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DOI

[10.15166/2499-8249/286](https://doi.org/10.15166/2499-8249/286)

Publication date

2019

Document Version

Final published version

Published in

European Papers

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[Link to publication](#)

Citation for published version (APA):

Eckes, C. (2019). Some Reflections on *Achmea's* Broader Consequences for Investment Arbitration. *European Papers*, 4(1), 79-97. <https://doi.org/10.15166/2499-8249/286>

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ARTICLES

SPECIAL SECTION – THE *ACHMEA* CASE

BETWEEN INTERNATIONAL LAW AND EUROPEAN UNION LAW

edited by Ségolène Barbou des Places, Emanuele Cimiotta *and* Juan Santos Vara

SOME REFLECTIONS ON *ACHMEA*'S BROADER CONSEQUENCES FOR INVESTMENT ARBITRATION

CHRISTINA ECKES*

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ABSTRACT: In the *Achmea* case (judgment of 6 March 2018, case C-284/16), the Court of Justice applied its standing case law on the autonomy of the EU legal order to Investor-state Dispute Resolution (ISDS) and concluded that the ISDS mechanism at hand was contrary to EU law. Irrespective of whether the Court's construction of autonomy is conceptually convincing, the principled elaborations on autonomy in *Achmea*, emphasized the relevance of the preliminary ruling procedure as the institutional backbone of the effectiveness of EU law. This institutional backbone, which allows for a constant dialogue between the Court of Justice and the national judiciary, played an important role in the Courts finding that EU law enjoys direct effect and primacy in *van Gend en Loos* and *Costa v. ENEL*. (respectively, judgment of 5 February 1963, case 26/62 and judgment of 15 July 1964, case 6/64). In the eyes of the Court, it cannot be compromised by offering investors an alternative route of dispute settlement from which no possibility exists to ask preliminary questions. While other aspects of the ruling, that is the Court's considerations on mutual trust, may apply specifically to the type of Intra-EU ISDS mechanisms in *Achmea*, the autonomy reasoning logically also applies to other forms of investment arbitration, such as the Investment Court System (ICS) in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and the envisaged Multilateral Investment Court (MIC). The principled stand on autonomy, as the Court has presented it in a long list of cases, including in *Achmea*, amounts to a considerable, albeit not nec-

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essarily insurmountable obstacle to both Member States and the Union submitting to the jurisdiction of international courts and tribunals.

KEYWORDS: autonomy of EU law – investor-state dispute resolution – mutual trust – *Achmea* – Opinion 1/17 – CETA.

I. INTRODUCTION

In the case of *Achmea*,¹ the Court of Justice ruled that the Investor-State-Dispute-Settlement (ISDS) mechanism in the bilateral investment treaty between the Netherlands and Slovakia (Netherlands-Slovakia BIT) was *incompatible* with EU law. The case concerned the legality of ISDS in BITs between Member States (intra-EU BITs); yet it also raises considerable doubts about the compatibility with EU law of the Investment Court System (ICS) model introduced in the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), the Multilateral Investment Court (MIC) that would replace the ICS under CETA at some point and more generally, the future of international investment arbitration, as well as ultimately the Union's ability to submit to the jurisdiction of international courts or tribunals in any substantive field.

Achmea, while it has attracted a lot of attention from the investment arbitration community, builds on a long line of case law on the autonomy of the EU legal order and does by no means constitute a surprising turn of any sort. The case confirms that arbitration clauses in intra-EU BITs, at least in their most common form, are incompatible with EU law. Yet it has not entirely ruled out Union submission to the jurisdiction of international courts and tribunals or even Union participation in setting up a MIC. This depends on the precise agreements on how their jurisdiction could be delimited in a way that protects the autonomy of the EU legal order. What *Achmea* has done is that it has put the Court of Justice and AG Bot in a difficult position with regard to pending Opinion 1/17 concerning the compatibility with EU law of the ICS agreed in CETA. AG Bot took the position that *Achmea* "is not prejudicial to the compatibility of the ICS with the requirement of the autonomy of the EU legal order".² In conclusion, he advised the Court to find the ICS in CETA in compliance with EU law.³

This *Article* discusses in turn the meaning and relevance of the autonomy of the EU legal order as it is constructed in the case law of the Court of Justice (Section II); the conclusions that can be drawn from *Achmea* for the ICS in CETA (Section III); *Achmea's* rationale in the context of intra-EU BITs (Section IV); whether the autonomy of the EU legal

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

² Opinion of AG Bot delivered on 29 January 2019, opinion 1/17, para 95 *et seq.* See for his argument section IV below.

³ *Ibid.*, para. 272.

order is an obstacle for the Union to submit to the decisions of international courts and tribunals (Section V); and finally whether it stands in the way of Union participation in a MIC and what it means for the future of international investment arbitration (Section VI).

II. A DELICATE GOOD: AUTONOMY OF THE EU LEGAL ORDER

The autonomy of EU law is what makes EU law a legal order.⁴ The Court justifies EU law's autonomy "by the essential characteristics of the EU and its law".⁵ The autonomy of the EU legal order is constructed in a circular reasoning: the essential characteristics of EU law justify its autonomy and autonomy makes its essential characteristics as a domestic legal order possible. In fact, this reasoning and the consequences flowing from understanding the EU legal order as a domestic legal order lie at the very core of what makes the Union different from international organisations. It is also essentially contested and depends on the support of above all national courts.

EU law depends on its autonomous character (that is, its self-referential nature of not depending on national and international law for its validity and interpretation) for its constitutional character and its ability to ensure the effectiveness of EU law. This formal legal (and absolute) autonomy allows the Court of Justice to uphold the claim that the effects of EU law within the national legal order are a matter of EU law, rather than national law. This in turn ensures the effectiveness of EU law on the ground, which is its most distinctive characteristic. The preliminary ruling procedure (Art. 267 TFEU) is the institutional backbone of this effectiveness and the mechanism that allows in an ongoing dialogue between the Court of Justice and the national judiciary a regular confirmation of the Court's autonomy claim by national courts.⁶ The institutionalized interaction is additionally protected by the Member States' obligation not to "submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than" the Court of Justice (Art. 344 TFEU). While this was previously questioned, including by the referring court, in *Achmea* the Court of Justice considered Art. 344 TFEU applicable to disputes between individuals and states, when it concluded that Arts 267 and 344 TFEU must jointly be interpreted to preclude a dispute settlement mechanism as the one in question.⁷

The Court of Justice's position on the autonomy of the EU legal order as expressed in *Achmea* is in line with its settled case law. The Court refers heavily to Opinion 2/13 on

⁴ This section draws on: C. ECKES, *EU Powers Under External Pressure - How the EU's External Actions Alter its Internal Structures*, Oxford: Oxford University Press, 2019: see p. 22 *et seq.* for a detailed conceptualization of the autonomy of EU law.

⁵ *Achmea* [GC], cit., para. 33.

⁶ See C. ECKES, *EU Powers Under External Pressure*, cit., p. 25 *et seq.*

⁷ *Achmea* [GC], cit., para. 60. The same position was suggested in the opinion of AG Wathelet delivered on 19 September 2017, case C-284/16, *Achmea*, para. 144.

EU accession to the European Convention on Human Rights in the lengthy preliminary section on autonomy in the *Achmea* case; yet, this is only the most recent culmination of the Court's long line of cases and opinions holding that EU submission to certain international courts or tribunals, while remaining possible as a matter of principle, may threaten the nature and existence of the EU as an autonomous legal order.⁸

More specifically, the Court held in *Achmea* that the protection of the autonomy of the EU legal order requires that no field of EU law be removed from the substantive reach of the preliminary reference procedure. This is fully in line with Opinion 1/09 on the European Patent Court.⁹ The *potential effects* of the institutional arrangement of the international court or tribunal must be considered when deciding whether such a removal takes place. In other words, the Court of Justice focused not on the specific arbitration at hand but considered how the international agreement set up arbitration and whether any (hypothetical future) arbitration could have negative effects for the (autonomy of the) EU legal order. The Court held that the EU judicial system would be undermined if disputes could be removed from it by bringing them before arbitral tribunals, which, besides the fact that they are not subject to an exhaustion of domestic remedies rule, do not form part of the EU judicial system and consequently cannot ask the Court of Justice preliminary questions.¹⁰ It should be added that this problem is not easily remedied. The removal of disputes from the ordinary judiciary is the *very purpose* of ISDS mechanisms and the Court's reasoning concerned the removal of *potential questions about EU law* from the preliminary ruling procedure. It was *not limited* to situations in which the arbitral tribunal actually *strictly speaking interprets EU law*. Questions about EU law can also arise from *prima facie* purely national legal issues, because they fall within the widely defined scope of EU law or because they touch upon the Union's interest.¹¹ The following sections consider what the Court's position on the autonomy of the EU legal order means for the compatibility of different investment arbitration mechanisms. The last section sets out how investment arbitration would have to be construed in order to avoid threatening the EU's autonomy.

III. CONSEQUENCES FOR CETA'S INVESTMENT COURT SYSTEM

On a *prima-facie*-reading, the ICS in CETA differs on several accounts from the ISDS model in *Achmea*, which is widely used in BITs. First, the ICS model meets higher rule of law

⁸ Court of Justice: opinion 2/13 of 18 December 2014; opinion 1/09 of 8 March 2011 (European and Community Patents Court); opinion 1/91 of 14 December 1991. See also explicitly opinion 1/00 of 18 April 2002, para. 12: "the preservation of the autonomy of the Community legal order requires [...] that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered".

⁹ Opinion 1/09, cit.

¹⁰ *Achmea* [GC], cit., paras 50-52.

¹¹ See for the interpretation of the scope of EU law, see Court of Justice: judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC], para. 22; judgment of 6 March 2014, case C-206/13, *Siragusa*.

standards. As is well known, the Commission presented its proposal to move to an ICS model replacing existing ISDS mechanisms in all ongoing and future EU investment negotiations in response to critical voices all around and with the intention to address some of the criticism.¹² The criticism levelled at ISDS challenged different aspects all related to its very limited legitimacy, including the lack of judicial independence, predictability and consistency of decisions, as well as transparency. The ICS, it is fair to conclude, addresses (some of) the criticism of the *ad hoc* arbitration of traditional ISDS mechanisms.

CETA was the first FTA to set up an ICS, following a last-minute move by the Commission.¹³ The ICS in CETA is composed of a Tribunal of first instance and an Appeal Tribunal, operating with relatively independent arbitrators¹⁴ with high-level legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body. The Tribunal¹⁵ has 15 Members; 5 from Canada, 5 from the EU, and 5 from a third country. Members of the tribunal must possess professional qualifications¹⁶ and adhere to an ethics code.¹⁷ The arbitrators are allocated to a case on the basis of drawing from a roster, “ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve”.¹⁸ An Appellate Tribunal reviews the decisions of the Tribunal.¹⁹

The ISDS mechanism in *Achmea* by contrast was an arbitral tribunal “constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a

¹² Commission, Press release of 16 September 2015, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (hereafter: Commission, ICS Press release), europa.eu. At face value this departs from the Council Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013, available at data.consilium.europa.eu.

¹³ Commission, ICS Press release, cit. The complete text of CETA was published in August 2014. On 29 February 2016, the Commission announced that the EU and Canada had agreed to replace the *ad hoc* ISDS with a permanent institutionalized construction (the ICS).

¹⁴ The Commission used at the hearing for opinion 1/17 of 26 June 2018 the term “hybrid” to characterize the ICS, despite its name, as neither ISDS nor a court system.

¹⁵ Art. 8.27 CETA.

¹⁶ Art. 8.27, para. 4, CETA: “The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements”.

¹⁷ Art. 8.30 CETA.

¹⁸ Art. 8.27, para. 7, CETA; see also European Parliament, Policy Department, Directorate-General for External Policies, *In Pursuit of an International Investment Court: Recently Negotiated Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, study by S. HINDELANG and T. HAGEMEYER, Brussels: European Union, 2017.

¹⁹ Art 8.28 CETA.

third State as Chairman of the tribunal".²⁰ The appointment rules for the tribunal in *Achmea* demonstrate the high level of private autonomy bias in arbitration that is characteristic for the current system.

The ICS moves ISDS on the scale between party-led arbitration and institutionalized judicial bodies towards the latter. It reduces the private autonomy bias, improves the internal coherence of investment law and strengthens the independence of arbitrators. The ICS also aimed to reduce the bias towards investors by limiting the financial incentives to act as an arbitrator, for instance by providing a retainer fee, as well as a random allocation of cases. The general commitment to the ICS model for all future international arbitration mechanisms acknowledges that the private autonomy bias is unjustified. This should be welcomed. Investor-state disputes concern claims by individuals that the public exercise of power is incompatible with the principles and norms by which the public authority has bound itself under the investment treaty. They do not concern disputes between two private parties who are free to attempt to find a pragmatic (rather than necessarily just) outcome for their dispute without involving the state. Additionally, investment awards are ultimately paid by the taxpayer. Yet the ICS does not address other issues that have been criticised with regard to ISDS mechanisms more generally. Crucially, they remain disconnected from any general, i.e. not investment focussed, constitutional system. They do not form part of any system of general rights and principles. They do use the same language or aim to connect to any system that generally establishes the rights of individuals and the limitations on public power, as domestic constitutions do.

In other words, the very purpose of the ISDS mechanism in *Achmea* and of the ICS in CETA is identical: offering an alternative mechanism of dispute settlement that is neither embedded in the national constitutional system nor subject to review by the ordinary judiciary. The ICS in CETA has hence in this particular regard the same effects as the ISDS mechanism in *Achmea*. CETA provides that foreign investors must choose to bring proceedings either before domestic courts or before an ICS tribunal. If they choose the ICS tribunal they are required to discontinue domestic proceedings or refrain from starting them.²¹ This is the so-called fork in the road clause, which is a common feature of investment arbitration. It effectively ensures that investment tribunals will be the sole arbitrator.

Not so much the outcome but the Court's reasoning in *Achmea* makes the case also bad news for the ICS. The Court introduced the *Achmea* ruling with eight paragraphs of principled considerations on the *autonomy of the EU legal order* before turning to the central question about the compatibility of the ISDS mechanism with EU law. It found the ISDS in *Achmea* to be in conflict with the *autonomy of the EU legal order* because it

²⁰ *Achmea* [GC], cit., para. 3.

²¹ Art. 8.22, para. 1, let. f) and g), CETA.

*removes disputes from the jurisdiction of the courts of the Member States.*²² This is not a new criticism. In fact, the Court of Justice had highlighted this point as the decisive feature of the investment chapter in the EUSFTA that requires Member States to endorse the mechanism.²³ In *Achmea*, it added more specifically that the autonomy of the EU legal order can only be preserved by an internal EU judicial system that remains able “to ensure the consistency and uniformity in interpretation of EU law”.²⁴

The fundamental nature of the Court’s autonomy concern becomes apparent in its general abstract reasoning. While the AG focused on the specific dispute at hand and on whether this specific award could have had “any impact on questions of EU law”²⁵ the Court pondered generally whether disputes that an arbitral tribunal under the BIT in question “is called on to resolve are *liable* to relate to the interpretation or application of EU law”.²⁶ By taking such an abstract approach and considering the *potential* scope of disputes settled by any tribunal rather than the *actual* scope of the specific dispute the Court revealed its deep unwillingness to take any chances that the domestic and autonomous nature of the EU legal order might come under pressure.²⁷ This indirectly confirms the high relevance of this concern for any and all ISDS mechanisms/the ICS.

The conclusion must be that, despite tangible differences between the ISDS mechanism in *Achmea* and the ICS under CETA, these fundamental concerns of the Court that the removal of disputes from the preliminary ruling procedure as the backbone of the autonomy and effectiveness of EU law seem to apply in the same way to both. This cannot be remedied by clauses declaring that the ICS assesses EU law “as a matter of fact”, aligning the interpretation of EU law by the arbitral tribunal to the “prevailing interpretation” of the Court of Justice and stipulating that “any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party”.²⁸ These clauses reduce the likelihood that any tribunal award interferes in a substantive manner with EU law. They do not change the fact that matters within the scope of EU law are decided by judicial bodies that cannot refer preliminary rulings to the Court of Justice. The potential misinterpretation of EU law may also have been a concern of the Court; yet this is not emphasised in the ruling. The Court did not engage with the issue of whether any such (mis-)interpretation by an ISDS tribunal would be binding on the

²² See *Achmea* [GC], cit., paras 50-52.

²³ Court of Justice, opinion 2/15 of 16 May 2017, para. 292.

²⁴ *Achmea* [GC], cit., para. 35.

²⁵ Opinion of AG Wathelet, *Achmea*, cit., paras 177-178.

²⁶ *Achmea* [GC], cit., para. 39 emphasis added.

²⁷ See C. ECKES, *EU Powers Under External Pressure*, cit., p. 15 *et seq.*, p. 185 *et seq.* on the plausibility of this concern.

²⁸ Art. 8.31 CETA; nearly identical for example: Art. 16(2) of the Free Trade Agreement between the EU and the Socialist Republic of Viet Nam, not yet ratified.

EU or whether the binding or non-binding nature of the decisions would make any difference for the threat to the autonomy of the EU legal order.

Opinion 1/17 is pending. The decision of AG Bot was delivered on 29 January 2019.²⁹ The Court will have to engage precisely with the issue of what about the ICS may or may not threaten the autonomy of the EU legal order and will hence likely shed more light on the issue. The Court's reasoning in a long line of case law, which in *Achmea* it applied specifically to investment arbitration, sets out a long-standing and fundamental concern that it will take into account in Opinion 1/17. Whether the Court sees a possibility to reconcile its autonomy concern with the institutional set up of the ICS in CETA and its potential effects on the EU legal order remains to be seen. Yet it should be concluded that the reasoning in *Achmea* has increased the threshold of necessary judicial justification for finding the ICS in CETA compatible with EU law.

In *Achmea*, the Court ruled on a bilateral investment agreement between two EU Member States. CETA, by contrast, is an FTA between the EU and all 28 Member States as one party and a third country as the other. The involvement of a non-EU actor is another core difference between CETA and the Netherlands-Slovakia BIT in *Achmea*. Moreover, some commentators have interpreted the section in *Achmea*, in which the Court recalls its settled case law that the Union can submit to the decisions of a court created under an international agreement concluded by the EU,³⁰ as indicating that *Achmea* has nothing to say about international investment treaties concluded by the EU.³¹ This reading does neither justice to the formulaic language nor to the reasoning of the Court. In its common use, the often-used phrase "it is true that [...] in principle..."³² recalls a general principle, followed by an explanation why nonetheless in the case at hand a different conclusion is warranted. The Court's reasoning was based on a rejection that an arbitral tribunal established under an international agreement between two Member States could be considered part of the judicial system of the EU.³³ This reasoning also applies to an arbitral tribunal established in a multilateral agreement involving a third country.

This is not to say that I expect the Court to simply apply the autonomy doctrine as set out in *Achmea* one-on-one to extra-EU constructions that involve non-EU parties. However, if anything, the multilateral nature and the involvement of non-EU parties makes the situation more problematic for the autonomy of the EU legal order. Non-EU actors are not part of the interlocking embrace of European integration.³⁴ They do not

²⁹ Opinion of AG Bot, opinion 1/17, cit.

³⁰ *Achmea* [GC], cit., para. 57.

³¹ See J. HILLEBRAND POHL, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?: ECJ 20 April 2018, Case C-284/16, Slovak Republic v. Achmea*, in *European Constitutional Law Review*, 2018, p. 10.

³² *Achmea* [GC], cit., para. 57.

³³ *Ibid.*, para. 45.

³⁴ See C. ECKES, *EU Powers Under External Pressure*, cit., p. 15 *et seq.*, for more details.

share the same interest in the functioning of the European project. They are not subject to the jurisdiction of the Court of Justice. They are not only able but also much more likely to challenge the (international) position and the particularities of the Union.³⁵ Most importantly, by contrast to courts of the Member States,³⁶ non-EU actors, including international courts and tribunals, are not bound by the primacy of EU law. A core difference is the relevance of the principle of mutual trust for intra-EU relations. The next section focusses among other things on this point.

IV. INTRA-EU BITS: NATIONAL COURTS AS THE GUARDIAN OF THE UNION OF LAW

Achmea confirms that, despite the Court's core concern that ISDS mechanisms are liable to remove disputes from the preliminary ruling procedure (and that this may undermine the effectiveness of EU law and the autonomy of the EU legal order), a case may still reach the Court of Justice if an arbitral tribunal is established in a Member State, whose law permits (limited) judicial review and in that context a reference for preliminary ruling.³⁷ This would in principle be the case for tribunals established under intra-EU BITS and extra-EU BITS. However, this limited review (in the case of German law in *Achmea* limited to reviewing the validity of the arbitration agreement and the consistency with public policy of the enforcement of the arbitral award)³⁸ does not offer the same guarantee of uniform and effective application of EU law than full judicial review of the claim of the investor in court in the first place. The limited review concerns no longer the substance of the case. In fact, as mentioned above, the removal from ordinary judicial review is the *very purpose* of setting up ISDS mechanisms. If disputes decided upon by the ISDS mechanism/ICS were also subject to full judicial review of the merits by national courts, the setting up an ISDS mechanism/ICS would become futile.

Within the EU, cooperation is built on the *principle of mutual trust*, which in turn is based on the shared commitment to the values in Art. 2 TEU and the enforcement of these values and EU law more generally in the Member States. This enforcement falls

³⁵ An example of this lower interest and willingness to accommodate the Union's particularities was the reaction of non-EU countries when the EU sought to become an observer in the UNGA in 2010 and other states in the UNGA voted against this: see L. PHILLIPS, *EU Wins New Powers at UN, Transforming Global Body*, in *EU Observer*, 3 May 2011 euobserver.com. Likewise, despite a 2010 Commission announcement that it would explore the possibility of acceding to the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), and the increasing necessity of doing so, it is "practically impossible" that all contracting parties will agree to this. See A REINISCH, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, in *Journal of International Economic Law*, 2016, p. 769.

³⁶ *Achmea* [GC], cit., para. 13.

³⁷ *Ibid.*, para. 53.

³⁸ *Ibid.*

pursuant to Art. 19 TEU both to national courts and the Court of Justice connected by the preliminary ruling procedure.³⁹ Hence, removing disputes from the national jurisdiction and from the preliminary ruling procedure also undermines the mechanism that ensures that the Union adheres to the rule of law, which is the basis of principle of mutual trust.

Furthermore, the Court of Justice is clear on its conception of the rule of law within the EU legal order. It identifies a properly functioning and independent national judiciary as the very essence of the rule of law within the Union⁴⁰ and a precondition for the principle of mutual trust.⁴¹ The Court further and more specifically expressed that the independence of national courts is “essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Art. 267 TFEU” and repeatedly confirmed that the preliminary ruling mechanism “may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence”.⁴² In fact, the Court conclusively held that the ISDS mechanism under the Netherlands-Slovakia BIT “call[ed] into question not only the principle of *mutual trust between the Member States* but also the preservation of *the particular nature of the law established by the Treaties*, ensured by the preliminary ruling procedure provided for in Art. 267 TFEU, and *is not therefore compatible with the principle of sincere cooperation*”.⁴³

In other words, the fact that the effective application of EU law in the Member States is threatened by moving disputes to ISDS mechanisms that are not embedded within the national judicial system is liable of undermining mutual trust and threatens the (autonomous) nature of EU law. These two reasons given by the Court should be read as *cumulative* reasons for finding the ISDS mechanism in *Achmea* incompatible with EU law.

Achmea clearly confirms the mutual trust reason applies to intra-EU BITs. This is also the reason why the Commission, which has argued all along that intra-EU BITs are incompatible with EU law, has welcomed the Member States’ commitments to terminate all intra-EU BITs following *Achmea*.⁴⁴ *Prima facie*, one could think that the mutual trust reason applies *exclusively* to intra-EU BITs⁴⁵ and hence neither to the ICS nor to the MIC. The

³⁹ *Ibid.*, paras 36-37.

⁴⁰ Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses* [GC], paras 31-37 and the case-law cited. See also: Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *LM* [GC], paras 49-54.

⁴¹ This was the central issue in *LM* [GC], *cit.*, and the Court held that “only in exceptional circumstances” based on “a specific and precise assessment of the particular case” the national court may reject execution of a European Arrest Warrant if “there are substantial grounds for believing” that the surrendered person runs a real risk of his fundamental rights to an independent tribunal and a fair trial (para. 73).

⁴² *Associação Sindical dos Juizes Portugueses* [GC], *cit.*, para. 43; *LM* [GC], *cit.*, para. 54.

⁴³ *Achmea* [GC], *cit.*, para. 58.

⁴⁴ See the 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); see for the Commission’s reaction: europa.eu.

⁴⁵ See opinion of AG Bot, opinion 1/17, *cit.*, para. 82.

consequences for mutual trust among Member States of agreements with non-EU states of either the EU or a Member State are definitely more difficult to establish. Logically, the establishment of an alternative dispute settlement mechanism in the extra-EU context only demonstrates mistrust by the non-EU party towards the judicial system of either the EU or the Member State and not by one Member State towards another. The mistrust of non-EU parties should be irrelevant for the functioning of the EU legal order.

For intra-EU BITs, it could even be argued that in light of the *objective* of alternative dispute settlement mechanisms, that is to offer an alternative judicial route outside and independent from the ordinary courts, the very establishment of such alternative dispute settlement mechanisms demonstrates a level of mistrust. However, this is *not* what the Court of Justice argued. The Court focussed in *Achmea*, including in the discussion of mutual trust, on the *effect* of establishing alternative dispute settlement mechanisms rather than on their *objective*. This is the reason why it is not so easy to limit the mutual trust reason exclusively to intra-EU BITs. Focussing on the effect, the Court discussed that the removal of disputes from the preliminary ruling procedure leads to an incomplete application of EU law as a result of the fact that some disputes within the scope of EU law may end up before arbitral tribunals that do not classify as “court” within the meaning of Art. 267 TFEU and hence cannot refer questions to the Court of Justice. The Court further considered that this undermines the rule of law and by extension the principle of mutual trust within the Union. The concerns of the Court about the effects of incomplete – or incorrect – application of EU law also apply to BITs between a Member State and a non-EU state, as well as international agreements concluded by the EU that set up extra-judicial dispute settlement between private parties and the state, such as the ICS. Disputes are removed from the jurisdictions of the EU and the Member State as a result of the agreement with the third party, including disputes that may raise questions of EU law. Furthermore, the interpretation of EU law by alternative dispute settlement mechanisms involving non-EU parties may, as a matter of principle and depending on the effectiveness of the agreed safeguards, undermine the uniform application of EU law in the same way as interpretations of dispute settlement mechanisms set up in intra-EU agreements.

The second reason concerning the autonomous nature of EU legal order was discussed in detail above. My considerations here are therefore limited to the relationship between autonomy and mutual trust. Mutual trust is part of the autonomy doctrine.⁴⁶ It serves the effectiveness of EU law in national courts and administrations, that is on the ground. Yet it is not the only building block at the core of the effectiveness of EU law. The Court’s considerations on the potential negative effects of EU submission to the jurisdiction of international courts and tribunals on the two other building blocks, namely

⁴⁶ See K. LENAERTS, *La vie après l’avis: Exploring the Principle of Mutual (Yet Not Blind) Trust*, in *Common Market Law Review*, 2017, p. 806.

the preliminary ruling procedure and the Court's monopoly to offer the correct interpretation of EU law from an EU law perspective, are valid also in the extra-EU context. In *Achmea*, the Court presented its argument as based on two *cumulative* reasons. Without further elaboration by the Court this should be read as that even if the first reason (mutual trust) does not apply the second (autonomy) in principle continues to be an obstacle to the establishment of any ISDS mechanism – in their traditional form, ICS or MIC. Whether the effect of removing disputes from the preliminary ruling procedure as a result of an agreement with a third party is sufficient to undermine mutual trust will be one question in Opinion 1/17. The AG has already answered it in the negative.⁴⁷ If the Court agrees with the AG, Opinion 1/17 should address, as a second step, whether interference with the latter two building blocks of the effectiveness of EU law (preliminary ruling procedure and monopoly of the Court of Justice) but not with the former (mutual trust) in the extra-EU context should be judged differently than interference with all three building blocks in the intra-EU context.

Finally, the fact that the Court concluded that ultimately the two cumulative reasons justified finding an infringement of the principle of *sincere cooperation* underlines the fundamental nature of the Court's considerations. Article 4, para. 3, TEU specifically identifies that it is the task of the Member States to give effect to EU law on the ground, including through judicial enforcement.⁴⁸ The reference to sincere cooperation is also in line with the Court's general use of sincere cooperation as the origin of, or at least working in support of, other constitutional principles. In its settled case law, the Court has identified a broad range of specific obligations flowing from the principle of sincere cooperation or more fundamentally EU loyalty, in particular for national courts.⁴⁹ EU loyalty is the organisational principle in the EU that ensures the *commitment of all parties involved to the overarching cause of making the EU legal order work*.

V. AUTONOMY AS AN OBSTACLE TO THE UNION SUBMITTING TO THE JURISDICTION OF INTERNATIONAL COURTS OR TRIBUNALS

As explained above, the Court's fundamental concern that international courts or tribunals may threaten the autonomy of the EU legal order is reflected in its settled case law.⁵⁰ The Court's strict position limits the Union's capacity to submit to the jurisdiction of international courts or tribunals. The Court's opinion on the Union's accession to the

⁴⁷ See opinion of AG Bot, opinion 1/17, cit., para. 82.

⁴⁸ Opinion 2/13, cit., para. 173; *Associação Sindical dos Juizes Portugueses* [GC], cit., para. 34.

⁴⁹ C. ECKES, *EU Powers Under External Pressure*, cit., p. 45 *et seq.*

⁵⁰ See case law cited at note 8 above. See also C. ECKES, *EU Powers Under External Pressure*, cit., p. 185 *et seq.* for a more extensive discussion on which international courts and tribunals constitute a justified threat to the autonomy of the EU legal order.

European Convention on Human Rights is probably the best illustration of this point.⁵¹ On the one hand, the Union is expressly committed to multilateralism and the observance of international law;⁵² on the other, the Court's autonomy concerns have proven to stand in the way at least of the Union's accession to the European Convention on Human Rights and to prohibit Member States from concluding intra-EU BITs.⁵³

In the present context, we must leave aside the *plausibility* of the Court's autonomy concerns, as any such discussion on their plausibility would require an in-depth consideration of the vulnerability of the EU legal order whose domestic and autonomous nature is essentially contested both by national constitutional courts and by international law.⁵⁴ This paper considers the autonomy concerns as they are *presented by the Court*, that is general and fundamental concerns that create an obstacle to Union submission to the jurisdiction of many other forms of international courts and tribunals, including in contexts in which the EU political institutions and the Member States have agreed that the Union should legally submit to their jurisdiction. At least where disputes with *individuals* are concerned, the Court takes (as discussed above) a cautious and perhaps even protectionist approach based on abstract considerations of what the consequences might be.

This does not mean that the Court might not in the individual case attempt to find pragmatic ways to keep the door open to Union participation in international regimes that set up an international court or tribunal, including if they allow private parties to bring complaints. Two reasons speak in favour of finding ways of reconciling the abstract and principled concerns and the political will of submitting the Union to international judicial regimes. First, the Union's role and influence as an international actor would be significantly constrained if the Union were ultimately unable to become a party to any international regime with a court or tribunal. This would also be the case if autonomy only stood in the way of submitting the Union to courts or tribunals that have jurisdiction to rule on disputes between individuals and states. At present, only two international judicial regimes of this form may come to mind, in which the EU is committed to participate: the European Court of Human Rights and ISDS/ICS. However, these forms of international courts and tribunals increase in number and in powers, parallel to the generally increasing role of non-state parties under international law, including natural and legal persons.⁵⁵ The creation of the MIC, discussed below, is a case in point.

⁵¹ Opinion 2/13, cit.

⁵² Arts 3, para. 5, and 21 TEU. See Commission, Reflection Paper on Harnessing Globalisation, COM(2017) 240, ec.europa.eu.

⁵³ Opinion 2/13, cit. and *Achmea* [GC], cit., respectively.

⁵⁴ See C. Eckes, *EU Powers Under External Pressure*, cit., p. 15 *et seq.*, p. 185 *et seq.*

⁵⁵ See: K. PARLETT, *The Individual in the International Legal System: Continuity and Change in the International Legal System*, Cambridge: Cambridge University Press, 2011. While international law remains state-centred, since the post-war period individuals have an increased role in many areas of international law. Parlett concludes that in international claims, while enforcement of individuals' rights remain largely reliant on diplomatic protection, ISDS is *lex specialis* to this general rule (p. 120 *et seq.*). Likewise, individ-

Another example is the Energy Charter Treaty, which involves the EU, its Member States and a range of non-EU states and provides investment protection in the energy sector.⁵⁶ The intra-EU application of the Energy Charter Treaty is very similar to intra-EU BITs. The extra-EU application is more similar to ISDS with non-EU states. Furthermore, in light of the growing realization that climate change is the greatest challenge of this century, one could well imagine or at least hope for the political courage to set up an international environmental/sustainability regime that sets up avenues for judicial review, including for cases brought by public interest organisations.

Second, if the Court further developed a doctrine of autonomy of the EU legal order that prevented the political institutions of the Union and the Member States from achieving their express global objectives⁵⁷ this would result in a tension between political wish and legal constraints that is even stronger than what we are used to within the European Union. The Union is a construction set up by Member States in order to subject the individual national (day-to-day) politics to the more entrenched legal constraints agreed by the collective. This leads to a particular tension between law and politics,⁵⁸ which can be witnessed within the Union. This tension largely flows from the strong role of the CJEU which is established under a regime of international treaties (the European Treaties) and is mandated to apply its own founding principles, including when the Union and Member States take collective decisions under any procedure other than the amendment procedure set out under the European Treaties. AG Bot further developed an extended argument on the issue of reciprocity, which has considerable political weight but seemed rather difficult to relate to the autonomy of the EU legal order in any direct legal way.⁵⁹

When considering the likelihood that the Court might find a pragmatic way of reconciling its fundamental concerns with international political and legal reality, it is worth considering two high profile cases that were decided even more recently than *Achmea*.⁶⁰ Neither case concerned ISDS, but both illustrate more broadly the Court's *deference to international law*, as well as *to the political institutions* of both the Union and

uals may now be held criminally responsible under International Law (p. 274 *et seq.*) and Parlett concludes that in international human rights law "in general there has been a steady progression towards individualized claims, particularly in the regional systems" such as the European Court of Human Rights (p. 337 *et seq.*).

⁵⁶ Energy Charter Treaty of December 1994, available at energycharter.org.

⁵⁷ See opinion of AG Bot, opinion 1/17, cit., para. 173 *et seq.*, on this matter.

⁵⁸ To the extent that the distinction makes sense. Law refers to a solidified and formalized expression of political will (constitutional law; legislation) or a judicial decision (case law) of the past, adopted pursuant to specific procedural rules and expressing a particular normative claim. Law adopted in the past has a framing and constraining force on present politics, including law-making.

⁵⁹ Opinion of AG Bot, opinion 1/17, cit., para. 72 *et seq.*; in para. 85 the AG simply purports the link between reciprocity and autonomy. Reciprocity has extensively been criticized for being an openly political consideration in the context of the Court's case law on the absence of direct effect of WTO law.

⁶⁰ Court of Justice: judgment of 20 November 2018, joined cases C-626/15 and C-659/16, *Commission v. Council (Antarctica)*[GC]; judgment of 10 December 2018, case C-621/18, *Wightman*.

the Member States. This deference may appear at first sight only tenuously related to the issue of whether the autonomy of the EU legal order, as it is construed by the Court of Justice, stands in the way of full participation of the Union in the creation of international courts and tribunals. Yet the Court's willingness to defer to international law and to the political will of the EU institutions and the Member States is crucial to finding pragmatic ways of allowing Union participation in international judicial regimes while protecting the absolute legal autonomy as it is construed by the Court of Justice.

The first case, *Antarctica*, concerned two actions for annulment brought by the Commission against Council decisions approving the submission, on behalf of the Union *and its Member States*, of several documents to an international body.⁶¹ The point of contention (as is the case in a growing body of post-Lisbon litigation) was *not the substantive position* but the question of *on behalf of whom* the paper and the positions at issue could be submitted: the Union alone or the Union together with its Member States.

The Court dismissed the Commission's challenges and held that permitting the Union "to have recourse [...] to the power which it has to act *without the participation of its Member States in an area of shared competence, when, unlike it, some of them have the status of [...] consultative parties, might well [...] undermine the responsibilities and rights of those consultative parties*".⁶² In other words, the Court emphasized the powers of Member States under the international regime, which were comparatively stronger than those of the Union. In addition, the Court pointed out that the Union had "acknowledge[d] the special obligations and responsibilities of the [...] [Member States as] consultative parties" when it joined the regime.⁶³ The Court further expressed deference to the Council as the political institution by pointing out that there was still "the possibility of the required majority being obtained within the Council for the European Union to exercise that external competence alone".⁶⁴ This appears to imply that the Council could have decided either way, submitting the documents alone or together with the Member States and that the Court would not have interfered by imposing legal limits based on internal competence considerations irrespective of which choice the Council had made.

The Court's argument in *Antarctica* seems two-pronged. First, the Union should involve the Member States because they are the more powerful actors under the international regime in question. This is supported by effectiveness considerations and entails a certain deference to international law. Second, the Union should respect that it had acknowledged these powers of the Member States under international law and the Council could have decided differently, that is submitting the documents only on behalf of the Union. This reflects a level of deference to the decisions of the Union's political institutions.

⁶¹ Commission for the Conservation of Antarctic Marine Living Resources.

⁶² *Commission v. Council* [GC], cit., para. 133.

⁶³ *Ibid.*, para. 131

⁶⁴ *Ibid.*, para. 126 with references to Court of Justice: judgment of 21 June 2017, case C-600/14, *Germany v. Council* [GC], para. 68, and opinion 2/15, cit., para. 244.

The weight that the Court attached to a Union commitment under international law and arguably also to the constraints of international law imposed on the Union as an international actor (not being able to be a consultative party by contrast to the Member States) must be read in conjunction with the earlier mentioned, often-repeated, and at times strongly-defended⁶⁵ dimension of the autonomy doctrine that entails that “an international agreement cannot affect the allocation of powers fixed by the Treaties”.⁶⁶ *Antarctica* seems to allow or even require⁶⁷ the submission of documents on behalf of the Union and its Member States, not because of the internal division of competences but because of powers that the Member States hold under international law.⁶⁸ The ruling should be read as the Court not only accepting the Council’s decision to submit the documents together with the Member States because this was legally possible within the framework of the European Treaties, but concluding that a joint submission was necessary in the specific situation. In other words, while generally within the category of shared competences, the Council could choose to act alone. The specific situation under the international regime in question warranted participation of the Member States. In any event, this should not be read to indicate that the Court would accept a decision of the Council to take joint action if the internal competence division did not allow for it, that is in the area of exclusive competences. Conceptually, it should be added that the *Antarctica* case concerned the political autonomy of the Union to take a specific position under an international legal regime (hereby submitting specific positions and documents). This political autonomy of the Union is – as any autonomy – relative. The legal conceptual autonomy of the EU legal order, depending on the monopoly of jurisdiction of the CJEU and the primacy of EU law, is construed by the Court to be absolute.

In the second case concerning the UK’s ability to unilaterally revoke the declaration of the intention to withdraw from the Union under Art. 50 TEU,⁶⁹ the Court reconfirmed its deference to international law and demonstrated this time its deference to the sovereignty of the Member States. The Court first recalled that Member States have “limited their sovereign rights”⁷⁰ by joining the Union but then concluded that the submission of the intention to withdraw under Art. 50, para. 1; TEU “depend[ed] solely on [...] sovereign choice” of the withdrawing state.⁷¹ The Court then went on for eight further paragraphs emphasizing the “sovereign nature” of that choice.⁷² The Court of Justice

⁶⁵ Opinion 2/13, cit., para. 201.

⁶⁶ *Achmea* [GC], cit., para. 32.

⁶⁷ In *Commission v. Council* [GC], cit., para. 133, the CJEU indicated that permitting the Union to make a different choice might undermine the responsibilities and rights of the Member States.

⁶⁸ See also: C. ECKES, *Antarctica: Has the Court of Justice got cold feet?*, 3 December 2018, european-lawblog.eu.

⁶⁹ *Wightman*, cit.

⁷⁰ *Ibid.*, para. 44.

⁷¹ *Ibid.*, para. 50.

⁷² *Ibid.*, paras 51-58.

further referred to the Vienna Convention on the Law of Treaties (general public international law) to find support for its reasoning.⁷³

Neither of the two cases stands in direct connection to international investment arbitration and one swallow does not make a summer. Yet if one reads these cases as a sign that the Court takes a (more) cautious position on international law constraints on the Union and *vis-à-vis* the political will of the Member States, as well as the EU institutions, they might allow us to speculate whether the Court might try to find a pragmatic way of approaching Opinion 1/17. Pragmatism, including in order to ensure continuous support from national courts and Member States, is over the years one of the strong points of the Court. Its level of deference towards international law seems indeed at times be influenced by such pragmatic considerations.⁷⁴ One option would be to indicate how an international judicial regime could meet the high threshold of offering enough safeguard mechanisms to protect the absolute autonomy of EU law. In that sense, Opinion 2/13 was very principled and did not seem to offer a lot of room for a way forward.

VI. THE FUTURE OF INTERNATIONAL INVESTMENT PROTECTION LAW AFTER *ACHMEA*

Achmea has certainly disconcerted the international investment arbitration crowd. More so than the Court's earlier rulings on the autonomy of the EU legal order and the Union's ability to commit to international dispute settlement mechanisms. I would say that their concern is justified. The referring court emphasized the relevance because of the "numerous bilateral investment treaties still in force between Member States which contain similar arbitration clauses"⁷⁵ and which the Member States are now committed to terminate.⁷⁶ I have argued above why the relevance of *Achmea* goes beyond the intra-EU BITs.

At the same time, the Council adopted the negotiation directives authorizing the Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes on 1 March 2018.⁷⁷ That is five days before the *Achmea* ruling. *Achmea* was even interpreted as an attempt to give the ICS a leg up.⁷⁸ My reading is much more cautious. I would say that any plan to establish a MIC must take account of the Court of Justice's autonomy concerns, expressed in its settled case and

⁷³ *Ibid.*, para. 70.

⁷⁴ Compare the Court of Justice's approach to international law in *Commission v. Council* [GC], cit., and Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

⁷⁵ *Achmea* [GC], cit., para. 14.

⁷⁶ Declaration of the Representatives of the Governments of the Member States, cit.

⁷⁷ Council, Negotiating directives of 1 March 2018 for a Convention establishing a multilateral court for the settlement of investment disputes, data.consilium.europa.eu.

⁷⁸ C. BROWER, J. AHMAD, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, in *Fordham International Law Journal*, 2018, p. 791 *et seq.*

specifically applied to ISDS in *Achmea*. And, it is not readily understandable what the realistic legal options are.

What could be pragmatic ways of reconciling Union submission to international judicial regimes with the Court's autonomy concern? What safeguard clauses in the international agreement could ensure that the autonomy of the EU legal order remains protected in the context of all disputes and all circumstances that may arise under that agreement? First, in light of the Court's case law on the independence of the national judiciary, it is unlikely that the Court would accept any form of reference mechanism modeled on the preliminary ruling procedure that would allow ISDS tribunals to refer questions to the Court of Justice. For the arbitral tribunal in *Achmea* it explicitly rejected this possibility,⁷⁹ which was sketched by the AG.⁸⁰ CETA does not provide for a mechanism for prior involvement either. An example of such a mechanism that springs to mind is the EU-Ukraine Association Agreement, which contains arbitration provisions for any disputes arising under the agreement.⁸¹ It also contains a strict carve-out clause for all "question of interpretation of a provision of EU law", which are referred to the Court of Justice and whose interpretation is then binding on the tribunal.⁸² However, this concerns arbitration between the contracting parties rather than individuals.⁸³ For ISDS tribunals dealing with disputes brought by individuals, this option is in my view excluded as long as the international court or tribunal is not embedded within the national judiciary which is the precise purpose of ISDS. Furthermore and even more importantly, such a prior involvement mechanism would put into question the objective of investment arbitration, which is to guarantee a separate dispute resolution mechanism disconnected from the domestic judiciary.

Second, the suggestion has been made to sidestep *Achmea* by making interpretations of EU law in the context of investment arbitration non-binding.⁸⁴ *Achmea* did not give a clear answer to the question whether EU legal autonomy could be adversely affected by interpretations of investment tribunals that are not binding as a matter of EU law.⁸⁵ However, as was discussed above, the non-binding nature would alleviate the impact of substantive positions of the international court or tribunal within the EU legal order. It does not address the core concern of the Court that removing disputes from the preliminary ruling procedure altogether undermines the autonomy of the EU legal order.

⁷⁹ *Achmea* [GC], cit., para. 46.

⁸⁰ Opinion of AG Wathelet, *Achmea*, cit., para. 85.

⁸¹ Chapter 14 of the EU-Ukraine Association Agreement, available at trade.ec.europa.eu.

⁸² Art. 322, para. 2, of the EU-Ukraine Association Agreement.

⁸³ In fact, Art. 321, para. 2, of the EU-Ukraine Association Agreement establishes expressly: "Any ruling of the arbitration panel shall be binding on the Parties and shall *not create any rights or obligations for natural or legal persons*" (emphasis added).

⁸⁴ J. LEE, *The Empire Strikes Back: Case Note on The CJEU Decision in Slovak Republic c. ACHMEA BV*, in *Contemporary Asia Arbitration Journal*, 2018, p. 150.

⁸⁵ J. HILLEBRAND POHL, *Intra-EU Investment Arbitration after the Achmea Case*, cit.

Third, CETA has made an attempt to ensure that the arbitration tribunal does not rule on the allocation of responsibility between the EU and its Member States.⁸⁶ The procedure allows the Union to determine the correct respondent and should be read in combination with an internal EU regulation managing the financial responsibility.⁸⁷ Such a construction could reasonably effectively avoid indirect pronouncement of international courts and tribunals on issues of competence within the EU legal order, which was certainly a core concern of the Court of Justice in the context of the EU's accession to the European Convention on Human Rights.

Fourth, the most far-reaching option would be to commit the international court and tribunal in question to respect the primacy of EU law. One central issue that distinguishes national judiciaries from arbitral tribunals of any sort and more generally EU actors from non-EU actors is their *commitment to the primacy of EU law*, which is the formal basis of the Court of Justice's ability to ensure the uniformity and autonomy of EU law. EU actors are committed to give EU law primacy both over national and international law of any formal status. Without the possibility of referring preliminary question, the international court or tribunal would however be left to its own devices to determine whether EU law is relevant to the dispute before it and how EU law should be interpreted. Enforcement of the primacy of EU law (if the court or tribunal disregards it) would depend on the scope and intensity of the usually very limited review by ordinary courts, discussed above. Reviewing whether any particular award is contrary to EU law would entail engaging with the substance of the case. This would stand in tension for example with the ICSID Convention, providing that awards should be treated as "final judgment of a court".⁸⁸ Furthermore and importantly, all these tentative considerations leave aside that non-EU parties are unlikely to accept references to the Court of Justice, let alone an extension of the primacy of EU law over the international regime.

By way of conclusion, *Achmea* is highly relevant not only for intra-EU BITs but also for the ICS and the future of ISDS. It demonstrates the fundamental nature of the Court of Justice's autonomy concern in the context of investment arbitration. At the same time, *Achmea* does not exclude that, in Opinion 1/17, the Court will take a pragmatic approach to the legality of the ICS/MIC plans and allow the realization of the political will in favour of international investment arbitration. It would be interesting to read the legal reasoning that could reconcile the ICS/MIC plans with the autonomy of the EU legal order.

⁸⁶ Art. 8.21 CETA.

⁸⁷ Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

⁸⁸ Arts 54 and 55 of the ICSID Convention.

