arbitrate on behalf of the third country would be valid. Contrary to where an investor from a third country invests in an EU Member State, the offer to arbitrate on behalf of the EU Member State would infringe EU law.[139] Eventually, there is one policy aspect that might deter the European Commission from condemning extra-EU BITs as intensely as it condemns intra-EU BITs. Extra-EU BITs provide investors from the EU with a level of legal protection that often exceeds the legal protection ensured by domestic courts.[140]

However, doubts remain as to the future of extra EU-BITs.[141] It is true that EU law is less relevant in this context. Many extra-EU BITs do not refer to EU law as

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[134]See European Commission (2018). It should, however, be noted that this communication was limited in its scope. It *a priori* only 'focuses on intra-EU investment and thus does not concern investments made by EU investors in third countries or investments made by third country investors in EU'. It is open to interpretation whether this limited scope indicates the understanding that the *Achmea* decision is equally limited in its effect.

[135]ECJ, *Achmea*, para 31 (emphasis added).

[136]Pinna (2018, p. 92). See also Stöbener de Mora (2018, p. 368), who considered any infringement unlikely since the application of EU law is not an issue in this constellation. Finally, Lang (2018, p. 47), considered such BITs to be unaffected primarily because the principle of mutual trust is inapplicable.

[137]Pinna (2018, p. 93), with reference to Art 351(1) of the TFEU.

[138]Pinna (2018, p. 93).

[139]See Pinna (2018, p. 93). But see also De Sadeleer (2018, p. 367), who observed this 'imbalance' but seemingly reconciled with it. After all, some asymmetries seem inevitable as Lavranos and Singla (2018, p. 351), asserted. The latter scholars noted that regarding claims against EU Member States, non-EU investors receive preferential treatment over EU investors if the extra-EU BITs remain in force.

[140]Cf. Rose-Ackerman and Tobin (2005, p. 6).

[141]See e.g. Ohler (2018, p. 515 et seq.). Ohler assumed that at least if the respondent of an arbitration is a Member State, and the law of the Member State applies to the dispute, extra-EU BITs infringe EU law.

the applicable law.[142] At the same time, it cannot be ruled out that arbitral tribunals under extra EU-BITs may interpret EU law if a question of EU law is relevant to deciding the case.[143] Thus, even if one were to assume that extra-EU BITs and the arbitration clauses therein will generally remain applicable,[144] EU law remains a relevant factor for subsequent arbitration proceedings. Eventually, the ECJ may also rule on the compatibility of extra-EU BITs with EU law. If a non-EU investor seeks recognition and enforcement by a court of an EU Member State of an award rendered under an extra-EU BIT, this court could request a preliminary reference to the ECJ pursuant to Article 267(3) of the TFEU.[145]

4.6 The Future of Investment Treaties Between the EU and Third Countries

Eventually, the impact of the *Achmea* decision on treaties between the EU and third countries is to be discussed. There are two types of such treaties. Firstly, there are bilateral treaties primarily negotiated between the EU and third countries. The most prominent example is probably the already mentioned CETA concluded between the EU and Canada. Secondly, there are other 'mixed agreements'.[146] Mixed agreements are multilateral treaties between the EU, its Member States and third countries. The most prominent example for the latter is the ECT. Both treaties will be analysed in the following.

4.6.1 Bilateral Treaties Between the EU and Third Countries

Firstly, regarding CETA as an one of the most important treaties between the EU and a third country, the ECJ also addressed the question as to its compatibility with EU law. In September 2017, Belgium requested an opinion of the ECJ on the compatibility

[142]Lavranos and Singla (2018, p. 351).

[143]Lavranos and Singla (2018, p. 351).

[144]There are, however, also scholars who assumed that extra-EU BITs equally infringe EU law. See, for example, De Sadeleer (2018, p. 367). De Sadeleer plainly assumed that 'dispute resolution mechanisms provided for under BITs concluded between Member States and third countries will also prove to violate Article 267 and 344 TFEU where the arbitral jurisdiction is liable to concern either the application or the interpretation of EU law'.

[145]Lavranos and Singla (2018, p. 352).

[146]Regarding that term, see e.g. Hess (2018, p. 15).

of CETA's Investment Court System (ICS) with EU law.[147] In its much anticipated *Opinion 1/17*, the ECJ ultimately found the ICS to be compatible with EU law.[148]

As one of its arguments, the ECJ emphasized that the treaty that establishes the ICS is one between the 'Union and a non-Member State'. The principle of mutual trust, which was an important element of the reasoning in the *Achmea* decision, is inapplicable between the EU and a third country. Prior to Opinion 1/17, it was disputed if the *Achmea* decision foreshadowed a conflict between the ICS and the EU law or not.[149] Besides having addressed the issue of international dispute settlement in earlier opinions, the ECJ did so in *Achmea* as well. The ECJ held 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'.[150] The EU may generally submit to the decisions of such a court.[151] Yet again, the ECJ emphasised the limit of such a conferral of power, namely that the 'autonomy of the EU and its legal order is respected'.[152]

There was a vivid debate in scholarly literature as to whether the ICS under CETA sufficiently respects the autonomy of the EU and its legal order. This debate concerned, most importantly, the relevance of EU law. On the one hand, one could assume that between Canada and the EU, EU law only qualifies as domestic law of the EU.[153] Article 8.31.2. of the CETA establishes that the Tribunal 'may consider, as appropriate, the domestic law of the disputing Party as a matter of fact'. The Tribunal further has to follow the 'prevailing interpretation given to the domestic law by the courts or authorities of that Party'. Finally, 'any meaning given to domestic law by the Tribunal shall not be binding upon courts […] of that Party' according to Article

[147] See Department of Foreign Affairs, Foreign Trade and Development Cooperation of the Kingdom of Belgium (2017). Its press release specifies that the request regards the compatibility of the ICS with: (1) the exclusive competence of the ECJ to provide the definitive interpretation of EU law; (2) the general principle of equality and the 'practical effect' requirement of EU law; (3) the right to access to the courts; and (4) the right to an independent and impartial judiciary.

[148] Lavranos and Singla (2018, p. 351). On 29 January 2019, Advocate General Yves Bot rendered his Opinion 1/17 on this matter (Advocate General Bot, Opinion 1/17, 29 January 2019 (ECLI:EU:C:2019:72)). He concluded that the provisions in questions are compatible with TEU, the TFEU and the Charter of Fundamental Rights of the European Union. For short discussions of Opinion 1/17, see Croisant (2019) and Gáspár-Szilágy (2019). Cf. Bodenheimer and Eller (2018, p. 788), who assumed that *Achmea* might constitute a prologue to Opinion 1/17.

[149] Eckes (2018) assumed that the *Achmea* decision foreshadows such a conflict with the EU law. In contrast, see Hindelang (2019, p. 394). He assumed that, albeit it cannot be ruled out that the ECJ will find CETA to infringe the autonomy of EU law, *Achmea* generally 'seems to be only of limited guidance' regarding agreements of the EU with third countries.

[150] ECJ, *Achmea*, para 57.

[151] In this regard, the ECJ expressly distinguished between bilateral agreements between Member States only and agreements concluded by the European Union itself as it emphasised that the Netherlands-Slovakia BIT was 'concluded not by the EU but by Member States', see ECJ, *Achmea*, para 58.

[152] ECJ, *Achmea*, para 57.

[153] See Ohler (2018, p. 516), and Stöbener de Mora (2018, p. 368). Both suggested that this suffices to avoid an infringement of EU law. For a more cautious assessment, see Glinski (2018, p. 66).

8.31.2 of the CETA. On the other hand, notwithstanding this effort to safeguard the primacy of EU law, scholars remained doubtful if it suffices.[154] After all, it is the 'very idea' of an ISDS to grant protection against legislative changes.[155] As this also covers changes in EU law, Article 8.31.2 of the CETA might be insufficient to prevent conflicts with the EU law.[156] Decisions within the ICS are also not subject to any review by courts of the EU.[157] In view of the reasoning of the ECJ regarding Article 267 of the TFEU,[158] it already seemed unlikely that the ECJ regarded the ICS as a court or tribunal of an EU Member State.[159] In addition, there were different opinions regarding the relevance of the principles of mutual trust and sincere cooperation between EU Member States in such a scenario. Whilst some suggested that both principles are less affected in an extra-EU situation,[160] others believed that those principles also oblige EU Member States to individually safeguard the unity of the EU and its objectives with regard to the EU's external relations.[161]

4.6.2 Multilateral Investment Treaties Between the EU, Its Member States and Third Countries

Secondly, the impact on mixed agreements, particularly on the ECT, is also uncertain.[162] Again, the European Commission voiced a clear stance on the question. It assumed the following:

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[154] See Glinski (2018, p. 66). See also O'Sullivan (2018, p. 15 et seq.), for an earlier assessment of CETA in light of the primacy of the principle of autonomy as established by the ECJ. She noted that '[h]aving compared the concerns of the CJEU in Opinion 2/13 with the solutions proposed in dispute settlement provisions in CETA, the future of the Tribunal appears to rest on a very shaky foundation' (p. 19).

[155] See Glinski (2018, p. 66).

[156] Art 8.9.1. of the CETA equally intends to avoid potential conflicts by affirming the Contracting Parties' 'right to regulate within their territories to achieve legitimate policy objectives'. According to Art 8.9.2. of the CETA, the mere fact that a Party regulates in a manner that negatively affects an investment or the expectations of an investor does not amount to a breach of an obligation under the respective section. But see further Glinski (2018, p. 66), who stated that it remains to be seen whether this sufficiently protects EU law from adverse influences. See also Lavranos and Singla (2018, p. 355), who suggested that the Appellate Tribunal is able to 'interpret and apply EU law as a matter of fact' under Art 8.28 of the CETA.

[157] Instead, Art 8.28 of the CETA establishes an Appellate Tribunal to review awards rendered under the agreement. For a short explanation of the appeal procedures, see Puccio and Harte (2017, paras 3.2.3. et seq.).

[158] ECJ, *Achmea*, paras 43–49.

[159] See Lavranos and Singla (2018, p. 355).

[160] See Glinski (2018, p. 66). Cf. Hindelang (2019, p. 395).

[161] See Eckes (2018).

[162] For a detailed analysis of this question, especially in view of Art 351 of the TFEU, see Lang (2018, p. 22 et seq.) Happold and De Boeck (2019, p. 33), noted that Opinion 1/17 of the ECJ had 'the potential to impact significantly on the extra-EU applicability of the ECT'.

> The *Achmea* judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in *Achmea* applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU.[163]

Notably, the representatives of 22 Member States followed the conclusions of the European Commission and considered the arbitration clause in the ECT to be incompatible with the EU law.[164] Indeed, scholars affirmed that 'the basic scenario […] is largely the same as the one of intra-EU BITs in the *Achmea* case'.[165] To safeguard the primacy of EU law, Article 30(4) lit. (a) of the VCLT could be the crucial provision of international public law.[166] To give Article 344 of the TFEU as *lex posterior* full effect, Article 30(4) lit. (a) of the VCLT could render the dispute resolution clause in Article 26 of the ECT inapplicable.[167]

By contrast, arbitral tribunals take a different view on the ECT.[168] The tribunal in the International Centre for Settlement of Investment Dispute (ICSID) proceeding *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* rendered its award on 16 May 2018.[169] It held that the '*Achmea* Judgment has no bearing upon the present case'.[170] According to the tribunal, the considerations of the ECJ do not apply to multilateral treaties.[171]

On 31 August 2018, the arbitral tribunal in the ICSID proceedings *Vattenfall AB* et al. *v the Federal Republic of Germany* rendered its decision on the *Achmea* issue.[172] In its extensive reasoning, this tribunal affirmed its jurisdiction notwithstanding the ECJ judgment. As one of the several key points, it referred to Article 16 of the ECT

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[163] European Commission (2018).

[164] Declaration of the Representatives of the Governments of the Member States (2019, p. 2).

[165] Hess (2018, p. 12). See also Hindelang (2019, p. 394), who suggested that 'intra-EU arbitration based on the ECT should in effect not be treated differently from those addressed in *Achmea*'.

[166] As suggested by Hess (2018, p. 12).

[167] Hess (2018, p. 13). However, see also Happold and De Boeck (2019, p. 14), who suggested that either the principle of the primacy of EU law, as established by the ECJ, or Art 16 of the ECT could be interpreted as conflict rules that prevail over the general rules of international law. They noted that '[u]nder international law, an expression of the parties' will to provide for a conflict rule, explicit or even implicit, is recognized' and the customary conflict of law rules 'codified fragmentarily in Articles 30 and 59 VCLT' apply only secondarily.

[168] Cf. Happold and De Boeck (2019, p. 16).

[169] *Masdar Solar*.

[170] *Masdar Solar*, para 678.

[171] *Masdar Solar*, para 679.

[172] *Vattenfall AB*. The tribunal rendered the decision after Germany had invoked a jurisdictional objection.

when examining the relation between the EU law and the ECT.[173] The tribunal read this provision in a way that precludes a contracting party from interpreting the 'EU Treaties so as to derogate from an Investor's right to dispute resolution under Article 26 ECT, to the extent that they are understood to concern the same subject manner'.[174] The tribunal further rejected that as a matter of conflicts of law, EU law prevails over the ECT.[175] In short, the tribunal did not recognise a conflict in the first place. Instead, Article 26 of the ECT and Articles 267 and 344 of the TFEU were deemed to 'operat[e] in their separate spheres without conflict' because the provisions 'do not have the same subject matter or scope'.[176] Nonetheless, even if one were to recognise a conflict, particularly Article 30(4)(a) of the VCLT shall not mandate that Articles 267 and 344 of the TFEU prevail over Article 26 of the ECT. According to the tribunal, Article 30(4)(a) of the VCLT is subsidiary to Article 16 of the ECT.[177] In addition, the tribunal suggested that it is 'by no means clear that the EU Treaties are the "later treaty" under Article 30 VCLT' because the relevant articles are deemed to have 'existed in substantively similar form since a time prior to the conclusion of the ECT'.[178] Finally, one more finding appears to be particularly noteworthy. The tribunal stressed that the EU *itself*, as a contracting party, has 'accepted the possibility of arbitration proceedings under Article 26 [ECT], even against itself, without making a distinction between investors from EU or non-EU Member States'.[179] By contrast, in the eye of the European Commission, this distinction is insignificant. The European Commission's take on it is that 'the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States'.[180]

Happold and De Boeck have pinpointed the underlying problem of this question:

> The analyses used in international law and EU law start from different premises, apply different conflict of laws mechanisms, and consequently lead to different outcomes.[181]

In the end, it might again be up to the ECJ to decide on the compatibility of the ECT with EU law. Spain has requested the Svea Court of Appeal in Sweden to annul the

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[173] Art 16 of the ECT reads in its relevant parts as follows: „Where two or more Contracting Parties have entered into a prior […] or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, […] (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 […]".

[174] *Vattenfall AB*, para 195.

[175] *Vattenfall AB*, paras 211 et seq.

[176] *Vattenfall AB*, para 212.

[177] *Vattenfall AB*, para 217.

[178] *Vattenfall AB*, para 218.

[179] *Vattenfall AB*, para 188. See also Stöbener de Mora (2018, p. 367), who suggested that in view of its Contracting States, the ECT is governed by international public law. As a consequence, the principle of *pacta sunt servanda* (Art 26 of the VCLT) was not to allow the EU law to deny tribunals their jurisdiction.

[180] European Commission (2018).

[181] Happold and De Boeck (2019, p. 2).

award in *Novenergia v Spain*. The award had been rendered on 15 February 2015 and was based on the ECT.[182] In the course of the annulment proceedings, Spain asked the Swedish court to seek preliminary reference from the ECJ. The Swedish court granted a stay of enforcement but ultimately rejected Spain's request for preliminary reference to the ECJ.[183] Pending a decision of the ECJ to the contrary, arbitral tribunals are currently encouraged to follow the lead of the *Masdar* and *Vattenfall* tribunals.[184]

4.7 The Impact of the Achmea Decision on Commercial Arbitration

Finally, the impact of the decision on *commercial* arbitration is to be examined. The ECJ itself addressed the realm of commercial arbitration in its decision. In doing so, it affirmed the findings it made in earlier judgments, namely in *Eco Swiss*[185] and *Mostaza Claro*.[186] The ECJ draws a distinct line between commercial arbitration and investment arbitration. Commercial arbitration builds on the express intent of private parties to arbitrate. In contrast to commercial arbitration, investment arbitration is based on treaties, concluded by the EU Member States. The EU Member States thereby remove one type of dispute from the judicial system. However, Article 19(1) of the TEU particularly requires the EU Member States to establish a judicial system that safeguards the uniform application and interpretation of EU law.[187] In view of the autonomy of the EU law, the ECJ does not tolerate the removal of disputes in the realm of investment arbitration. Yet, due to the distinction between investment arbitration and commercial arbitration, the ECJ nonetheless accepts the 'review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be subject of a reference to the Court for a preliminary ruling'.[188] Apparently, this leads to the conclusion that the judgment does not affect disputes in commercial arbitration. This corresponds with the assessment of the

[182] *Novenergia II—Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Arbitration (2015/063), Final Arbitral Award, 15 February 2018, https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf.

[183] Svea Court of Appeal, Decision in Case T 4658-18, 25 April 2019. See also Lavranos and Singla (2018, p. 352), Schwedt and Reichert (2018).

[184] Lavranos and Singla (2018, p. 354).

[185] ECJ, Judgment of the Court in Case C-126/97 (*Eco Swiss*), 1 June 1999 (ECLI:EU:C:1999:269) (hereafter 'ECJ, *Eco Swiss*').

[186] ECJ, Judgment of the Court in Case C-168/05 (*Mostaza Claro*), 26 October 2006 (ECLI:EU:C:2006:675) (hereafter 'ECJ, *Mostaza Claro*').

[187] ECJ, *Achmea*, para 55.

[188] ECJ, *Achmea*, para 54.

ECJ[189] and the existing scholarly literature.[190] Article 19(1) of the TEU does not oblige private parties to safeguard the primacy of the EU law in the way it obliges EU Member States to do so. Private parties should thus have the autonomy to freely choose their forum for dispute settlement.

Nonetheless, it has been noted that the ECJ would have needed to prevent *any* instances outside of the EU legal system to decide on the interpretation of EU law if it were to follow its strict reasoning in *Achmea* consistently.[191] Or, to put it in other words: if the ECJ were to consistently follow its earlier decisions in *Eco Swiss* and *Mostaza Claro*, it would have found that at least non-ICSID investment arbitration is compatible with EU law.[192] Both *Eco Swiss*[193] and *Mostaza Claro*[194] were based on the assumption that the subsequent, limited review by domestic courts (as per Article 267 of the TFEU) suffices in safeguarding the primacy of EU law.[195] The domestic courts scrutinise commercial arbitration either in the course of annulment or enforcement proceedings.[196] In this regard, the New York Convention notably does not differentiate between the review of awards from commercial and non-ICSID investment arbitration.[197] By contrast, the ECJ only regarded the review of awards from investment arbitration as insufficient. After all, in view of the ECJ's distinction between commercial and investment arbitration, the parties in commercial arbitrations have 'nothing to worry about—at least for now'.[198]

5 Conclusion

In the end, the highly anticipated *Achmea* decision probably left more questions unanswered than it had settled. The views on the consequences regarding the various treaties and both the jurisdiction of arbitral tribunals as well as the enforceability of arbitral awards differ significantly. Not only were these differences caused by different legal views, but they also root in divergent objectives. This is especially true to the political agenda of the European Commission on the one hand, and arbitral tribunals on the other hand. In the end, these uncertainties in themselves presumably strengthen the position of respondent States and the European Commission.

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[189] Cf. ECJ, *Achmea*, paras 54 et seq.

[190] See Hess (2018, p. 6), who noted that '*Achmea* does not change the present situation' regarding commercial arbitration. See further Lavranos and Singla (2018, p. 356), and Ohler (2018, p. 515).

[191] Lavranos and Singla (2018, p. 356).

[192] Cf. Alvarez (2018, p. 153), Bodenheimer and Eller (2018, p. 790).

[193] ECJ, *Eco Swiss*, paras 35, 36, 40.

[194] ECJ, *Mostaza Claro*, paras 34–39.

[195] Sadowski (2018, p. 1055). Cf. Pinna (2018, p. 77 et seq.).

[196] Sadowski (2018, p. 1055).

[197] Alvarez (2018, p. 153).

[198] Lavranos and Singla (2018, p. 356).

When assessing the uncertain legal landscape in the aftermath of *Achmea*, one aspect seems to be particularly difficult. Irrespective of the exact legal consequences, the legal unpredictability encroaches the legal position of investors, causing more difficulties for investors to pursue their rights and protect their investments. This applies all the more as scholars consistently note that the protection of investments under EU law alone is not as effective as the mechanisms of ISDS.[199] There is a stark contrast between the theoretical demands on the protection of investments in the EU and the actual enforceability of these rights. This discrepancy is prominently illustrated by the Article 7 of the TEU procedure against an EU Member State in view of the 'threat of a persistent and systematic breach of the rule of law in Poland'.[200] Yet at the same time, the decision of the ECJ potentially offers the chance to implement effective investment protection amongst the EU Member States, rooted in EU law.[201] This, however, depends on the combined efforts of the EU as a whole—an effort that, at least at the moment, seems hardly achievable.

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[199] This disparity was for example noted by the Board of ASA (2018, p. 556), and Sadowski (2018, p. 1040 et seq.) Cf. Hindelang (2019, p. 384).

[200] Sadowski (2018, 1025 et seq.).

[201] Notably, the representatives of 22 Member States announced their commitment to 'intensify discussions without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union', see the Declaration of the Representatives of the Governments of the Member States (2019, p. 3). Cf. Lavranos (2018).

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