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OPINION 1/17 IN LIGHT OF *ACHMEA*: CHRONICLE OF AN OPINION FORETOLD?

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ABSTRACT: The *Achmea* judgment of the Court of Justice (judgment of 6 March 2018, case C-284/16 [GC]) indicates that two Member States cannot set up an investor-to-state dispute settlement mechanism via a bilateral investment agreement inter se. Does this imply that the Union cannot set up an international investment tribunal through an agreement with a third State? The Court will rule on this issue in Opinion 1/17, dealing with the compatibility between the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and EU Treaties. The present *Article* suggests that the Court drafted *Achmea* having Opinion procedure 1/17 in mind. However, the *Achmea* judgment is ambiguous: the Court implicitly distinguished *Achmea* from CETA but elaborated a test potentially applicable to all investment tribunals, including the CETA Tribunal, which is at issue in Opinion procedure 1/17. Should the Court apply the *Achmea* test in Opinion 1/17, the fate of the CETA Tribunal might be all but sealed.

KEYWORDS: investment – ISDS – CETA – Investment Court System – autonomy – mutual trust.

I. INTRODUCTION

In the *Achmea* judgment,¹ the Court of Justice ruled that the principle of autonomy of EU law prevents two Member States – Slovakia and the Netherlands – from setting up an investor-to-State dispute settlement (ISDS) mechanism via a bilateral investment

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

agreement (BIT) *inter se*.² *Achmea* has crucial constitutional relevance: not only does it have a dramatic impact on arbitration within the EU, but might prevent the Union from concluding investment agreements with third countries.

The Court of Justice will soon rule on the later issue: in Opinion procedure 1/17,³ the Court is requested to decide on the compatibility between EU Treaties and the Canada-EU Comprehensive Economic and Trade Agreement (CETA), which includes an investor-to-public authorities dispute settlement mechanism (the Investment Court System, ICS).⁴ Although the case is pending, several commentators suggested that its outcome is predetermined by *Achmea*: the same reasons that motivate the incompatibility between intra-EU arbitration and EU principles in *Achmea* might imply the inconsistency between CETA and EU Treaties.⁵ Other authors, however, read *Achmea* in a different manner: the findings of this judgment are allegedly circumscribed to intra-EU investment agreements and are motivated solely by the specific characteristics of intra-EU arbitration.⁶

Should *Achmea* be interpreted as an indication that the Investor Court System included in CETA is not compatible with the EU legal order? The present *Article* answers this question, to provide insight into the Court's understanding of the principle of autonomy and its potentially strategic use of precedents. It is argued that the Court anticipated, to a certain extent, the result of Opinion 1/17, although its position is ambiguous.

The investigation begins by suggesting that, at first sight, *Achmea* does not seem to be intended as a precedent for Opinion 1/17; nonetheless, a closer investigation points in the opposite direction (section II). It is then submitted that, if the Court applied in Opinion 1/17 the same test it used in *Achmea*, it would probably conclude that the CETA tribunal is not compatible with EU law (III). The conclusion explores the consequences of *Achmea* from the perspective of Opinion 1/17 and provides explanations for the apparently contradictory views expressed by the Court (IV).

² Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 29 April 1991, 2242 UNTS 205, p. 82.

³ Court of Justice, request for an opinion submitted by Belgium on 13 October 2017, opinion procedure 1/17.

⁴ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, signed on 30 October 2016.

⁵ *Inter alia*, C. ECKES, *Don't Lead with Your Chin! If Member States Continue with the Ratification of CETA, They Violate European Union Law*, in *European Law Blog*, 13 March 2018, www.europeanlawblog.eu; S. GÁSPÁR-SZILÁGYI, *It Is Not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, in *European Papers*, Vol. 3, 2018, No. 1, www.europeanpapers.eu, p. 357 *et seq.*, p. 370.

⁶ *Inter alia*, L. PANTALEO, *The Participation of the EU in International Dispute Settlement: Lessons from EU Investment Agreements*, Berlin, Heidelberg: Springer, 2018, p. 62; P. IANNUCELLI, *La Corte di giustizia e l'autonomia del sistema giurisdizionale dell'Unione europea: quousque tandem?*, in *Il diritto dell'Unione europea*, 2018, p. 300-303; J.H. POHL, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, in *European Constitutional Law Review*, 2018; A. DIMOPOULOS, *Achmea: The principle of Autonomy and Its Implications for Intra and Extra-EU BITs*, in *EJIL:Talk!*, 27 March 2018, www.ejiltalk.org.

II. *ACHMEA'S* RELEVANCE AS A PRECEDENT FOR OPINION 1/17

In *Achmea*, the Court of Justice answered the preliminary question of the German Federal Court of Justice by conducting a three-pronged test. To be compatible with EU law, a tribunal should have at least one of three characteristics: it should not interpret EU law, it should belong to the judicial system of the Member States, or its awards should be reviewable by the Member States' courts.⁷ As the arbitral tribunal set up by the Czechoslovakia-Netherlands BIT has none of these characteristics, it has adverse effects on the autonomy of EU law. If applied in Opinion 1/17, this test might possibly lead the Court to rule that the CETA Tribunal is incompatible with EU law, as shown in the next section. Before discussing the application of the *Achmea* test to the CETA Tribunal, at any rate, one should preliminarily wonder whether the *Achmea* test should be applied to the CETA tribunal in the first place.

The Court ostensibly applied the *Achmea* test to "an arbitral tribunal such as that referred to in Art. 8 of the [Czechoslovakia-Netherlands] BIT",⁸ i.e. an arbitral tribunal set up by two Member States (hereinafter, "intra-EU tribunal"). Does this *caveat* limit the relevance of *Achmea* as a precedent?

The *Achmea* test seems to be relevant only for a specific class of international tribunals, i.e. those that decide disputes affecting the rights of individuals. *Achmea* is concerned with the removal of disputes from the jurisdiction of the courts of the Member States and, consequently, with the functioning of Art. 267 TFEU and the uniformity of EU law, as shown in the next section.⁹ Therefore, *Achmea* does not seem to be directly relevant in respect of tribunals that decide disputes between international subjects, such as the Dispute Settlement Body of the World Trade Organization.¹⁰ *Achmea* consequently does not have the consequence of rendering the EU incapable of setting up international tribunals *in toto*:¹¹ obstacles would exist only in respect of bodies deciding disputes affecting individuals – mostly, investment tribunals.

⁷ *Achmea* [GC], cit., paras 39-56.

⁸ *Ibid.*, para. 43; see also, to that effect, paras 39, 49 and 50.

⁹ *Ibid.*, para. 36; cf. Court of Justice, Opinion 1/09 of 8 March 2011, para. 79. See also Court of Justice, Opinion 2/15 of 16 May 2017, para. 292.

¹⁰ On the alleged inconsistency between *Achmea* and the Court of Justice's case-law on WTO dispute settlement, see B. ARP, *Comment to Achmea*, in *American Journal of International Law*, 2018, p. 466 *et seq.*, p. 471; A. DIMOPOULOS, *Achmea: The principle of Autonomy and Its Implications for Intra and Extra-EU BITs*, cit.

¹¹ According to G. KÜBEK, during the hearing of Opinion procedure 1/17, "several Member States, the Council and the Commission urged the Court to consider the need to cultivate the development and strengthening of a rule-based international order, especially in current times. The autonomy of the EU legal order principle should not be interpreted so narrowly as to prevent the EU from remaining in or adhering to any international dispute resolution mechanisms", see G. KÜBEK, *CETA's Investment Court System and the Autonomy of EU Law: Insights from the Hearing in Opinion 1/17*, in *Verfassungsblog*, 4 July 2018, www.verfassungsblog.de.

The CETA Tribunal certainly decides disputes affecting the rights of individuals, but it would be set up by an agreement concluded by the Union and a third State, not via an agreement between Member States. Would the *Achmea* test apply to such an “extra-EU” Tribunal, or does it apply only to intra-EU tribunals, such as that at issue in *Achmea*?

The introductory remarks and the final considerations of *Achmea* seem to suggest, at least at first sight, that the test is applicable only to intra-EU situations. The Court focuses its introductory remarks (paras 31-38) on the principle of mutual trust, a principle that is applicable to the relations between the Member States and that is not applicable to the relations with third States. The Court argues that primacy and direct effect of EU law have given rise to principles, rules and mutually interdependent legal relations “binding [the] Member States to each other”.¹² These States are linked by “common values” that justify “mutual trust”,¹³ they “ensure in their respective territories the application of and respect for EU law”,¹⁴ including fundamental rights, and they must consider each other to be complying with EU law.¹⁵ It is “in that context” that national courts and the Court of Justice must ensure the full application of EU law in all Member States, notably by using the procedure of Art. 267 TFEU, to ensure the consistency, the full effect, and the “autonomy” of EU law.¹⁶

While the Court’s introductory considerations do not permit *per se* to answer the preliminary question, it is “in the light of those considerations” that the Court then formulates the *Achmea* test.¹⁷ It might, therefore, be surmised, at least in principle, that the Court’s reference to mutual trust at the beginning of its considerations might be indicative of its intention to narrow down the implications of *Achmea* and prevent it from functioning as a precedent for Opinion 1/17.¹⁸

The coda of the judgment (paras 57-59) distinguishes the legal background of *Achmea* from that of Opinion 1/17 in a more explicit manner. Once having performed the *Achmea* test on the Slovakia-Netherlands arbitral tribunal, the Court recalls that the EU can in principle conclude an agreement establishing a tribunal responsible for the interpretation of its provisions and whose decisions are binding on EU institutions, including the Court of Justice.¹⁹ However, such a rule does not apply to the Czechoslovakia-Netherlands BIT, which was concluded “not by the EU but by Member States”.²⁰ The BIT, therefore, calls into question “mutual trust” among the Member States, the preservation of the “particular nature of the law established by the Treaties”, as well as the principle of sincere coopera-

¹² *Achmea* [GC], cit., para. 33; see Court of Justice, opinion 2/13 of 18 December 2014, para. 167.

¹³ *Achmea* [GC], cit., para. 34.

¹⁴ *Ibid.*

¹⁵ *Ibid.*; See also opinion 2/13, cit., para. 191.

¹⁶ *Achmea* [GC], cit., paras 36-37.

¹⁷ *Ibid.*, paras 38.

¹⁸ See J.H. POHL, *Intra-EU Investment Arbitration after the Achmea Case*, cit.

¹⁹ Provided, of course, that the autonomy of EU law is respected, see *Achmea* [GC], cit., para. 57.

²⁰ *Ibid.*, para. 58.

tion.²¹ It is significant that the Court mentions the principle of mutual trust again, at the end of the judgment, after having raised it in its introductory remarks. And it is even more striking that the Court expressly stresses the difference between the legal regimes applicable to the Czechoslovakia-Netherlands BIT, on the one hand, and to the agreements concluded by the EU (such as CETA), on the other hand.

The relevance of the judgment's coda is reinforced by its apparently superfluous character. The Court *de facto* reaches the conclusion of *Achmea* in para. 56, directly after the performance of its three-pronged test. Here the Court notes that the contested BIT, because of its characteristics, could prevent disputes from being resolved in a manner that ensures the full effectiveness of EU law. This consideration could have permitted the Court to answer the preliminary request: an agreement between the Member States that reduces the effectiveness of EU law is inevitably incompatible with it. Nonetheless, the Court introduced three further paragraphs – the coda – whose sole function seems to consist in distinguishing *Achmea* from Opinion 1/17. It might perhaps be argued that the unnecessary recalling of EU's ability to submit itself to an international court at the end of a judgment concerning an international agreement concluded by the Member States can be seen as “expressive of the Court's willingness to narrow down the implications of its ruling”.²²

However, that is not necessarily the case. While the introduction and conclusion of *Achmea* seem to distinguish this case from Opinion 1/17, the principles interpreted in the judgment may be relevant for Opinion 1/17 too. The principle of autonomy is indeed applicable to both intra- and extra-EU tribunals. In *Achmea*, the Court links autonomy to mutual trust among the Member States, but we know from the case-law that autonomy does not apply solely in the context of intra-EU relations, but also to the agreements between the Union and third States.²³ In other words, the principle of EU law autonomy is not “delimited by the principle of mutual trust” among the Member States.²⁴

The Court seems indeed to imply that *Achmea* may have consequences beyond purely intra-EU situations. The referring tribunal had asked whether the Czechoslovakia-Netherlands BIT violated Art. 344 TFEU, a provision introducing obligations for the Member States.²⁵ Nonetheless, the Court held that the BIT has an adverse effect “on the autonomy of EU law”²⁶ at large, a principle that is expressed “in particular” in Art. 344

²¹ *Ibid.*

²² L. PANTALEO, *The Participation of the EU in International Dispute Settlement*, cit., p. 62.

²³ See e.g. Court of Justice: opinion 1/91 of 14 December 1991, paras 30-46; opinion 1/92 of 10 April 1992, paras 18-35; opinion 1/00 of 18 April 2012, paras 11-46.

²⁴ See *a contrario* J.H. POHL, *Intra-EU Investment Arbitration after the Achmea Case*, cit., p. 15. See also pp. 22-23.

²⁵ Art. 344 TFEU: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein” (italics by the author). See *Achmea*, paras 14-17.

²⁶ *Achmea* [GC], cit., para. 59.

TFEU,²⁷ but that also applies to the Union as such. The interpretation of EU autonomy provided by the Court in *Achmea*, therefore, appears applicable *mutatis mutandis* in the context of Opinion 1/17, too.

Moreover, and most importantly, the test developed by the Court in *Achmea* does not refer to any intra-EU element and is consequently *prima facie* applicable to extra-EU tribunals too, as shown in the next section. The Court could have answered the preliminary question by using principles relevant only within the EU, such as non-discrimination or mutual trust. Such arguments were in fact raised before the national judge and the Court of Justice.²⁸ For instance, the Court could have ruled that intra-EU investment agreements are incompatible with EU law because they are premised on the lack of confidence in the judiciary system of the state of destination of the investment, which is *de facto* bypassed via arbitral tribunals. By contrast, a similar argument could not be made in the context of CETA, as there is no “mutual trust” between the EU and Canada, at least not under EU law.

Had the Court utilised a test based on mutual trust to solve *Achmea*, this judgment would not have raised significant expectations with respect to Opinion 1/17. On the contrary, the Court’s choice to employ standards potentially applicable to extra-EU tribunals may suggest that the *Achmea* test might be employed again in Opinion 1/17.

If so, would the CETA Tribunal pass the *Achmea* test?

III. APPLICATION OF THE *ACHMEA* TEST TO THE CETA TRIBUNAL

The central part of the *Achmea* judgment (paras 39-56) contains a test that, as noted above, has three elements. A tribunal (deciding disputes affecting the rights of individuals) that lacks all three elements is incompatible with the principle of autonomy of EU law. It is worth stressing that these three elements are alternative, not cumulative: if a tribunal has at least one of those elements, it is apparently compatible with EU law.

This section presents the test and applies it to the Slovakia-Netherlands tribunal and the CETA Tribunal. For ease of exposition, the three elements of the test are not discussed in the same order in which they are found in *Achmea*.

According to the *Achmea* test, a tribunal should, in the first place, be “situated within the judicial system of the EU”, meaning that it may be regarded as a “court or tribunal of a Member State within the meaning of Art. 267 TFEU”.²⁹ Only a “court or tribunal” would be capable of making preliminary references to the Court of Justice under Art. 267 TFEU, which may ensure the full effectiveness of the rules of the EU.³⁰ In *Ascendi*

²⁷ *Ibid.*, para. 32.

²⁸ *Ibid.*, para. 14; opinion of AG Wathelet delivered on 19 September 2017, case C-284/16, *Achmea*, paras 256 and 268.

²⁹ *Achmea* [GC], cit., para. 43.

³⁰ *Ibid.*, para. 43.

Beiras, the Court held that an arbitral tribunal could be considered as a court or tribunal under Art. 267 TFEU, *inter alia*, because it was created by a national law.³¹ Differently, the arbitral tribunal in *Achmea* “is not part of the judicial system of the Netherlands or Slovakia”, because of the “exceptional nature” of its jurisdiction compared with that of national courts.³² The distinction would seem to lie in the source of the tribunal’s authority: an international agreement rather than national law. Similar considerations might apply *a fortiori* to extra-EU tribunals. If a tribunal constituted by an agreement between two Member States is not part of the EU judicial system, a tribunal constituted via an agreement between the EU, the Member States and a *third state* (e.g. CETA) may hardly be part of that system.³³

The second condition of the *Achmea* test applies specifically to those bodies that are not part of the EU judicial system. To be compatible with EU law, they should adopt awards “subject to review by a court of a Member State”, which may then issue a preliminary request to the Court of Justice.³⁴ According to the Court, the standard of review ensured in the case of the Czechoslovakia-Netherlands BIT is insufficient. This agreement requires the arbitral tribunal to apply the United Nations Commission On International Trade Law (UNCITRAL) arbitration rules, which grant the tribunal the possibility to choose its seat and, consequently, the law applicable to the procedure governing judicial review of the validity of the award.³⁵ The arbitral tribunal in *Achmea* chose to sit in Frankfurt, which made German law applicable to the procedure governing judicial review. German law provides only for limited review, concerning, in particular, the validity of the arbitration agreement and the consistency with public policy. In light of the case-law of the Court of Justice, such a limited review might be compatible with EU law, as long as it concerns commercial arbitration.³⁶ However, the Court held in *Achmea* that “arbitration proceedings such as those referred to in Art. 8 of the BIT are different from commercial arbitration proceedings”, because they derive, not from the freely expressed wishes of the parties, but from a treaty by which the Member States “agree to remove from the jurisdiction of their own courts” disputes which may concern the application or interpretation of EU

³¹ *Rectius*, a decree having the force of a law, see Court of Justice, judgment of 12 June 2014, case C-377/13, *Ascendi Beiras*, paras 29 and 34; see also *Achmea* [GC], cit., para. 44; see also P. IANNUCELLI, *La Corte di giustizia e l'autonomia del sistema giurisdizionale dell'Unione europea*, cit., p. 294.

³² *Achmea* [GC], cit., para. 45.

³³ In *Achmea* the Court discusses the possibility that the arbitral tribunal might be a “court common to a number of Member States”, see *Achmea* [GC], cit., paras 47-49. Since the Court reaches a negative conclusion in *Achmea*, it can be assumed that the CETA Tribunal cannot be considered as a court common to the Member States, especially because it includes a non-EU state as a party.

³⁴ *Achmea* [GC], cit., para. 50.

³⁵ Art. 8, para. 5, of the Czechoslovakia-Netherlands BIT, cit.; *Achmea* [GC], cit., para. 51.

³⁶ See Court of Justice, judgment of 26 October 2006, C-168/05, *Mostaza Claro*, paras 34 to 39; see also *Achmea* [GC], cit., para. 54.

law.³⁷ Again, it would seem that the problem lies with the source of the tribunal's authority: being constituted via an international agreement, an international arbitral tribunal does not benefit from the lax standard of review that is granted in the case of arbitration set up via a contract.³⁸ Being CETA an international agreement, as much as the Czechoslovakia-Netherlands BIT, one may argue that the standard for judicial review of the awards of the CETA Tribunal should be as high as that applicable to the BIT. Considering that CETA allows the parties to identify the arbiters' seat,³⁹ and consequently the law applicable to the review of awards, there is the possibility that those awards might not be subject to sufficient review by a court of a Member State.⁴⁰

The third – and most crucial – condition is that the arbitral tribunal should not resolve disputes “liable to relate to the interpretation or application of EU law”.⁴¹ The Czechoslovakia-Netherlands BIT expressly affirms that the arbitral tribunal decides on the basis of the law, taking into account, *inter alia*, the laws of the contracting party and international agreements between them.⁴² As EU law is both a law of the parties and the product of agreements with them, the arbitral tribunal could inevitably be called to interpret it.⁴³

What about the CETA Tribunal? The negotiators of this agreement sought to avoid conflicts with the Court of Justice, by stressing in Art. 8.31, para. 2, CETA that the Tribunal cannot “determine the legality of a measure under domestic law” and that its appreciation of domestic law “shall not be binding upon the courts” of the parties. Therefore, the awards of the Tribunal do not formally have the effect of “binding” the Union to a particular interpretation of EU rules - something that the Court had found problematic in its earlier case-law.⁴⁴

However, in *Achmea* the Court seems to have raised the bar: the question is not whether the tribunal can adopt interpretations of EU law “binding” on Union institutions, but whether the disputes before the tribunal are liable to relate to the “interpretation” of EU law. The mere fact that a tribunal decides a dispute affecting individuals by interpreting EU law may trigger an interference with the autonomy of EU law,⁴⁵ possibly

³⁷ *Achmea* [GC], cit., para. 55.

³⁸ See also J.H. POHL, *Intra-EU Investment Arbitration after the Achmea Case*, cit., p. 21.

³⁹ See e.g. Art. 8.23, para. 2, let. c), allowing the submission of claims under UNCITRAL rules; cf. Art. 18 of the UNCITRAL Arbitration rules.

⁴⁰ In addition, one may note that CETA allows investors to submit claims under ICSID rules, which do not allow for a review of the award, see CETA, Art. 8.23, para. 2, let. a) and b), as well as Art. 53, para. 1, of the ICSID Convention.

⁴¹ *Achmea* [GC], cit., para. 39.

⁴² Art. 8, para. 6, of the Czechoslovakia-Netherlands BIT, cit.

⁴³ *Achmea* [GC], cit., paras 40-42.

⁴⁴ Cf. opinion 1/00, cit., para. 13; opinion 2/13, cit., para. 184. See further A. DIMOPOULOS, *Achmea: The principle of Autonomy and Its Implications for Intra and Extra-EU BITs*, cit.

⁴⁵ P. IANNUCELLI, *La Corte di giustizia e l'autonomia del sistema giurisdizionale dell'Unione europea*, cit., p. 291.

because such an interpretation might generate a “factual pressure” on the conduct of the Member States and, hence, on the Court and its interpretative monopoly.⁴⁶

It is not necessary that the tribunal actually interprets EU law (something that the *Achmea* tribunal was not doing): the “abstract possibility”⁴⁷ for the tribunal to interpret EU law is sufficient to render the Czechoslovakia-Netherlands agreement incompatible with EU law. Such an attention for purely potential situations is not surprising, considering that in Opinion 2/13 the Court had found that the “very existence of [...] a possibility” of conflicts between the European Convention of Human Rights and EU primary law triggered a violation of autonomy.⁴⁸

Therefore, from the perspective of Opinion 1/17, the relevant question is not “may the CETA Tribunal bind the EU to an interpretation of EU law”, but rather “may the CETA Tribunal interpret EU law”? At first sight, this would not seem to be the case. According to Art. 8.31, para. 2, CETA, in determining the consistency of a measure with CETA, the Tribunal may consider the domestic law of the disputing Party only “as a matter of fact”. This seems understandable because, as a matter of principle, an international body should consider domestic law as a matter of fact.⁴⁹ Nonetheless, one cannot exclude that the CETA Tribunal may interpret EU law when it adjudicates potential violations of CETA. Art. 8.31, para. 2, CETA implicitly acknowledges this possibility, by admitting that the Tribunal may give a “meaning” to domestic law – albeit one nonbinding for domestic courts. Furthermore, Art. 8.28, para. 2, admits that the CETA appellate Tribunal may reverse a Tribunal’s award based on, *inter alia*, “manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law”.⁵⁰ If there can be two “appreciations” of domestic law, one might assume that such law is not a fact, but can be “appreciated”, viz. interpreted, in different manners.⁵¹

CETA negotiators presumably anticipated this issue, since they agreed, in Art. 8.31, that the Tribunal is not free in the appreciation of domestic law but must follow the “prevailing interpretation” given to the domestic law by the “courts or authorities” of the

⁴⁶ S. HINDELANG, *Repellent Forces: The CJEU and Investor-State Dispute Settlement*, in *Archiv des Völkerrechts*, 2015, p. 68 *et seq.*, pp. 74-76; see also H. LENK, *An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada*, in *European Papers*, Vol. 1, 2016, No. 2, www.europeanpapers.eu, p. 665 *et seq.*

⁴⁷ S. WUSCHKA, *Investment Protection and the EU after Achmea*, in *Zeitschrift für Europarechtliche Studien*, 2018, p. 25 *et seq.*, p. 38.

⁴⁸ See e.g. opinion 2/13, cit., para. 208; see also para. 109. See further P. EECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955 *et seq.*, particularly pp. 966-967, and 974-979.

⁴⁹ See Permanent Court of International Justice, *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, judgment of 25 May 1926, p. 19.

⁵⁰ Art. 8.28, para. 2, CETA.

⁵¹ See H. LENK, *An Investment Court System for the New Generation of EU Trade and Investment Agreements*, cit., p. 674.

parties. It is remarkable that the negotiators tried to bind the CETA Tribunal to the domestic practice of the parties, as this is generally not the case.⁵² Nonetheless, the CETA tribunal might have a certain latitude in the identification of what constitutes a “prevailing interpretation” of EU law: is it only the interpretation of the Court of Justice, or does it include the decisions of the EU General Court or those of national courts? Should the CETA Tribunal take into account the practice of non-judicial “authorities” at the EU or national level – such as the European Commission or national governments – as Art. 8.31 CETA seems to suggest? It cannot be excluded that the CETA Tribunal might select the “prevailing interpretation” of EU law that it prefers. By choosing an interpretation of EU law, it would *de facto* interpret it.

A “prevailing interpretation” of EU law might not even exist, as investors can bring claims against recently enacted laws, which have never been interpreted by domestic “courts or authorities”. For instance, in 2011 Philip Morris sued Australia before its plain tobacco packaging law was even adopted.⁵³ Similarly, if the Union introduced restrictive tobacco packaging rules, a Canadian tobacco company might sue the European Union before the CETA Tribunal. The CETA Tribunal would then have to give a “meaning” to the EU measure providing for the packaging rules before the Court of Justice has the chance to do so. Therefore, there is at least the abstract possibility that the CETA Tribunal might provide its own interpretation of EU law.⁵⁴

The CETA Tribunal thus seems to lack all the elements contained in the *Achmea* test: *i*) it is not “situated within the judicial system of the EU”, *ii*) its awards may not be subject to sufficient “review by a court of a Member State”, and *iii*) it might resolve disputes “liable to relate to the interpretation or application of EU law”.

IV. CONCLUSION: AN OPINION FORETOLD?

It would seem that the Court drafted *Achmea* with Opinion 1/17 in mind, but its message appears contradictory. On the one hand, the Court obliquely indicates that the findings of *Achmea* are not relevant for Opinion 1/17. On the other hand, *Achmea* introduces a test applicable to both intra- and extra-EU tribunals, including the one at issue in Opinion procedure 1/17.

The ambiguities of *Achmea* raise four questions. In the first place, does *Achmea* imply that all international dispute settlement mechanisms are inevitably incompatible

⁵² Cf. e.g. ICSID, award of 1 November 1999, case no. ARB (AF)/97/12, *Azinian and Others v. Mexico*, para. 86.

⁵³ See Notice of Arbitration, Australia-Hong Kong Agreement for the Promotion and Protection of Investments, 21 November 2011, www.italaw.com.

⁵⁴ See P. IANNUCELLI, *La Corte di giustizia e l'autonomia del sistema giurisdizionale dell'Unione europea*, cit., p. 303; see also N. DE SADELEER, *Tribunaux d'investissement sur la sellette : CJUE, gde ch., 6 mars 2018, Achmea, aff. C-284/16*, in *Revue des affaires européennes*, 2018, p. 117 et seq., p. 125.

with EU law? It does not. As noted in section II, the *Achmea* test is potentially applicable only to tribunals deciding disputes affecting individuals' rights, such as those at issue in *Achmea* and Opinion 1/17. It is not applicable to organs deciding disputes between international subjects, such as the WTO Dispute Settlement Body.

Should the Court apply the *Achmea* test in Opinion 1/17? Arguably, yes. The Court might possibly hold in Opinion 1/17 that the *Achmea* test cannot apply to extra-EU tribunals, as it was conceived for intra-EU tribunals. However, it is difficult to imagine why the *Achmea* test, which never refers to the intra-EU characterisation of the case, should not apply in Opinion 1/17. It has been argued that a teleological interpretation of the Treaties might lead the Court to be lenient with CETA: the impossibility to include investor-to-state mechanisms in international agreements would allegedly constitute an obstacle for the EU's external policy.⁵⁵ However, one should take all EU external objectives into account.⁵⁶ Investor protection mechanisms might arguably lead to "regulatory chill", as public authorities might refrain from measures taken in the public interest because of the possibility of investment arbitration.⁵⁷ Investment tribunal may indeed hold public authorities liable for measures that are the result of choices of economic or social policy,⁵⁸ something that is normally excluded by domestic courts, precisely to avoid a regulatory chill.⁵⁹ Although CETA mentions the "right to regulate" of the parties,⁶⁰ it does not seem to dramatically reduce the scope of manoeuvre of its Tribunal and, hence, the risk of regulatory chill.⁶¹ It cannot be excluded that CETA might *de facto* prevent the Union to foster objec-

⁵⁵ See *ibid.*; S. WUSCHKA, *Investment Protection and the EU after Achmea*, cit., p. 45.

⁵⁶ See Arts 3, para. 5, and 21 TEU, as well as Arts 205 and 207, para. 1, TFEU.

⁵⁷ See e.g. K. TIENHAARA, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in C. BROWN and K. MILES (eds), *Evolution in International Treaty Law and Arbitration*, New York: Cambridge University Press, 2011, p. 606 *et seq.*; R. LENCUCHA, R. LABONTE, J. DROPE, *Tobacco Plain Packaging: Too Hot for Regulatory Chill*, in *The Lancet*, 2015, p. 1723 *et seq.*; K. PELC, *What Explains the Low Success Rate of Investor-State Disputes?*, in *International Organization*, 2017, p. 559 *et seq.*

⁵⁸ See e.g. ICSID, award of 23 May 2003, case no. ARB (AF)/00/2, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, para. 154.

⁵⁹ See for instance Court of Justice: judgment of 9 September 2008, joined cases C-120/06 P and C-121/06 P, *FIAMM*, paras 171-172; judgment of 13 June 1972, joined cases 9/71 and 11/71, *Compagnie d'approvisionnement, de transport et de crédit and Grands Moulins de Paris*, para. 13; judgment of 25 May 1978, joined cases 83/76, 94/76, 4/77, 15/77 and 40/77, *Bayerische HNL Vermehrungsbetriebe and Others*, para. 5. See also L. JOHNSON, O. VOLKOV, *Investor-State Contracts, Host-State 'Commitments' and the Myth of Stability in International Law*, in *American Review of International Arbitration*, 2013, p. 361 *et seq.*

⁶⁰ Art. 8.9 CETA. See also C. TITI, *Le «droit de réglementer» et les nouveaux accords de l'Union européenne sur l'investissement*, in *Journal du droit international*, 2015, p. 39 *et seq.*; D. NYER, *The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement*, in *Journal of International Arbitration*, 2015, p. 697 *et seq.*, p. 700-703; F. HOFFMEISTER, G. ALEXANDRU, *A First Glimpse of Light on the Emerging Invisible EU Model BIT*, in *The Journal of World Investment and Trade*, 2014, p. 379 *et seq.*, pp. 394-395.

⁶¹ See e.g. N. PIGEON, *La mise en œuvre de la compétence de l'Union européenne en matière d'investissements internationaux*, PhD Thesis, University Paris I, 2018, pp. 535-545; M. PAPARINSKIS, *Inter-*

tives such as improving the quality of the environment or the sustainable management of natural resources.⁶² A teleological interpretation of the Treaties might thus suggest that the Court should not be particularly lenient with the CETA Tribunal.

If one assumes that the *Achmea* test should apply to the CETA Tribunal, a third question comes to the fore: would the CETA Tribunal fail the *Achmea* test? Probably, yes. The negotiators sought to render CETA more palatable to the Court of Justice, by restraining its ability to interpret domestic law,⁶³ by enhancing its transparency, and by characterising it as a permanent tribunal.⁶⁴ These elements might perhaps convince the Court to apply the *Achmea* test loosely in Opinion 1/17, based on the assumption that the CETA Tribunal will exercise restraint. However, such a scenario does not appear very likely. Investment tribunals are not known for their predictability and restraint⁶⁵ and the Court of Justice is generally wary of any potential interference with the autonomy of EU law.⁶⁶ In Opinion 2/13, in particular, it was very rigorous with a court that protects the human rights of individuals.⁶⁷ One may expect it to be equally rigorous with a tribunal that protects the economic interests of investors.

Nonetheless, it is impossible to predict how the Court will rule in Opinion 1/17 because the indications of *Achmea* are contradictory. Such contradictions lead to a fourth question: why did the Court distinguish *Achmea* from Opinion 1/17 in the introduction and conclusion of the judgment, but solved the case through a test potentially applicable to CETA? One can only formulate hypotheses in this respect. The apparent contradictions in *Achmea* may be the product of dissension within the Court or might have been an attempt at preserving some room of manoeuvre for the solution of future cases. Alternatively, the contradictions might be the accidental consequence of a practical

national Investment Law and the European Union: A Reply to Catharine Titi, in *European Journal of International Law*, 2015, p. 663 *et seq.*, p. 669.

⁶² Art. 21, para. 2, let. f), TEU.

⁶³ In addition, CETA contains rules for determining the respondent party which are arguably aimed at preventing the Tribunal from passing judgment on issues of EU law, see C. CONTARTESE, L. PANTALEO, *Division of Competences, EU Autonomy and the Determination of the Respondent Party: Proceduralisation as a Possible Way-Out?*, in E. NEFRAMI, M. GATTI (eds), *Constitutional Issues of EU External Relations Law*, Baden-Baden: Nomos, 2018, p. 409 *et seq.*, pp. 436-438.

⁶⁴ H. LENK, *An Investment Court System for the New Generation of EU Trade and Investment Agreements*, cit.

⁶⁵ See e.g. UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, United Nations, 2012, pp. 11 and 91; S. HINDELANG, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law*, in European Parliament Directorate-General for External Policies, *Investor-State Dispute Settlement Provisions in the EU's International Investment Agreements*, www.europarl.europa.eu, 2014, p. 39 *et seq.*, pp. 73-75.

⁶⁶ See e.g. B. DE WITTE, *A Selfish Court?: The Court of Justice and the Design of International Dispute Settlement beyond the European Union*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Oxford: Hart, 2014, p. 33 *et seq.*

⁶⁷ See opinion 2/13, cit., particularly paras 109 and 208.

choice. The Court could use the principle of mutual trust to solve *Achmea*, thus distinguishing it from Opinion 1/17. However, the Court might have chosen not to emphasise mutual trust because this principle is problematic, given the authoritarian tendencies of some Member States, which do not exactly elicit “trust”.

Another scenario is possible: the Court might have formulated *Achmea* strategically, to set a precedent that legitimises Opinion 1/17 *ex ante*. The composition of the Court might be remarkable: while Opinion 1/09, Opinion 2/13, and Opinion 1/17 were assigned to the plenary, *Achmea* was decided by a Grand Chamber.⁶⁸ A majority of the Grand Chamber, which might be a minority in the plenary, may have intended to trail-blaze the path for Opinion 1/17. To throw critics off, the Court might have deliberately inserted contradictory elements in *Achmea*, thereby preventing one from concluding with certainty that Opinion 1/17 has indeed been foretold.

⁶⁸ See further B. ARP, *Comment to Achmea*, cit., p. 469.

