



ARTICLES

SPECIAL SECTION – THE *ACHMEA* CASE

BETWEEN INTERNATIONAL LAW AND EUROPEAN UNION LAW

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ACHMEA: CONSEQUENCES ON APPLICABLE LAW AND ISDS CLAUSES IN EXTRA-EU BITs AND FUTURE EU TRADE AND INVESTMENT AGREEMENTS

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ABSTRACT: In its judgment in *Achmea* (judgment of 6 March 2018, case C-284/16 [GC]), the Court of Justice ruled that an investor-State arbitration clause in a bilateral investment treaty concluded between two EU Member States was contrary to the principle of the autonomy of the EU legal order. In this *Article*, I suggest that the *Achmea* judgment could have implications for the validity, not only of ISDS clauses in intra-EU BITs, but also of ISDS and applicable law clauses in BITs and other agreements concluded by the EU (or its Member States) with third States.

KEYWORDS: intra-EU arbitration – investment law – investor-State dispute settlement – autonomy of EU law – extra-EU BIT – CETA.

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I. INTRODUCTION: THE *ACHMEA* JUDGMENT

In its judgment of 6 March 2018 in *Achmea*,¹ the Court of Justice ruled that an investor-State arbitration clause in a bilateral investment treaty (BIT) concluded between two EU Member States (intra-EU BIT, in the case at hand between the Netherlands and Czechoslovakia) violated EU law and was contrary to the principle of the autonomy of the EU legal order.

This judgment marked a strong victory for the European Commission which had long claimed that such intra-EU BITs were incompatible with the EU legal order.²

In that case, Achmea, a Dutch insurance company which had established a subsidiary in Slovakia in order to market private sickness insurance products, had initiated investor-State arbitral dispute settlement (ISDS) proceedings against Slovakia following the adoption of new regulations governing the insurance sector. The proceedings were initiated on the basis of a 1991 BIT between the former Czechoslovakia and the Netherlands (the Czechoslovakia-Netherlands BIT).

In 2012, the arbitral tribunal ruled in favour of Achmea and ordered Slovakia to pay Achmea damages of approximately 22 millions of euro.

Subsequently, Slovakia sought the annulment of that award before the German courts (the place of arbitration was Germany) on the grounds that the arbitration clause in the Czechoslovakia-Netherlands BIT was contrary to:

- Art. 344 TFEU which prohibits EU Member States from submitting a dispute concerning the interpretation or application of EU law to any method of settlement other than those for which the EU Treaties provide;
- Art. 267 TFEU which provides for a preliminary ruling mechanism that ensures that only the CJEU gives a final legally binding interpretation of EU law;
- Art. 18 TFEU which prohibits discrimination on grounds of nationality.

The German court decided to stay the proceedings and referred these questions to the CJEU for a preliminary ruling.

On 6 March 2018, the Court of Justice ruled that Arts 267 and 344 TFEU preclude an arbitral clause such as that found in the Czechoslovakia-Netherlands BIT. It therefore was not necessary to examine whether such a clause might also be discriminatory because investors of other Member States were precluded from having recourse to arbitration against Slovakia.

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

² See European Commission Press Release of 15 June 2015, *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, in which the Commission announced that it had initiated infringement proceedings against five Member States requesting them to terminate their intra-EU BITs. The European Commission also requested the authorization to participate in intra-EU investor-State arbitration proceedings as *amicus curia* in (at least) eleven cases in order to persuade the tribunals to decline their jurisdiction, F. DIAS SIMÕES, *A Guardian and a Friend? The European Commission's Participation in Investment Arbitration*, in *Michigan State International Law Review*, 2017, p. 257 *et seq.*

The Court considered Arts 267 and 344 TFEU together. Its starting point was that, as the CJEU had previously explained in Opinion 2/13 on the accession of the EU to the European Convention on Human Rights,³ those provisions help to preserve the principle of the autonomy of the EU legal order.⁴ Based on that premise, the CJEU then applied a three-step analysis in order to establish whether an arbitral clause such as the one found in the Czechoslovakia-Netherlands BIT undermined that autonomy: 1) whether arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT needed to apply and interpret EU law; 2) whether arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT could request a preliminary ruling from the CJEU and 3) whether judicial review of awards rendered pursuant to the Czechoslovakia-Netherlands BIT guaranteed the autonomy of the EU legal order?

For the purpose of this *Article*, I will only focus on the first question (*i.e.* whether arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT need to apply and interpret EU law), given that the answer to that question might have strong implication for the validity of ISDS and applicable law clauses in BITs and other agreements concluded by the EU (or its Member States) with third States.

In answering this question, the CJEU focused on the provision in the Czechoslovakia-Netherlands BIT (*i.e.* Art. 8, para. 6) laying down the law to be applied by an arbitral tribunal in resolving an investor-State dispute.

The CJEU noted that the applicable law included the domestic law of the Member State concerned and other relevant agreements between the parties to the treaty.⁵ It followed that EU law (in particular, the fundamental freedoms), which forms part of the national laws of Member States, may be part of the applicable law. As a result, the CJEU found that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT might need to interpret and apply EU law.⁶ Since such application and interpretation would be made by an arbitral tribunal (*i.e.* a body which does not form part of the EU judicial system), the CJEU found that such application and interpretation could potentially affect the autonomy of the EU legal order.

In light of this finding, it was therefore necessary for the CJEU to turn to the second step of the analysis and to analyse whether, irrespective of this interpretation or application of EU law by an arbitral tribunal, the autonomy of the EU legal order could still be safeguarded by means of preliminary references made by such arbitral tribunal to the CJEU as well as by judicial review of the arbitral award handed down by this tribunal.

Ultimately, the CJEU found that 1) arbitral tribunals established pursuant to intra-EU BITs were not allowed to refer preliminary questions to the CJEU⁷ and 2) that invest-

³ Court of Justice, opinion 2/13 of 18 December 2014.

⁴ *Achmea*, cit., para. 32 *et seq.*

⁵ *Ibid.*, para. 40.

⁶ *Ibid.*, para. 42.

⁷ *Ibid.*, para. 49.

ment arbitration tribunals were not subject to sufficient judicial review in a manner that ensures the full effectiveness of EU law.⁸

The CJEU therefore concluded that Arts 267 and 344 TFEU preclude Member States from concluding agreements that include a provision on arbitration such as Art. 8 of the Czechoslovakia-Netherlands BIT.

II. THE EUROPEAN COMMISSION'S ASSESSMENT AND THE EU MEMBER STATES' POSITION

Shortly after the CJEU delivered its judgment in *Achmea*, the European Commission published a communication on the protection of intra-EU investments in which it summarized its views on the *Achmea* judgment.⁹

According to the Commission, that judgment

“implies that all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the *Achmea* judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITS”.

In the *Q&A*¹⁰ that accompanied the Communication, the European Commission also emphasised that the *Achmea* judgment does not have consequences for agreements with third States. According to the Commission, *Achmea* “only concerns intra-EU disputes” and “different legal considerations apply to external EU investment policies”.

On 15 January 2019, the EU Member States declared their commitment to terminate all BITs between themselves.¹¹

⁸ *Ibid.*, para. 56.

⁹ Communication COM(2018) 547 final of 19 July 2018 from the Commission on the protection of intra-EU investment.

¹⁰ European Commission Fact Sheet of 19 July 2018, *Commission provides guidance on protection of cross-border EU investments – Questions and Answers*, europa.eu.

¹¹ 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, 15 January 2019, ec.europa.eu. That declaration also extended the findings of *Achmea* to arbitration proceedings arising out of the 1994 Energy Charter Treaty. It was signed by 22 EU Member States with the exception of Luxembourg, Malta, Finland, Hungary, Slovenia and Sweden. On 16 January 2019, Luxembourg, Malta, Finland, Slovenia and Sweden on the one hand, and Hungary, on the other hand, signed respectively two other declarations emphasizing that, according to them, the judgment of the CJEU in *Achmea* was silent on the issue of the validity of arbitration proceedings arising out of the Energy Charter Treaty.

III. POTENTIAL CONSEQUENCES FOR EXISTING BITs, CETA AND FUTURE TRADE AND INVESTMENT AGREEMENTS

In light of the CJEU's findings in the first question, I suggest in this *Article* that – contrary to the position expressed by the European Commission in its communication of 19 July 2018 – the *Achmea* judgment could have implications for the validity of ISDS clauses BITs and other agreements concluded by the European Union (or its Member States) with third States (extra-EU BITs), such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA).¹²

The starting point of my analysis is the fact that the CJEU's assessment of the choice of law clause in Art. 8, para. 6, of the Czechoslovakia-Netherlands BIT was central to the Court's findings. That clause defined the law to be applied, in resolving disputes between a contracting party and an investor, by arbitral tribunals established pursuant to that BIT. The applicable law included "the law in force of the Contracting Party concerned" and "other relevant agreements between the Contracting Parties". Taking into account that EU law is part of the law in force in every Member State and derives from an international agreement between the Member States, the CJEU concluded that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT might potentially¹³ apply and interpret EU law. Given that such interpretation and application of EU law by arbitrators affected the autonomy of the EU legal order, the CJEU concluded that the arbitration clause contained in the Czechoslovakia-Netherlands BIT was contrary to EU law. The CJEU also made clear that other international agreements concluded by the EU, and thus including other extra-EU BITs, must also respect the autonomy of the EU legal order.¹⁴

With this in mind, I argue that, depending on the applicable law clause contained in a particular BIT, the *Achmea* judgment could have implications for extra-EU BITs and international agreements concluded by the European Union.

¹² See also, M. GATTI, *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?*, in *European Papers*, 2019, Vol. 4, No 1, forthcoming, www.europeanpapers.eu.

¹³ It is important to note that, although an investor may rely on a BIT of which the applicable law clause provides for the application and interpretation of the host State's law, that does not necessarily imply that EU law will be applied and interpreted by the arbitral tribunal having jurisdiction to hear that dispute. Indeed, the national measure at stake in that dispute could be a purely domestic law which does not, whatsoever, emanate from neither EU's primary (*i.e.* EU Treaties) nor EU secondary law (*i.e.* EU Regulations or EU Directives). For example many investment arbitration cases initiated against Spain resulted in the removal of purely domestic measures (such as feed-in tariffs) adopted in favored of the solar industry.

¹⁴ *Achmea*, *cit.*, para. 57. This was also confirmed by AG Bot in his Opinion on whether the investment court system (ICS) in CETA is compatible with EU law (see Opinion of AG Bot delivered on 29 January 2019, opinion 1/17). AG Bot also emphasized that, unlike what was the case for the intra-EU agreement at issue in *Achmea*, international agreements with non-Member States such as CETA are not based on mutual trust between the parties. Instead, they are based on reciprocity between the European Union and a third State (*ibid.*, paras 72-85, 107-109).

III.1. VARIOUS FORMS OF APPLICABLE LAW CLAUSES

Applicable law clauses in BITs can take many different forms.¹⁵ Some BITs do not contain any rules on the applicable law,¹⁶ other BITs contain clauses that refer exclusively to the principles of international law. Certain BITs merely refer to international law including the substantive rules of the BIT itself.¹⁷ Finally, there are BITs that contain applicable law clauses that combine the host state law and international law.¹⁸ Finally, a BIT might provide for the application of the BIT only.¹⁹

In the light of those elements, BITs can be classified into three broad categories: 1) BITs which are silent on the law applicable in investment disputes, and BITs whose applicable law clause contains a reference to the domestic law of the host State (which for EU Member States, includes also EU law) (section III.2); 2) BITs whose applicable law clause provides for the sole application and interpretation of international law (section III.3); and 3) BITs whose applicable law clause provides for the sole application and interpretation of the provisions contained in the BIT (section III.4).

III.2. EXTRA-EU BITS WHICH ARE SILENT ON THE APPLICABLE LAW IN INVESTMENT DISPUTES, AND EXTRA-EU BITS WHOSE APPLICABLE LAW CLAUSE CONTAINS A REFERENCE TO THE DOMESTIC LAW OF THE HOST STATE

Following *Achmea*, it is clear that intra-EU BITs whose applicable law clause contains a reference to the domestic law of the host State are contrary to the autonomy of the EU legal order. Likewise, the *Achmea* reasoning likely applies also to extra-EU BITs which contain a similar applicable law clause, since investor-State disputes under those extra-EU BITs are also likely to trigger questions relating to the application and interpretation of EU law.²⁰

In the same vein, the reasoning of the CJEU in *Achmea* can be extended to extra-EU BITs which are silent on the issue of the applicable law. Indeed, when a BIT is silent on

¹⁵ R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, Oxford: Oxford University Press, 2012, p. 288 *et seq.*

¹⁶ As explained by Yas Banifatemi, BITs that do not contain rules on applicable law are by no means exceptions. Y. BANIFATEMI, *The Law Applicable in Investment Treaty Arbitration*, in K. YANNAKA-SMALL (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, Oxford: Oxford University Press, 2010, p. 200.

¹⁷ E.g. Art. 26, para. 4, of the Energy Charter Treaty which provides that arbitral tribunals in investor-State disputes under that Treaty shall decide the issues in dispute in accordance with the Energy Charter Treaty itself and applicable rules and principles of international law.

¹⁸ E.g. Art. 10, para. 5, of the 1992 Spain-Argentina BIT.

¹⁹ E.g. ICSID, award of 27 June 1990, case no. ARB/87/3, *AAPL v. Sri Lanka*, in which the tribunal found that, although the BIT at stake (i.e. the 1980 UK-Sri Lanka BIT) did not provide for an applicable law clause, by arguing their case on the basis of that BIT, the parties had expressed their choice of the BIT as applicable law (see: R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, cit., p. 291).

²⁰ As discussed before, the CJEU in *Achmea* found that the autonomy of the EU legal order could be undermined by the mere potential application of EU law by an arbitral tribunal.

the issue of the applicable law, the application of the residual rules provided for in the arbitration rules chosen by the parties to the dispute will resolve the matter. Typically, the parties will opt for the arbitration rules of the ICSID Convention or of the United Nations Commission on International Trade Law (UNCITRAL).

According to Art. 42, para. 1, of the ICSID Convention, “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”. Art. 35 of the 2010 UNCITRAL Arbitration Rules provides that “[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate”.

Consequently, an arbitral tribunal established pursuant to one of those types of BIT might apply and interpret the domestic law of the host State (including EU law since EU law is part of the Member States’ domestic law). That would be contrary to the autonomy of the EU legal order. Therefore, in light of *Achmea*, extra-EU BITs that are silent on the issue of the applicable law could indeed be contrary to EU law.

III.3. EXTRA-EU BITS WHOSE APPLICABLE LAW CLAUSE PROVIDES FOR THE APPLICATION AND INTERPRETATION OF INTERNATIONAL LAW

A separate question concerns the validity of ISDS provisions in extra-EU BITs whose applicable law clause provides for the application and interpretation of the principles of international law.²¹

In theory, EU law is international law.²² Therefore extra-EU BITs containing applicable law clauses which allow for the application of international law are susceptible to be contrary to the autonomy of the EU legal order.

However, EU law enjoys a *sui generis* nature which “combines features both of an international organization and of a [S]tate”.²³ Conceptually it could therefore be argued

²¹ E.g. Art. 26 of the Energy Charter Treaty or Art. 9 of the 1991 France-Hungary BIT.

²² In *Van Gend en Loos* (judgment of 5 February 1963, case C-26/62), the CJEU found that the EU constituted “a new legal order of international law” (p. 12). In *Achmea*, cit., para. 41, the CJEU found that “EU law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States”. In *Vattenfall v. Germany* (ICSID, award of 31 August 2018, case no. ARB/12/12, paras 148-155), the arbitral tribunal constituted of Albert-Jan Van Den Berg (President), Charles N. Brower and Vaughan Lowe found that “EU law, to the extent of the TEU and the TFEU, including their interpretation by the ECJ, constitutes a part of international law”. However, the tribunal did not “consider it necessary or appropriate to determine whether other aspects of EU law that are not rooted in the EU Treaties also constitute international law”. Despite EU law being found to be part of international law, the tribunal refused to take account of EU law for the purposes of interpretation of Art. 26 of the Energy Charter Treaty.

that EU law does not form part of the “traditional” notion of international law. Under this theory, extra-EU BITs whose applicable law clause provides for the application and interpretation of international law would exclude the possibility of applying and interpreting EU law or the host State’s domestic law and thus the autonomy of the EU legal order would remain unaffected.

III.4. EXTRA-EU BITS WHOSE APPLICABLE LAW CLAUSE PROVIDES FOR THE SOLE APPLICATION AND INTERPRETATION OF THE PROVISIONS CONTAINED IN THE BIT

If an applicable law clause contained in an Extra-EU BIT solely provides for the application of the substantive provisions contained in the BIT itself, the findings of the CJUE in *Achmea* might also not be applicable to such BITs.²⁴ Indeed, such an applicable law clause excludes the possibility of applying and interpreting EU law or the host State’s domestic law.

One might however argue that an EU measure (or its national implementation by a Member State) may still be, by itself, the cause of violations of international obligations. Therefore, when analyzing the validity and the effects of such a measure, a tribunal may still be called upon to examine the content of (and sometimes interpret) EU law if such law constitutes a breach of the host State’s obligations under the BIT. In such a case, the tribunal would necessarily examine the exact meaning and consequences of that law, and such examination would infringe the principle of autonomy of EU law.

However, such a position disregards the fact that international courts and tribunals with jurisdiction to consider whether a State has complied with its international treaty obligations, and which therefore might be called upon to scrutinise national law, typically consider the meaning of national law to be a question of fact which is therefore not subject to interpretation.²⁵ Art. 8.31 of CETA has expressly clarified that:

²³ K. ZIEGLER, *The Relationship Between EU Law and International Law*, in D. PATTERSON, A. SODERSTON (eds), *A Companion to EU and International Law*, Oxford: Wiley-Blackwell, 2016, p. 2.

²⁴ Opinion of AG Bot, opinion 1/17, cit., para. 110.

²⁵ In Permanent Court of International Justice, judgment of 25 May 1925, *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), the Court found that “[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention”. In addition, the WTO panels and Appellate Body, have routinely repeated that municipal law is an issue of fact. See, WTO AB, panel report of 19 December 1997, no. WT/DS152/R, in *India v. United States – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 66 and WTO, panel report of 28 February 2000, case no. ds152, *European Communities v. United States, US – Section 301*, para. 7.18. The statement by the United States at the meeting of the WTO Dispute Settlement Body held in Geneva on the 27 August 2018, available at geneva.usmission.gov, gives additional examples of cases in which the WTO panels have repeated this proposition (p. 16 *et seq.*).

"1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party".

Nevertheless, that principle according to which national law should be considered as facts before international courts and tribunal is "debatable".²⁶ According to Sharif Bhuiyan, it is "problematic in that it fails to take account that rules of national law do not lose their normative quality in relation to the rights, obligations and transactions that they seek to regulate, simply because their content or meaning is determined as a factual matter and on the basis of evidence".²⁷ For instance, in the *Serbian Loans cases*, the Permanent Court of International Justice recognized that it had "to decide as to the meaning and scope of a municipal law".²⁸ Likewise, in *Brazilian Loans*, that same court sought the possibility to make a just appreciation of the interpretation of national law by domestic courts and ruled that in case of divergent interpretation, it will "select the interpretation which it considers most in conformity with the law".²⁹ According to Sharif Bhuiyan, "this task of selecting the most appropriate interpretation from amongst the diverging interpretations by domestic courts cannot be performed without interpreting, to a certain degree, the relevant national law".³⁰

Whether this express reference in Art. 8.31 of CETA to the obligation for the tribunal to consider municipal law as a matter of fact is sufficient to safeguard the autonomy of the EU legal order awaits a response from the CJEU.³¹ The CJEU will certainly address this question in its upcoming Opinion on the compatibility with the EU Treaties, including fundamental rights, of the chapter on investor-State dispute settlement (chapter 8)

²⁶ C. W. JENKS, *Prospects of International Adjudication*, 1964 quoted in J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, 2012, p. 52.

²⁷ S. BHUIYAN, *National Law in WTO Law*, cit., p. 42.

²⁸ Permanent Court of International Justice, judgment of 12 July 1929, *Payment of Various Serbian Loans Issued in France* (France v. Kingdom of the Serbs, Croats and Slovenes).

²⁹ Permanent Court of International Justice, judgment of 12 July 1929, *Payment in Gold of Brazilian Federal Loans Contracted in France* (France v. Brazil).

³⁰ S. BHUIYAN, *National Law in WTO Law*, cit., p. 215, footnote 29.

³¹ In his Opinion, AG Bot found that the fact that Art. 8.31 of CETA provides that EU law and the law of the Member States (which includes EU law) will be considered as a question of fact was one of the key features to find that the ICS in CETA complied with EU law (Opinion of AG Bot, opinion 1/17, cit., paras 110, 129, 130 and 156).

in CETA. This answer will hopefully provide clarity on the manner in which applicable law clauses should be drafted in future trade and investment agreements (such as a future UK-EU post-Brexit partnership).

IV. CONCLUSION

In this *Article*, I have argued that the *Achmea* judgment could have implications for the validity, not only of ISDS clauses in intra-EU BITs, but also of ISDS clauses in BITs and other agreements concluded by the EU (or its Member States) with third States.

I have also highlighted that, in negotiating future trade and investment agreements with third States, negotiators will need to apply particular care to the wording of the clause on the applicable law.

Furthermore, the question of whether investor-State arbitration clauses in investment agreements with third States (and possibly trade agreements) may be saved due to the fact that domestic law (and thus EU law) is a question of fact awaits a response from the CJEU in Opinion 1/17.