



ARTICLES

SPECIAL SECTION – THE *ACHMEA* CASE

BETWEEN INTERNATIONAL LAW AND EUROPEAN UNION LAW

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ON *ACHMEA*, THE AUTONOMY OF UNION LAW, MUTUAL TRUST AND WHAT LIES AHEAD

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ABSTRACT: This *Article* considers the role, application, and implications of the *Achmea* judgment (judgment of 6 March 2018, case C-284/16 [GC]). As such, the Authors first consider the *Leitmotive of Achmea*, that is to say, the principles of autonomy and mutual trust. The latter principle, it is argued, should be given much more attention, particularly in light of its fundamental importance in the overall architecture of the European Union. The *Article* then critically analyses the application of the *Achmea* judgment by intra-EU arbitral tribunals and how these tribunals have distinguished the effects of the judgment for their assessments on jurisdiction. In a concluding section, the Authors finally reflect on the declarations made by Member States on 15 and 16 January 2019 on the implications and interpretation of *Achmea* and the intended effects thereof for pending arbitrations.

KEYWORDS: *Achmea* – bilateral investment treaties – Energy Charter Treaty – autonomy – mutual trust – declaration.

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I. INTRODUCTION

In its judgment of 6 March 2018 in case C-284/16 *Achmea*, the Court of Justice (the Court) ruled that “Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States [...] 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”.¹

Since then, countless articles and commentaries on the implications of the judgment have followed. Often unhelpful and limiting to the alleged need to “protect” intra-EU investment, or the separate system of dispute settlement established pursuant to bilateral² and plurilateral³ treaties, those opinions do not give fair credence to the underlying mantra of the *Achmea* judgment. That is, most importantly, because *Achmea* is a judgment of the European Union legal order. Consequently, this *Article* is written from a EU law perspective. And, from that starting point, *Achmea* should be far from surprising, both to the booming “dispute resolution industry” surrounding intra-EU investors and to EU Member States alike.⁴ In doing so, we will first look at the *Leitmotive* behind *Achmea*: the principles of autonomy of Union law and mutual trust. That discussion will then lead us to the application of *Achmea* in publicly-available arbitral awards and how arbitral tribunals have side-stepped the judgment without paying real effort to its implications. Our final section will briefly deal with the legal consequences of the judgment, in light of the declarations of the Member States of 15 January 2019 and 16 January 2019, and end on closing remarks in light of these declarations.⁵

¹ Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC], para. 60.

² In 2013, Zachary Douglas estimated there to be approximately 190 intra-EU investment treaties currently in force. See Z. DOUGLAS, *Problem Relating to Intra-EU BITs in the Investment Treaty Cases*, 2013, www.matrixlaw.co.uk.

³ Such as the Energy Charter Treaty (ECT). See Communication COM(2018) 547 final of 19 July 2018 from the Commission on the protection of intra-EU investment, p. 2. Paschalidis has argued that the ECT constitutes a multilateral treaty. See P. PASCHALIDIS, *International Investment Law and EU Law: Are There Systemic Conflicts and Incompatibilities?*, in E. GAILLARD, H. RUIZ-FABRI (eds), *EU Law and International Investment Arbitration*, Huntington: JurisNet LLC, 2018, paras 67 and 87.

⁴ In a publication of December 2018, UNCTAD finds that, by 31 July 2018, 83 publicly-known intra-EU investor-State dispute settlement (“ISDS”) proceedings were pending. UNCTAD, IIA Issues Note, *Fact Sheet on Intra-European Union Investor-State Arbitration Cases*, Issue 3 of December 2018, UNCTAD/DIAE/PCB/2018/7, p. 5.

⁵ That is, Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, ec.europa.eu (hereafter Declaration of the 22); Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Court of Justice in *Achmea* and on Investment Protection in the European Union, www.kormany.hu (hereafter Dec-

II. BEYOND AUTONOMY: MUTUAL TRUST APPLIES TO INVESTMENT PROTECTION AND BEYOND

As the Court in *Wightman* recalled, the founding Treaties of the Union established a new legal order, whose characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally as well as binding its Member States to each other.⁶ At the heart of that constitutional makeup lies, *inter alia*, the EU's *Kompetenzkatalog*, which stands as witness to the idea that, "by acceding to the EU the Member States limited their freedom of action in international law and renounced the exercise between themselves of rights in international law that conflicted with EU law".⁷

The EU is a subject of,⁸ and subject to,⁹ public international law. That does not mean, however, that the EU only follows the rules and principles of the public international legal order. The EU Treaties have created a new legal order,¹⁰ subject to its own rules and its own system of enforcement. Under that system, citizens of the Union have rights and obligations independently of their Member States, derive those directly from the Union legal order,¹¹ and can seek review of any decision or other national measure relating to the application of those rights and obligations to ensure compliance with EU law.¹² That system is composed of the national courts and the Court, the latter of which ensures the uniform interpretation and the validity of EU law throughout the EU.¹³ The novelty of the EU is the creation of a different order, whose subjects are not only the Member States but also the citizens, who have rights and obligations independently of their Member State. EU citizenship is, therefore, a fundamental status of the nationals of the Member States that brings with it certain rights and obligations.¹⁴

That is the premise on which the *Achmea* judgment is founded. That premise does not challenge the traditional public international legal order: within the *sui generis* order established by EU membership, the Member States and their citizens have to solve

laration of Hungary); and Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union: www.regeringen.se (Declaration of the 5).

⁶ Court of Justice, judgment of 10 December 2018, case C-621/18, *Wightman and Others*, paras 44 and 45. See also *Achmea* [GC], cit., para. 33 and the case law cited.

⁷ German Federal Court of Justice, judgment of 31 October 2018, case I ZB 2/15, *Achmea* [GC], para. 41.

⁸ *Wightman and Others*, cit., para. 45.

⁹ Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC], para. 47.

¹⁰ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, p. 12.

¹¹ *Wightman and Others*, cit., para. 64.

¹² Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality*, paras 49-51.

¹³ *Achmea*, cit., para. 33.

¹⁴ *Wightman and Others*, cit., para. 64.

those controversies which are based on EU law within the rules and principles of the common legal system established between them. Nothing else.

The case law referred to in the *Achmea* judgment proves that the impossibility to submit controversies between an EU investor and a Member State to an external dispute settlement mechanism is enshrined at the core of the EU architecture.¹⁵ According to Arts 2 and 19 TEU, “it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law”.¹⁶

Achmea recalls once more that – no matter the source or authority on which the controversy in question is based –, within the complete system of Union law, there is no possibility to “externalise” the competence to revise the legality of EU acts to other bodies or institutions outside the Union. That idea finds its origin in the autonomy of Union law and acts “*ad intra*” as well as “*ad extra*”. In other words, any decision of an international organisation or of a treaty-based body has to comply with the EU legal order, if it is sought to be applied within the Union.¹⁷ To that end, all decisions and acts of the Union can be supervised solely within the Union legal order.¹⁸ It follows that Member States cannot decide independently whether certain controversies could be dealt with outside that order.

However, that does not automatically mean that, if the EU is a party to the international agreement establishing the possibility of a separate dispute settlement system, that that option would be compatible with Union law.¹⁹ In fact, the same rationale underlying the judgment in *Achmea* should apply to any investment treaty that would include a dispute settlement clause that could be applied between the Member States.²⁰ *Achmea* has clearly stated that an EU investor cannot initiate arbitration proceedings against another EU Member State. There is no reason why in the case, for instance, of the Energy Charter Treaty (ECT), that conclusion should be any different. Nor is there anything controversial about that conclusion: in the same way as any sovereign State has to respect its domestic constitutional order when entering into an international agreement, the Member States and the Union themselves have to respect the Union legal order, which includes respect-

¹⁵ Before referring to the specific issue of the nature of arbitral tribunals, the first part of the *Achmea* judgment refers to Opinion 2/13 (Court of Justice, opinion 2/13 of 18 December 2014), and then to the judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses* [GC], and to opinion 1/09 of 8 March 2011, and the case law referred therein.

¹⁶ *Minister for Justice and Equality*, cit., para. 50.

¹⁷ Court of Justice, judgment of 3 September 2008, case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [GC], para. 305.

¹⁸ *Kadi and Al Barakaat International Foundation v. Council and Commission* [GC], cit., para. 326.

¹⁹ *Achmea* [GC], cit., para. 58.

²⁰ See, in this regard, opinion of Advocate General Bot in opinion 1/17 (opinion of AG Bot delivered on 29 January 2019, paras 122-124 and 134-140) for the conditions under which the Advocate General deems the system of dispute settlement contained in Comprehensive Economic and Trade Agreement between the EU and Canada (also known as “CETA”) compatible with EU law.

ing the principle of autonomy when concluding and applying international agreements. As both the Member States and their citizens are subjects of this legal order, neither of them can renounce that constitutional structure nor decide to submit a controversy to an arbitral tribunal outside the system established in Art. 19 TEU.

But, *Achmea* is about more than autonomy: the second pillar of the Court's reasoning is that of mutual trust. Implied within Art. 2 TEU,²¹ and developed within the area of justice and home affairs, the principle of mutual trust goes hand in hand with the principle of sincere cooperation contained in Art. 4, para. 3, TEU and serves to stand as witness that the Union's legal order goes far beyond the traditional understanding of the reciprocal treaty obligations that establish the international law plane. The fact that Member State share with all other Member States, and recognise that they share with them, a set of common values on which the Union is founded implies and justifies the existence of mutual trust.²² As such, the principle of mutual trust forms part of the exhaustive²³ architecture of the Union and the relations between the Member States as well as between its citizens and the Member States. It is that fundamental part of the architecture of the Union that a resolution system between these parties, outside the system established by the Treaties, unjustifiably²⁴ calls, or risks calling,²⁵ into question.²⁶

Easily overshadowed by the first pillar, it is that second pillar that, in fact, holds the greatest weight in practice. It is clear that maintaining a single market without internal borders requires that cross-border investors can *rely* on EU law protecting their investments.²⁷ It is at this point that *Achmea* takes hold. In fact, the principle of mutual trust should not only be considered as a principle confined to, and applied in, the area of justice and home affairs, but it equally should be taken as a fundamental principle of the EU legal order.²⁸ The *Achmea* case, which concerns an set-aside action of an arbitral award in the field of investment protection, demonstrates the extension of that principle, as the case in itself did not refer to any instrument of judicial cooperation.

Indeed, the judgment clearly pronounces the importance of the principle of mutual trust in a case which does not concern the area of judicial cooperation. The cross-

²¹ *Achmea* [GC], cit., para. 58.

²² *Ibid.*, para. 34. See also opinion 1/17, cit., paras 82 and 107, where AG Bot notes that relations between the EU and third States are not based on mutual trust.

²³ Hence the reference in *Achmea* [GC], cit., para. 36, to opinion 1/09, cit., para. 68; opinion 2/13, cit., para. 175; and *Associação Sindical dos Juizes Portugueses* [GC], cit., para. 33.

²⁴ See Court of Justice, judgment of 5 April 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Caldaru* [GC], para. 82 ("limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances'").

²⁵ Note the use of the conditional "could" in *Achmea* [GC], cit., para. 56.

²⁶ *Achmea* [GC], cit., para. 58.

²⁷ Communication COM(2018) 547 final, cit., p. 17.

²⁸ Court of Justice, judgment of 16 July 2015, Case C-681/13, *Diageo Brands*, para. 40.

reference of *Achmea* in other judgments reminds also of the fundamental importance of that principle in the architecture of the Union. Take, in this regard, for instance, the recent judgments in relation to the European Arrest Warrant²⁹ or the revocation of the notification of the United Kingdom (UK) to withdraw from the EU.³⁰ In *Minister for Justice and Equality* and *RO*, the Court recalled the importance of preserving the system of judicial cooperation and the high level of trust underpinning the area of freedom, security and justice, so that, save in exceptional circumstances, the Member States must consider each other to be complying with EU law and particularly with the fundamental rights recognised thereby.³¹ Similarly, in *Wightman*, the Court recalled that despite the UK's notification of its intention to withdraw from the Union, the values on which the Union legal order is established would prevent a Member State to be forced to withdraw from the structured network of principles, rules and mutually interdependent legal relations that establish the Union.³²

Alongside *Achmea*, these three cases, in fact, share the understanding that the common values established in Art. 2 TEU are the origin of the EU legal order and, by necessity, also the EU enforcement system established to preserve it. *Achmea* and *Minister for Justice and Equality* are two sides of the same coin: *Achmea* indicates the need to retain certain controversies within the EU legal system, as the relations of Member States are ruled by the principle of mutual trust and as that trust could only be ensured within the system established by the Treaties. On the other hand, *Minister for Justice and Equality* recalls the need to preserve the judicial systems of the Member States according to the principle of the rule of law (in particular as regards judicial independence) to ensure the protection provided for in Art. 19 TEU.³³ Any breach of, or any interpretation against, those principles would then violate the constitutional order of the Union. Thus, sharing the values and principles upheld in *Achmea* and *Minister for Justice and Equality* includes, naturally, sharing the trust in other Member States, including the trust in their judicial system. For want of a better comparison, mutual trust must thus be seen as the engine oil in the *sui generis* European machine, reducing the friction and wear of holding together the various obligations and interests of 28 different societies and cleaning the whole apparatus from doubt clogging the system. Some wear and tear will, naturally, remain.³⁴ But, take away that lubricating force – or start reduc-

²⁹ *Minister for Justice and Equality*, cit., paras 35 *et seq.* and Court of Justice, judgment of 19 September 2018, Case C-327/18 PPU, *RO*, paras 34 *et seq.*

³⁰ *Wightman and Others*, cit., para. 45.

³¹ *Minister for Justice and Equality*, cit., paras 72 to 75

³² *Wightman and Others*, cit., paras 45, 61, 62, and 67.

³³ *Minister for Justice and Equality*, cit., para. 53.

³⁴ See, by analogy, *Aranyosi and Caldázar* [GC], cit., para. 82.

ing it permanently³⁵ – and the resulting machine will fragment and come to a grinding halt.

And that is the reminder that *Achmea* instills: mutual trust in *inter se* relations between the Member States derives from the trust in the complete and exhaustive system of judicial remedies and fundamental rights protection as a whole. As the European Commission (the “Commission”) recalls in its Communication,

“while international investment law (for example bilateral investment treaties) focuses mainly on compensating investors after the violation has taken place, EU law enables the protection of cross-border investors in the EU through multiple ways and at different levels. Crossborder investors are protected in the EU through a number of mechanisms aiming at the prevention or resolution of violations of their rights committed by the legislator, the administration or the judiciary. The judicial enforcement of rights ensuing from EU law is one of several possible solutions. Where judicial enforcement is considered to be the most appropriate avenue or where other possibilities have been exhausted, an individual can rely on a fully-fledged and complete system of judicial remedies under EU law”.³⁶

There is nothing rigid in that approach. The submission of certain controversies to external bodies would damage and undermine the Union order or the existence of mutual trust between the Member States or the autonomy of Union law. That is because, “the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law”.³⁷ But, even more so, the existence of effective judicial review is the essence of the EU. And, within that system, judicial review has to be ensured by the national courts and ultimately by the Court, by way of preliminary reference. Excluding, or even allowing for an “opt out” from the complete system of legal remedies established by the Treaties³⁸ would undermine that rule of law³⁹ – that *ordre publique* – framework which is imperative for the Member States and their citizens alike. The reality of the matter is that EU law already protects all forms of cross-border intra-EU investment, throughout the entire life cycle of that investment.⁴⁰ That system is, in turn, protected through Art. 19 TEU and Art. 47 of the Charter of Fundamental Rights of the EU.

³⁵ K. LENAERTS, *La vie Après l’avis: Exploring the Principle of Mutual (yet not Blind) Trust*, in *Common Market Law Review*, 2017, p. 822.

³⁶ Communication COM(2018) 547 final, cit., p. 17.

³⁷ *Associação Sindical dos Juizes Portugueses* [GC], cit., para. 36.

³⁸ Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft* [GC], paras 66-67.

³⁹ *Associação Sindical dos Juizes Portugueses* [GC], cit., para. 36.

⁴⁰ Communication COM(2018) 547 final, cit., pp. 3 and 5. At p. 21, the Communication also highlights, along the way, national courts can provide a multitude of remedies, ranging from provisional measures, the obligation to interpret national law in a way that is consistent with EU law, the obligation for judges to set aside of their own motion any act which is in conflict with EU law, the elimination of the consequences of a violation of EU law, or the award of damages for violations of EU law.

And so there is simply no space – or need, for that matter – for a separate avenue providing more substantive rights or protection than that afforded by the Union legal order.

Achmea could not have been decided differently: the principles of autonomy and mutual trust prevent Member States from offering – and EU citizens from accepting – a system of dispute resolution outside the Treaties when EU law is both the *means* and the *end* in the life cycle of intra-EU investment.⁴¹

III. THE APPLICATION OF *ACHMEA* BY INVESTOR-STATE TRIBUNALS

Even if *Achmea* clearly pronounces the impossibility of EU investors to bring proceedings against a Member State, arbitral tribunals have not followed this line and have attempted to distinguish the judgment and its implications – with disputable logic – from the proceedings put before them. In this section, we will attempt to analyse the reasoning in those publicly-available awards and jurisdictional decisions that distinguished *Achmea* and highlight their shortcomings on the basis of both EU law and international investment law.

No State is under any obligation to give an account of itself to an international tribunal which lacks jurisdiction or whose jurisdiction has not been established.⁴² The propriety of arbitral tribunals in investor-State arbitration exercising jurisdiction is, consequently, dependent on the establishment and keeping of proper jurisdiction.⁴³ It is for that reason, too, that a tribunal must, at any point in time, be satisfied that it has jurisdiction, and must, if necessary, go into that matter *proprio motu*.⁴⁴

This ability, known as *Kompetenz-Kompetenz*, gains in importance where review is sought of a State's continued competence to consent to such arbitration in the first place. And yet, *Kompetenz-Kompetenz* of intra-EU arbitral tribunals remains, as of yet, insufficiently exercised. Of the four publicly-available awards rendered since the judgment in *Achmea* was handed down, not a single arbitral tribunal has declined jurisdiction on the basis that Member States to the EU never had the competence to consent to intra-EU arbitration.⁴⁵ And that is despite the (contradictory) fact that there by now exists general

⁴¹ See, by analogy, Court of Justice, judgment of 7 May 2013, case C-617/10, *Åkerberg Fransson* [GC], para. 46.

⁴² S. ROSENNE, *An International Law Miscellany*, Alphen aan den Rijn: Kluwer Law International, 1993, p. 149.

⁴³ See, for an expression of that principle, Art. 41, para. 1, ICSID Convention and Art. 45, para. 1, ICSID Additional Facility Rules, Schedule C ("The Tribunal shall be the judge of its own competence") and Art. 21 UNCITRAL Arbitration Rules ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement"). See by analogy United Nations Commission on International Trade Law, report no. 40/17 of 7-18 July 2013, para. 150.

⁴⁴ International Court of Justice, *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), judgment of 18 August 1972, para. 13.

⁴⁵ It might be opportune at this point to highlight that the Commission has sought intervention in all pending intra-EU arbitrations to raise the question of competence and to highlight the effective consequence

agreement among arbitral tribunals established both under BITs and the ECT that EU law forms part of the law to be applied by tribunals established pursuant to a dispute between an investor from one EU Member State and another EU Member State.⁴⁶

Note, in this regard, the recent decision of the arbitral tribunal in *UP and CD Holding v Hungary* (Böckstiegel, Fortier, Bethlehem; BIT, ICSID), which held that “in the present Award, the Tribunal does not consider that a detailed discussion of the substance of *Achmea* is required, because the present case differs in determinative aspects from the case in *Achmea*”.⁴⁷ That difference in determinative aspects from the case in *Achmea* was considered to be that the arbitral tribunal in *UP and CD Holding v. Hungary* operated under the ICSID Convention, to which Hungary is a Contracting Party, and the validity of which has not been put into question by the judgment in *Achmea*.⁴⁸ That same line of reasoning was also adopted in *Marfin v. Cyprus* (Hanotiau, Edward, Price; BIT, ICSID), which noted that the tribunal’s “jurisdiction derives not only from the Treaty but also from the ICSID Convention [and] its cornerstone principles established in Article 25(1)”.⁴⁹

Under Art. 25, para. 1, ICSID Convention, the jurisdiction of ICSID tribunals extends to “any legal dispute arising directly out of an investment [...] which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”. This last sentence in particular should be read alongside the Report of the Executive Directors on the Convention note, “[c]onsent of the parties is the cornerstone of the jurisdiction of the centre”.⁵⁰ Consent by both the parties to a dispute is thus an indispensable condition for the jurisdiction of ICSID tribunals.

That, however, is not surprising. There exists no self-contained customary international law right to investment arbitration, in the same vein as there exists no self-

of the judgment in *Achmea*. See, in this regard, Commission Decision C(2018) 4303 final of 29 June 2018 on intervention as a non-disputing party in investor-State dispute settlements between an investor from one Member State and another Member State based on BITs concluded between Member States or ECT.

⁴⁶ *Ex multis*, ICSID, decision on the *Achmea* Issue of 31 August 2018, case no. ARB/12/12, *Vattenfall v. Germany*, paras 146-148; Permanent Court of Arbitration, final award of 11 October 2017, case no. 2014-03, *JSW Solar and Wirtgen v. Czech Republic*, paras 175-178; ICSID, decision on jurisdiction of 30 November 2012, case no. ARB/07/19, *Electrabel S.A. v. Republic of Hungary*, paras 4.122, 4.189, and 4.195; and ICSID, award of 27 December 2016, case no. ARB/14/3 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, para. 278. This derives also from Art. 1, para. 3, of the ECT, which indirectly recognizes that acts of EU law, issued by the institutions of the Union, are binding on EU Member States as a matter not only of EU law, but also of the ECT itself.

⁴⁷ ICSID, award of 9 October 2018, case no. ARB/13/35, *UP and CD Holdings v. Hungary*, para. 252.

⁴⁸ *Ibid.*, paras 253 to 264.

⁴⁹ ICSID, award of 26 July 2018, case no. ARB/13/27, *Marfin v. Cyprus*, para. 592.

⁵⁰ ICSID Convention, Regulations and Rules, Report of the Executive Directors of the ICSID Convention, ICSID/15/Rev. 1, point 23. On the status of the Report, see B. LEGUME, W. KIRTLEY, *The Status of the Report of the Executive Directors on the ICSID Convention*, in *ICSID Review – Foreign Investment Law Journal*, September 2012, p. 159-171 (concluding that the Report is a non-binding, albeit “reliable” source of interpretation of the ICSID Convention).

contained right to legitimate expectations in public international law.⁵¹ So, the legal act that is the basis for consent to arbitration is always the relevant provision in the investment treaty, that is to say in the BIT or the ECT (or, where the consent is expressed through a contract or national law, the relevant contract or the relevant national law), and not Art. 25 of the ICSID Convention. The ICSID Convention does not create a default rule for consent to arbitration.⁵² As such, take away the consent to arbitration by the State concerned (or establish that there never was consent in the first place) and an ICSID tribunal loses jurisdiction (and the ICSID Convention application). Consequently, it is a logical fallacy to reason that if consent to arbitration was withdrawn or never existed, jurisdiction of the tribunal arising from the separate consent to a set of rules governing the practical aspects of the arbitration nonetheless cures that former deficiency and keeps the arbitration alive. The converse, as appears to be suggested, would wreak havoc to the fundamental principle of public international law “that no State can, without its consent, be compelled to submit its disputes [...] either to mediation or to arbitration, or to any other kind of pacific settlement”.⁵³

In that context, the argument made by the tribunal in *UP and CD Holding* that Hungary had not shown that EU law, as interpreted in *Achmea*, has the effect that consent has been validly withdrawn retroactively⁵⁴ overlooks the fundamental point that consent to arbitration did not have to be withdrawn, because it had never been validly given in the first place. This derives readily from the Court’s reasoning in that intra-EU investment arbitration “could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law”,⁵⁵ so that Arts 267 and 344 TFEU preclude “a provision in an international agreement concluded between the Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may [...] bring proceedings against the latter Member State before an arbitral tribunal.”⁵⁶ The language used could not possibly be any wider. As the German Federal Court of Justice in *Achmea* noted, “[i]f Article 8(2) of the BIT is thus contrary to Articles 267 and 344 TFEU, it cannot apply [...], and no effective arbitration agreement has been concluded between the parties. [...] This meant that the applicant [Slovakia] had made no offer to conclude an arbitration agreement with investors from the Netherlands that the defendant [Achmea] could then accept”.⁵⁷ In other words, there was never a valid offer for

⁵¹ See International Court of Justice, *Obligations to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile), judgment of 1 October 2018, para. 162.

⁵² See *similarly* ICSID, award of 22 August 2012, case no. ARB/05/1, *Daimler Financial Services AG v. Argentina Republic*, para. 175.

⁵³ Permanent Court of International Justice, *Status of Eastern Carelia*, advisory opinion of 23 July 1923, p. 27.

⁵⁴ *UP and CD Holdings v. Hungary*, cit., para. 264.

⁵⁵ *Achmea* [GC], cit., para. 56.

⁵⁶ *Ibid.*, para. 60.

⁵⁷ German Federal Court of Justice, *Achmea*, cit., paras 25-26.

arbitration pending when the EU investor sought to accept the standing offer for arbitration, thus flouting jurisdiction of any tribunal *ab initio*.

In the same vein, no rights derivative in nature from the BIT or the ECT can, accordingly, be invoked against the Member State concerned. As such, because the request for arbitration in *UP and CD Holding* had been filed after the accession of Hungary to the EU, that is, after 1 May 2004, the BIT had been an agreement between two Member States of the EU and so subject to the limitations of EU law.⁵⁸ One could, accordingly, speak of a “reverse Mavrommatis” situation, where jurisdiction for any claims arising out of the BIT or the ECT between an investor from one EU Member State and another EU Member State ceased at the point of accession to, or last confirmation of, the EU Treaties after conclusion of the BIT / accession to the ECT.⁵⁹

The tribunal in *UP and CD Holding v. Hungary* equally reasoned that the applicable BIT provides for a so-called “sunset clause”, according to which protection continues for 20 years after the expiry of the BIT.⁶⁰ In relation thereto, it suffices to note that, when applied on an intra-EU basis, any such clause (including that contained in Art. 47(3) of the ECT), would be ineffective for the simple reason that it cannot extend the *ratione temporis* application of a treaty clause which is considered *ultra vires* the Member States’ sovereign competence to act to begin with.⁶¹

This is also where the tribunals in *Masdar v. Spain* (Beechey, Born, Stern; ECT, ICSID) and *Vattenfall v. Germany* (van den Berg, Brower, Lowe; ECT, ICSID) fall short of reasoning. Both tribunals considered that the judgment in *Achmea* is limited to the BIT between the Netherlands and Slovakia, but does extend to a treaty such as the ECT.⁶² Again, that type of reasoning is little persuasive. If the Court had wanted to limit its ruling to bilateral treaties between the Member States, it would have done so, or have used language to that effect. In fact, it did precisely the opposite: the question from the *Bundesgerichtshof* referred to “a provision in a bilateral investment protection agreement”,⁶³ but the Court formulated its judgment in wider terms, referring to “a provision

⁵⁸ See also, to that effect, German Federal Court of Justice, *Achmea*, cit., para. 20.

⁵⁹ Permanent Court of International Justice, *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), objection on the jurisdiction of the Court of 30 August 1924, at para. 90 (“in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to its after its establishment”. See also, for an expression of that principle in the realm of investment arbitration, ICSID, decision on jurisdiction of 29 November 2004, case no. ARB/02/13, *Salini v. Jordan*, paras 176-178.

⁶⁰ *Ibid*, para. 265.

⁶¹ Recall German Federal Court of Justice, *Achmea*, cit., para. 41: “by acceding to the EU the Member States limited their freedom of action in international law and renounced the exercise between themselves of rights in international law that conflicted with EU law.” See, by analogy, *Achmea*, cit., para. 33.

⁶² ICSID, award of 16 May 2018, case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, para. 679; *Vattenfall v. Germany*, cit., paras 139, 208, and 239.

⁶³ *Achmea* [GC], cit., para. 23.

in an international agreement concluded between Member States".⁶⁴ Consequently, *Achmea* speaks not in terms of treaties, but in terms of claims, issues, and parties: Arts 267 and 344 TFEU establish clear boundaries of exclusive jurisdiction for dispute settlement mechanisms between the Member States. It is, in effect, a Europeanisation of the case-law on original jurisdiction of the United States Supreme Court.⁶⁵ Alas, the *Masdar v Spain* tribunal concludes otherwise, without further reasoning or taking position on the result that flows from *Achmea*.

In this respect, it is noteworthy, in particular, that the *Masdar v. Spain* tribunal makes no attempt at taking stock of the positions of the EU Member States on intra-EU arbitration. Respondent Member States in intra-EU disputes have consistently argued that the ECT does not apply intra-EU, in particular (in historical order) Hungary, the Czech Republic, Spain, and Italy. Other Member States that used to defend intra-EU arbitration, such as Germany⁶⁶ and the Netherlands,⁶⁷ have publicly changed their position and stated that they, too, deem *Achmea* relevant under the ECT.

The *Masdar v Spain* tribunal then refers with approval to the opinion of Advocate General Wathelet in *Achmea*.⁶⁸ That, again, is not persuasive. It need not be recalled that the Court not once referred to the substance of the Advocate General's conclusions in its judgment. As such, whether or not he deemed a certain interpretation of the law to be correct at the time is not determinative. The fact that the Court explicitly recalled, in the *Achmea* judgment, that it is not bound either by the Advocate General's conclusion or by the reasoning which led to that conclusion should be guidance enough that it was not convinced by the conclusion put forward.⁶⁹

Finally, the tribunal in *Vattenfall v. Germany* refrains from taking itself a view as to whether intra-EU investment arbitration on the basis of Art. 26 ECT is compatible with general principle of Union law of autonomy, Art. 19 TEU, and Arts 267 and 344 TFEU, but merely takes note of the reasoning employed in *Masdar v. Spain*.⁷⁰ The former tribunal relies, instead, decisively on Art. 16 ECT, which it considers to be a special conflict rule

⁶⁴ *Ibid*, para. 60.

⁶⁵ See, for instance, the US Supreme Court, judgment of 14 December 1992, *Mississippi v. Louisiana*, p. 77 (ruling that the US Supreme Court has "original and exclusive jurisdiction of all controversies between two or more States", and that state courts lack subject-matter jurisdiction to resolve those disputes themselves).

⁶⁶ Reply by the German government in response to a question posed in the German Parliament, Drucksache 19/2174 of 15 May 2018, dipbt.bundestag.de.

⁶⁷ Reply by the Dutch government to a question posed by the lower house of the Dutch Parliament, Raad Algemene Zaken en Raad Buitenlandse Zaken, 21 501-02, no. 1863 of 26 April 2018, www.tweedekamer.nl.

⁶⁸ *Masdar v. Spain*, cit., para. 680 *et seq.*

⁶⁹ *Achmea* [GC], cit., para. 27.

⁷⁰ *Vattenfall v. Germany*, cit., paras 208 and 231.

governing the relationship between the ECT and Union law. Some thoughts on this should be offered.

First, that reasoning overlooks that the effect of the primacy of EU law and its impact on international law applicable between the Member States. As the German Federal Court of Justice (*Bundesgerichtshof*) in its judgment of 11 November 2018 in *Achmea v. Slovak Republic* notes: "In that respect [that is, the limitation of EU Member States' freedom of action in international law,] the primacy of EU law has the consequence that *a provision in an agreement operating between Member States inside the EU cannot apply even as a provision of international law [...]*. Nationals of Member States therefore cannot rely on prior international-law obligations of the Member States that conflict with EU law".⁷¹

That renunciation between EU Member States of rights in international law, coupled with the implementation into EU law of the ECT⁷² has the effect that, while the ECT remains applicable to the Member States by way of their international obligations vis-à-vis other contracting parties to the ECT, it has become inapplicable to EU Member States *inter se* by way of their obligations and limitations to competences under EU law. So, while Art. 16 ECT might be used as a conflict rule between Contracting Parties to the ECT between which EU law does not operate (if indeed that is its object and purpose), it certainly cannot operate between Member States to the Union to the detriment of the primacy of Union law.⁷³ That, again, loops back the discussion to the issue of consent under international law enunciated above: by limiting their freedom of action in international law through the creation of the Union legal order, the Member States have done away with the power to accept and maintain a conflict rule deriving from the international law plain that could have adverse effects on the autonomy of EU law as it operates between them. As implemented into Union law, Art. 16 ECT consequently has taken on a different ambit as that which it may personify between non-EU Contracting Parties to the ECT. As such, in the context of the internal and autonomous legal order of the Union, which finds application in intra-EU arbitrations, the ambit of Art. 16 ECT is subordinated to the principles of primary EU law, among which stands the principle of primacy. The tribunal in *Vattenfall v. Germany* consequently also erred on this aspect of its analysis.

Opportunity is missed by most people because it is dressed in overalls and looks like work.⁷⁴ For the time being, arbitral tribunals have not taken full account of the reali-

⁷¹ German Federal Court of Justice, *Achmea*, cit., para. 41 (emphasis added).

⁷² Decision 98/181/EC of the Council and the Commission on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, p. 1.

⁷³ See, by analogy, *Kadi and Al Barakat International Foundation v. Council and Commission* [GC], cit., para. 299 *et seq.*

⁷⁴ Popularly attributed to Thomas Edison, although with unknown provenance. See G. BRANDRETH (Ed.), *Oxford Dictionary of Humorous Quotations*, Oxford: Oxford University Press, 2013, p. 331.

ty of Union law, despite their clear obligation as creatures of subjects of Union law,⁷⁵ and their related mandate to apply that law. They have not only sought to maintain jurisdiction in disputes based on BITs, but also continue to establish jurisdiction on the basis of the ECT (which, as we have noted, by extension of the principles evoked in *Achmea*, is also incompatible with EU law if applied *inter se*). That is a missed opportunity, especially in light of the possibilities for compatible resolution of the jurisdictional hurdle, for instance, via a *juge d'appui*.⁷⁶ The only hope then remains that, by way of external or internal influence, the tribunals will start properly applying their *Kompetenz-Kompetenz*, and will start shifting towards an EU law-compatible resolution of the question before them, in line with *Achmea*.

IV. THE CONSEQUENCES: HOW MEMBER STATES HAVE COMMITTED TO APPLY *ACHMEA*

Member States are under an obligation to take the necessary measures to comply with judgments of the Court. Even where a judgment is not addressed to all Member States, the doctrine included therein is legally binding across the Union and applicable to any situation materially identical to the one at issue. Alas, in case of *Achmea*, Member States' understanding of the material identity of the situation – despite urging from the Commission – appeared to differ, in particular as concerns the consequences to draw from the judgment vis-à-vis their own *inter se* BITs and the ECT.

The result of this finally crystalized in a declaration signed, on 15 January 2019, by 22 Member States,⁷⁷ “On the Legal Consequences of the Judgment of the Court of Jus-

⁷⁵ See *Daimler Financial Services AG v. Argentina Republic*. “All international treaties – whether bilateral, plurilateral or multilateral – are essentially expressions of the contracting states’ consent to be bound by particular legal norms. They encapsulate voluntarily accepted restraints upon the universally recognized principle of state sovereignty. Consent is therefore the cornerstone of all international treaty commitments, at least insofar as those commitments exceed the minimum requirements of customary international law.” *Daimler Financial Services AG v. Argentina Republic*, cit., para. 168. Consent is the source of all treaty commitments, irrespective of the type of treaty concerned: *ibid.*, para. 169.

⁷⁶ See, on that possibility, Court of Justice, judgment of 23 March 1982, case C-102/81 *Nordsee*, para. 14. See, on this point, for example, also J.C. FERNÁNDEZ ROZAS, *Le rôle des juridictions étatiques devant l'arbitrage commercial international*, in *Collected Courses of the Hague Academy of International Law*, 2001, p. 130. The *juge d'appui* is typically the judge designated for that function by the procedural law of the State where the tribunal has its seat. See C. KESSEDIAN, *L'arbitrage comme mode de règlement des différends est-il remis en cause par le droit européen?*, in C. KESSEDIAN, C. LEBEN (eds), *Le droit européen et l'investissement*, Paris: Panthéon Assas, 2009, p. 120, for references to the relevant specific provisions in British and Danish law. As example, recall International Tribunal for the Law of the Sea, decision of 24 May 2005, *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, para. 103.

⁷⁷ That is, Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, and the UK.

tice in *Achmea* and on Investment Protection in the European Union”.⁷⁸ Therein, these Member States declare that they deem the judgment in *Achmea* to establish that “all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable” and that “[a]n arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty”.⁷⁹ That conclusion would also extend to “sunset or grandfathering clauses”.⁸⁰ In relation to the ECT, those Member States further note that any interpretation of the ECT “as also containing an investor-State arbitration clause applicable between the Member States [...] would be incompatible with the Treaties and thus would have to be disapplied”.⁸¹

While the Declaration of the 22 was meant to be signed by all Member States, six Member States decided to limit themselves to commit only to terminate their intra-EU BITs and either remain silent on the ECT or chose not to take a position thereon. That is, even though the Commission’s view on the implications of *Achmea* for the ECT had been clear already well before the adoption of the Member States’ declarations.⁸²

Indeed, a day later, on 16 January 2019, Hungary signed a different declaration, without reference to the effects of *Achmea* on the ECT, as, in its opinion, “the *Achmea* judgment concerns only the intra-EU bilateral investment treaties”.⁸³ On the very same day, five other Member States⁸⁴ signed yet another declaration “On the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union”.⁸⁵ Therein, those Member States agree that *Achmea* affects intra-EU BITs and their sunset clauses.⁸⁶ Unlike Hungary, however, the *Declaration of the 5* does not take a view on the application of *Achmea* on the ECT, and refers to the set-aside proceeding in the Svea Court of Appeal, case no 4658-18 *Novaenergia II*. They then go on to indicate that “it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty.” As such, at the time of writing, just one Member State disagreed on the application of the *Achmea* judgment to the ECT, leaving five Member States silent until the Court has ruled on that issue, too (be that by way of preliminary reference from the Svea Court of Appeal or not).

⁷⁸ Declaration of the 22, cit.

⁷⁹ *Ibid.*, page 1.

⁸⁰ *Ibid.*, page 2.

⁸¹ *Ibid.*

⁸² Communication COM(2018) 547 final, cit., p. 3.

⁸³ Declaration of Hungary, cit.

⁸⁴ That is, Finland, Sweden, Malta, Luxembourg, and Slovenia.

⁸⁵ Declaration of the 5, cit.

⁸⁶ *Ibid.*, pp. 1 and 2.

The above being said, the different declarations agree on a number of common conclusions to be drawn from the judgment in *Achmea*:

- All investor-to-State arbitration clauses contained in BITs concluded between Member States are contrary to EU law and inapplicable;

- Host and home States of intra-EU investors will inform tribunals of pending intra-EU arbitrations of the consequences arising from the preceding point, and will request the courts – including in third countries – which are to decide in proceedings relating to an intra-EU investment arbitration award, to set aside these awards or not to enforce them;

- No new intra-EU investment arbitration proceedings should be initiated under intra-EU BITs;

- By 6 December 2019, Member States will formally terminate all intra-EU BITs by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally;

- Member States will ensure effective legal protection against State measures that are the object of pending intra-EU arbitration proceedings; and

- Member States, together with the Commission, will discuss without undue delay whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the ECT.

Far beyond a mere political declaration, these commitments are reciprocal by nature⁸⁷ clarify the implications on Member States' international law commitments arising from Union membership, and consequently present a major step towards effective implementation of the judgment in *Achmea*. That is to say that these commitments will have to be taken into account by arbitral tribunals as expressions of the *ex tunc* intention of the Member States (from the point of accession to, or last confirmation of, the EU Treaties), within the meaning of Art. 31, para. 3, let. a), of the Vienna Convention on the Law of Treaties (VCLT), vis-à-vis the particular BIT and/or the ECT.⁸⁸

Basing itself on one of the declarations when deciding the jurisdictional issue laid before it, an arbitral tribunal would thus benefit from the clarification of the Member States that the object and purpose, within the meaning of Art. 31, para. 1, VCLT, of accession to the EU Treaties was to impliedly terminate the relevant BIT (or at least the

⁸⁷ See, in this regard, International Court of Justice, judgment of 24 July 1964, *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), pp. 32-33.

⁸⁸ Pursuant to Art. 31, para. 3, let. a), of the VCLT, together with the context shall be taken into account for the interpretation of an international agreement "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." It is recalled, in this regard, that all paragraphs of Art. 31 VCLT have equal value: as the International Law Commission's Final Draft on the VCLT notes: "[The] General rule of interpretation' in the singular [...] indicate[s] that the application of the means of interpretation in the article would be a single combined operation. All the various elements [...] would be thrown into the crucible, and their interaction would give the legally relevant interpretation." International Law Commission, Draft Articles on the Law of Treaties with commentaries of 18 July 1966, UN Doc. A/6309/Rev.1, p. 220.

dispute resolution clause thereof) and the *inter se* application of the ECT (or at least Art. 26 thereof).⁸⁹ That is, to take account of the intention of Member States as it stood at the point of accession to, or last confirmation of, the EU Treaties. And, since the judgment in *Achmea* is not limited in time but applies *ex tunc*,⁹⁰ those statements should be applied to any pending dispute or any award rendered⁹¹ pursuant to a dispute already concluded, with the effect, like in *Achmea*, that the final award is set aside.⁹²

That subsequent clarification of the intention of the parties must, then, be read alongside Art. 59 VCLT and the notion of a special “integral”⁹³ obligation between the Member States that, from the point of accession to, or last confirmation of, the EU Treaties, EU Member States intended to impliedly terminate the dispute resolution clause of the particular BIT and the *inter se* application of Art. 26 ECT between themselves (that is, insofar as it concerns the bundles of obligations arising between the Member States as opposed to the general obligations vis-à-vis other contracting parties to the ECT). The non-limitation in time of the declarations must, furthermore, be seen as an expression of the intention of the Member States as it stood at the point of accession to the Union / last expression of Union membership, given the *ex tunc* effect of *Achmea*.

The above common position – even if in multiple political forms – is a strong response of the Member States. While the legal effects of those declarations are clear, at the time of writing, the practical effects of the various declarations are yet to be assessed. In particular, given the politically-divergent understanding of *Achmea*, it appears likely that the Court will have to take a position specifically on the *inter se* applicability of the ECT. That should, however, not overshadow the fact that, for the time being, EU citizens and the Member States, including their judicial authorities, will have to apply *Achmea* and the principles evoked therein. In a similar fashion, the Commission, as guardian of the Trea-

⁸⁹ Even if one were to argue that such a declaration is a mere unilateral interpretative act, it should be recalled that academic writing understands that the legal effects of unilateral declarations may depend on the reactions of the other contracting parties. Furthermore, an interpretative declaration “remains a unilateral act via which its author conveys his understanding of the convention, thereby serving as an indication of the latter’s intention”. See M. BENATAR, *From Probative Value to Authentic Interpretation: The Legal Effects of Interpretative Declarations*, in *Belgian Review of International Law*, 2011, pp. 182 and 183.

⁹⁰ See, for instance, Court of Justice, judgment of 19 December 2013, case C-262/12 *Vent De Colère and Others*, para. 39.

⁹¹ Any payment of compensation awarded, either voluntarily or by forced execution would deprive EU law of its full effectiveness. See, to this effect, Court of Justice, judgment of 11 November 2015, Case C-505/14 *Klausner Holz Niedersachsen*, para. 34. See also Court of Justice, judgment of 18 July 2007, Case C-119/05, *Lucchini* [GC], paras 59-63.

⁹² German Federal Court of Justice, *Achmea*, cit., operative part.

⁹³ See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and the Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi of 13 April 2006, UN Doc. A/CN.4/L.682, paras 245 *et seq* (as regards the special “integral” obligation arising from membership to the European Convention on Human Rights).

ties, will have to supervise whether Member States correctly apply the judgment, and – where need be – draw all necessary consequences from non-compliance.

To the Authors, there should be no doubt: the complete and exhaustive system of judicial remedies and fundamental rights protection under the Union legal order leaves no space for an externalized dispute settlement system such as that contained in the relevant BIT or Art. 26 of the ECT. Those dispute settlement systems, as currently applied, do not conform to the values on which the Union legal order is established. Indeed, keeping such *inter se* dispute resolution alive trivialises the guiding principles of the Union and distorts the values and rules that form the “level playing field” that was sought to be created through the establishment of the internal market. As such, the full and correct functioning of the internal market, and ultimately of the EU, is only ensured if those values, rules, and principles are upheld uniformly between Member States and for all citizens (and investors) of all Member States alike. After all, that is the message of *Achmea*.