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Incompatibility of an arbitration clause contained in a bilateral investment treaty with EU law

Guiding principle

The submission of investment disputes to an arbitration tribunal as provided in Article 9(2) of the Agreement between the Republic of Austria and the Republic of Croatia on the Promotion and Protection of Investments of 19 February 1997 is contrary to EU law.

Note

There is a press release on this decision on the Court's website (www.olgfrankfurt-justiz.hessen.de).

Tenor

The arbitration proceedings initiated against the Applicant by the Respondents by notice of arbitration of 14 February 2020 are declared inadmissible.

The respondents shall bear the costs of the proceedings.

The value of the dispute is fixed at EUR 5.2 mln.

Reasons

I.

The Applicant seeks a declaration of inadmissibility of the arbitration proceeding initiated by the Respondents against the Applicant on the basis of the Agreement between the Republic of Austria and the Republic of Croatia on the Promotion and Protection of Investments (hereinafter: the "BIT") of 19 February 1997.

The Applicant has been a Member State of the EU since 1 July 2013.

Respondent 1 is an Austrian bank incorporated as a joint-stock company (Aktiengesellschaft) under Austrian law. It is the sole shareholder of Respondent 2, a Croatian bank incorporated as a joint-stock company under Croatian law. Both Respondents provide financial services inter alia on the Croatian market.

By Notice of Arbitration of 14 February 2020 (Annex AST 1), the Respondents initiated arbitration proceedings against the Applicant with reference to the BIT concluded between the Republic of Austria and the Applicant. The arbitration concerns a claim for damages brought by the Respondents, which is based on the Applicant's amendment of the Croatian insolvency law and the allegation of a systematic denial of justice by Croatian courts.

The BIT concluded between the Republic of Austria and the Applicant contains, inter alia, the following rules:

"Article 9
Settlement of Investment Disputes

(1) Any dispute arising out of an investment between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute within the meaning of paragraph 1 of this Article cannot be settled within three months from a written notification of sufficiently detailed claims, the dispute shall, upon request of the Contracting Party or of the investor of the other Contracting Party, be subject to the following proceedings:
[…]

b) arbitration by three arbitrators in accordance with the UNCITRAL Arbitration Rules as amended by the latest amendment accepted by both Contracting Parties at the time of the request for the initiation of the arbitration proceeding. In the event of arbitration, each Contracting Party, by this Agreement, irrevocably consents in advance, even in the absence of an individual arbitration agreement between the Contracting Party and the investor, to submit any such dispute to the arbitral tribunal mentioned above.

(3) The award shall be final and binding; it shall be executed according to national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

[…]

Article 11
Application of the Agreement

(1) The present Agreement shall apply to investments made in the territory of one of the Contracting Parties in accordance with its legislation by investors of the other Contracting Party whether before or after the entry into force of the present Agreement, […]

(2) the Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time.

[…]"

Reference is made to the BIT (Annex AST 3) for further particulars.

By letter dated 1 April 2020 (Annex AST 6), the Applicant accepted the Respondents' offer of Frankfurt am Main as the place of the arbitration, after the Applicant had previously disputed the jurisdiction of an arbitral tribunal vis-à-vis the Respondents by letter of 21 January 2020 (Annex AST 5), and again immediately after the initiation of the arbitration proceedings.

The Applicant submits that the arbitration proceedings initiated by the Respondents are inadmissible because the offer to arbitrate contained in Article 9(2)(b) of the BIT is no longer applicable since the Applicant's accession due to a manifest breach of EU law and there is thus no valid arbitration agreement. It argues that the CJEU ruling in the Achmea case (Judgment of 6 March 2018, C–284/16) is fully transferable to the present proceedings and applies to all intra-EU BITs. According to the Applicant, the CJEU's reasoning in that judgment is mainly based on general principles of EU law, referring in particular to the autonomy of EU law vis-à-vis national and international law, the constitutional structure of EU law and the principle of mutual trust and sincere cooperation between Member States. Article 9(2)(b) of the BIT is said to violate the autonomy of EU law, given that, under that provision, an arbitral tribunal renders a decision that is binding on a Member State – with mandatory application of EU law – without having the possibility to initiate a preliminary ruling procedure before the CJEU pursuant to Article 267 TFEU. The Applicant argues that the CJEU's Achmea Judgment is aimed at preserving the Court's interpretative monopoly in a general and all-encompassing manner and at precluding inter-jurisdictional competition in matters of EU law. To this end, the CJEU is said to have adopted a broad understanding of the principle of autonomy, according to which the mere referral of disputes to an investor-State arbitration tribunal already qualifies as a violation of the autonomy of EU law, insofar as it is capable of implicating the interpretation or application of EU law. Accordingly, the CJEU's interpretative monopoly is already compromised or threatened even if the possibility that an investment arbitration tribunal will apply EU law is merely an abstract one. A single preliminary question addressed by the investment arbitration tribunal concerning EU law is said to be sufficient to violate the autonomy of EU law. By contrast, it is, according to the Applicant, irrelevant whether an intra-EU BIT provides that the host State's law shall be the applicable law, nor is it essential for EU law to constitute the applicable law for an investment arbitration tribunal in the first place. Under the CJEU's Achmea Judgment, it suffices that the investor-State dispute resolution mechanism creates the possibility of excluding the involvement of a Member State court. Based on the above, the Applicant concludes that the very existence of an investor-State arbitration clause in an international treaty between two Member States adversely affects the principle of the autonomy of EU law.

Given the primacy of EU law, this adverse effect of Article 9(2)(b) of the BIT on EU law entails the result that a Member State's offer to conclude an arbitration agreement becomes ineffective and an offer to conclude an arbitration agreement is lacking.

The Applicant further argues that intra-EU investor-State proceedings do not offer sufficient legal possibilities to put questions of interpretation and application of EU law before the CJEU. In particular, an investor-State arbitration tribunal has no direct access to the preliminary ruling procedure under Article 267 TFEU. As shown by the CJEU's Achmea Judgment and the Federal Court of Justice Judgment of 31 October 2018 (I ZB 2/15), this also applies to the legal position under German arbitration law. The possibilities of referral in the context of State court decisions under Section 1040(3), second sentence, of the German Civil Procedure Code (ZPO) and Sections 1059 and 1060 ZPO do not suffice. The fact that German law, in principle, opens the possibility for an arbitral tribunal to request the support of a State court under Section 1050 ZPO is likewise not enough to secure the uniform interpretation and effective application of EU law.

Contrary to the Respondents' legal position, EU law, including the principles of autonomy and primacy of EU law, does form part of the applicable law in the arbitration proceedings initiated by the Respondents. Article 11(2) of the BIT constitutes a clear duty to give priority to EU law over all other provisions of the BIT that are incompatible with EU law. According to the Applicant, this provision constitutes a specific codification of the general principle of Union law primacy. It furthermore also expressly designates EU law as the applicable law, given that it requires the arbitral tribunal to determine the respective rights and obligations of Member States arising from the BIT and from EU law before it is able to either apply or refrain from applying a BIT provision.

According to the Applicant, the CJEU, in its 30 April 2019 Opinion on CETA (Opinion 1/17), further clarified the scope of the Achmea Judgment, emphasizing, in particular, that every intra-EU investment arbitration procedure violates the principle of mutual trust between the Member States and is therefore incompatible with EU law. Even if an investor-State arbitration tribunal were to apply and interpret EU law in accordance with the CETA treaty text, viz as a fact rather than as EU law, the CJEU's Opinion requires an international agreement to contain safeguards to ensure that, in exercising their judicial functions, investor-State arbitration tribunals do not call into question the level of protection of public interest that led to the introduction by the Union of restrictions on the freedom to conduct business. The text of the BIT does not contain any safeguards comparable to those in the text of the CETA, and no higher standards may be imposed on the design of dispute settlement mechanisms in relation to third States outside the EU judicial system than is the case inside the EU.

Contrary to the Respondents' legal position, the Applicant argues that it was not precluded from invoking the ineffectiveness of the arbitration agreement by the principle of good faith in Section 242 of the Civil Code (BGB). At the threshold, there never existed a relationship of trust that is required for the good faith rule to apply. The Respondents should have been aware that the prevailing EU law could have an effect on the applicability of the provisions contained in the BIT even before the Applicant's accession to the EU. After its accession to the EU, the Applicant's invocation of the ineffectiveness of the BIT's dispute resolution clause constituted an act of compliance with EU law, and certainly not an act contrary to good faith.

Contrary to the Respondents' assertions, there are also no exceptional circumstances capable of justifying a departure from the principle of mutual trust. Rather, the Achmea Judgment shows that there is no room in the field of judicial cooperation between the CJEU and the EU Member States' courts for exceptions to the principle of mutual trust. Furthermore, the requirements for an assumption of exceptional circumstances have not been met. In particular, the Respondents' explanations concerning the alleged deficiencies of the Croatian judicial system and the legal opinion submitted by the Respondents to that effect are irrelevant to the present case and misrepresent the legal and political situation in Croatia.

The Applicants [sic] request

> A declaration that the arbitration proceedings initiated by the Respondents' Notice of Arbitration of 14 February 2020 are inadmissible.

The Respondents request

> 1. That the question of compatibility of Article 9(2)(b) of the BIT of 19 February 1997 with EU law be referred to the CJEU by way of preliminary ruling procedure pursuant to Article 267 TFEU.
>
> 2. In the alternative to 1, that the Applicants' [sic] request for a declaration of inadmissibility of the arbitration proceedings be rejected.

The Respondents argue that Article 9(2)(b) of the BIT is compatible with EU law. According to the Respondents, the question of the admissibility or inadmissibility of arbitration under Section 1032(2) ZPO must be determined exclusively by reference to the content of the BIT and under the international law rules on interpretation and validity of the Vienna Convention on the Law of Treaties (VCLT). Given that the BIT was neither terminated nor denounced by the contracting parties, the VCLT rules would render the arbitral proceedings inadmissible only if Article 9(2)(b) of the BIT were incompatible with EU law. However, no such incompatibility exists. In particular, the CJEU's Achmea Judgment is not transferable to the factual universe of the present case because the CJEU's conclusion on the incompatibility of Article 8 of the Netherlands/Slovakia BIT in that case was based exclusively on an overall assessment of that provision's specific features. According to the Respondents, the decisive factors for the CJEU were: the mandatory application of EU law by the arbitral tribunal; the lack of power of the arbitral tribunal to conduct the preliminary ruling procedure; and the contingency of legal protection on the choice of the arbitral tribunal's seat. By contrast, the Respondents argue that, in the present case, the overall assessment to be performed should lead to a finding of compatibility of Article 9(2)(b) of the BIT with EU law.

The Respondents argue that the CJEU's Achmea Judgment was based on a precise analysis of the choice of law clause in the Netherlands/Slovakia BIT under which the arbitral tribunal was required to interpret or even apply EU law in a specific case. By contrast, an arbitral tribunal seised under the present BIT would only apply the BIT and general principles of international law. There is therefore no risk that the arbitral tribunal would also be required to interpret or even apply EU law. It does not follow from Article 11(2) of the BIT that the arbitration tribunal

would be required to interpret or apply EU law. Rather, this provision merely requires the tribunal to establish EU law as a fact, in order to be able to determine whether a BIT provision is compatible with EU law. This view is in line with the international law principle of systemic integration within the meaning of Article 31(3)(c) VCLT, since interpreting Article 11(2) of the BIT in this manner easily avoids the onset of any conflict with the TFEU, and, in particular, with Articles 267 and 344 TFEU. Consistently with this, the CJEU found, in its CETA Opinion, that it was not contrary to EU law for a court outside the EU judicial system to consider the compatibility of an EU or a Member State measure with the CETA agreement because, in doing so, it would only consider the implications of that measure as a fact. Moreover, the notion that EU law is to be treated only as a fact is also in line with the jurisprudence of international arbitral tribunals. The provision of Article 11(2) of the BIT to the effect that that Agreement must not be interpreted and applied contrary to EU law only regulates the interpretation and application of the BIT itself. However, the fact that a tribunal is merely required to consider EU law as a criterion in the interpretation of a provision that does not form part of EU law is not sufficient to entail a breach of EU law.

Contrary to the Applicant's legal position, there is also no general prevalence of application of EU law in a matter regulated by EU law. Rather, Member States are, for example, free to regulate the free movement of capital more liberally, or the provisions on market abuse more strictly, than is the case under EU law. Furthermore, in accordance with its own heading, Article 11 of the BIT only concerns the "Application of the Agreement" and not the law governing that Agreement. The same is true with regard to the limitation of the BIT's scope to investments made in accordance with the host State's legislation contained in Article 11(1) and with regard to the rule contained in Article 11(2) providing that the BIT does not apply when it is contrary to EU law. The tribunal is required to resolve either issue – that of the investments' compliance with the host State's legislation as well as that of the BIT's conflict with EU law – as a factual question with a "yes" or "no" answer. The CJEU's Achmea Judgment says nothing that deviates from the above; in particular, it does not say that the arbitration clause is contrary to EU law irrespective of the law to be applied by the arbitral tribunal.

In addition, the Respondents argue that an arbitral tribunal established under Article 9(2)(b) of the BIT is under an obligation to work towards an effective and enforceable award. Accordingly, the arbitral tribunal's first obligation is to choose a seat in an EU Member State such as to ensure that the competent State court would apply EU law in any judicial assistance, annulment or enforcement proceedings and, if necessary, make a reference under Article 267 TFEU. According to the Respondents, the arbitral tribunal's ability to bring about a reference to the CJEU arises from the fact that the arbitration and civil procedure legislation of numerous EU Member States provides for assistance requests to national courts. In particular, in German law, both the arbitral tribunal and the parties to the arbitration have the option of submitting questions about the application or interpretation of EU law to the CJEU via State courts by way of Section 1050 ZPO. Alternatively, the Respondents argue that, in line with the CJEU's CETA Opinion, arbitral tribunals otherwise have the jurisdiction to appreciate EU law themselves as a fact. According to the Respondents, in Section 1059(2) ZPO, German law provides for annulment grounds in the event of any violation by the arbitral tribunal of the duty to ascertain EU law or to set in motion a reference pursuant to Section 1050 ZPO. In addition, where the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 applies, it may, if necessary, also provide a ground to refuse enforcement in

accordance with Article V(1) and (2) of the Convention. On an overall assessment, the CJEU's authority of final judgment is therefore secured.

In the Respondents' opinion, the CJEU's Achmea Judgment is not applicable in the factual universe of this case because the principles or sincere cooperation and mutual trust do not apply in the exceptional circumstances of the specific case, and because there are sufficient safeguards that the arbitral tribunal will refer questions concerning the application and interpretation of EU law to the CJEU with the assistance of German courts. In the Achmea Judgment, the CJEU emphasises the principle of mutual trust and the Member States' obligation of sincere cooperation as well as their obligation to ensure the application of and respect for EU law. However, according to CJEU jurisprudence, the applicability of the principle of sincere cooperation is not absolute; that principle is not applicable in the presence of exceptional circumstances. According to the Respondents, the exceptional circumstances arise from the lack of independence of Croatian judges and the serious structural deficiencies of the Croatian judicial system making it the worst in the EU. Furthermore, Croatian courts, particularly of last instance, are guilty of systematic and blatant disregarded for the preliminary reference obligation under Article 267 TFEU. Thus, until 1 October 2020, Croatia's higher courts have not made a single preliminary reference to the CJEU under Article 287 [sic] TFEU in a civil case, even though, in several cases, they were quite evidently required to do so. The Respondents allege to have been deprived of their right to a fair trial in Croatia because they suffered harm from the amendment of Croatian insolvency law (the "Lex Argokor"). They allege that, when they challenged that law, the Croatian Constitutional Court had denied them effective legal protection by manifestly disregarding its duty under Article 267 TFEU to refer the question of compatibility with EU law to the CJEU. In addition, the Respondents allege to have been harmed by a series of Croatian Supreme Court decisions. Specifically, in its decision of 3 September 2019, the Croatian Supreme Court, without stating reasons, ignored its duty to refer the case to the CJEU under Article 267 TFEU despite a reasoned submission by Respondent 2 concerning the conflict of Croatian courts' interpretation with EU law. According to the Respondents, this specifically violated their fundamental right under Article 47 of the Charter of Fundamental Rights. Rather than presenting further particulars of their submissions on the deficiencies of the Croatian judicial system, the Respondents refer to their written pleadings of 30 June 2020 and 11 November 2020, as well as to the legal opinion of 30 June 2020 submitted by the Respondents (Annex GL 2 and GL 2a) together with a supplementary statement (Annex GL 6).

In the Respondents' view, given the disregard of the obligation imposed by Article 267 TFEU by Croatia's higher courts, the primacy of EU law can only be secured by the arbitral tribunal established in accordance with Article 9 of the BIT. Therefore, in this case, if the CJEU is indeed serious about its interpretation and application monopoly, it would have to find the BIT's arbitration clause acceptable.

The Respondents propose that the question of compatibility of Article 9(2)(b) of the BIT with EU law be referred to the CJEU by way of a preliminary ruling procedure under Article 267 TFEU. They believe that numerous questions that are material for deciding the application, particularly with regard to the Achmea Judgment, remain unanswered and require the CJEU's clarification.

II.

Pursuant to Section 1062(1)(2) ZPO, the Higher Regional Court of Frankfurt am Main has jurisdiction to decide the application brought pursuant to Section 1032(2) ZPO for a declaration of inadmissibility of an arbitration proceeding because the parties to the arbitration have agreed on Frankfurt am Main as the place of arbitration.

The application for a for a declaration of inadmissibility of an arbitration proceeding under Section 1032(2) ZPO is admissible. The required need for legal protection on the part of the Applicant is present given that the Respondents have initiated arbitration by their Notice of Arbitration of 14 February 2020. The Applicant's application is also timely, given that it was made before the constitution of the arbitral tribunal, as shown by the uncontested submission of the Applicant, according to which the parties had by then only appointed their respective party-appointed arbitrators, and the arbitral tribunal had not yet been constituted pending the appointment of a chairperson.

The application for a declaration of inadmissibility also succeeds on the merits for lack of an effective arbitration agreement between the parties.

The conclusion of an effective arbitration agreement between the parties is precluded by the fact that, in accordance with the legal principles set out in the CJEU's judgment in the Achmea case (Judgment of 6 March 2018, C 284/16) to be observed by the Senate, Article 9(2) of the BIT is contrary to EU law and thus cannot form the basis of an obligation on the part of the Applicant to arbitrate.

Notwithstanding the individual case-specific remarks contained in the CJEU's Achmea Judgment concerning the underlying BIT, that judgment must be seen as a landmark decision with significance extending beyond the individual case to all intra-EU BITs.

In the CJEU's assessment, an international agreement between EU Member States may not affect the autonomy of the EU legal system enshrined, in particular, in Article 344 TFEU and the EU judicial system intended to ensure the consistency and uniformity in the interpretation of EU law (CJEU, op cit, esp. paras 32 et seq, 35 quoted acc to Juris). In this regard, given their common values and the existence of mutual trust in the recognition of those values and the respect for EU law pursuant to the principle of sincere cooperation set out in the first subparagraph of Article 4(3)(1) TEU, Member States are obliged to ensure compliance with EU law within their jurisdiction (CJEU, op cit, para 34). Within the judicial system, in accordance with Article 19 TEU, it is for the national courts and tribunals and the CJEU to ensure the full application of EU law in all Member States and the judicial protection of the rights of individuals (CJEU, op cit, para 36). In this context, the preliminary ruling procedure in accordance with Article 267 TFEU forms the keystone for securing uniform interpretation of EU law (CJEU, op cit, para 37).

Under these principles, the CJEU considers that the submission of disputes to an arbitral tribunal as provided in an intra-EU BIT has an adverse effect on the principle of mutual trust and the autonomy of EU law if the arbitral tribunal is called upon to resolve disputes that are "are liable to relate to the interpretation or application of EU law", without a guarantee that

the questions of EU law which the tribunal may have to address can be submitted to the CJEU by means of a reference for a preliminary ruling (CJEU, op cit, paras 39, 43, 50 et seq, 58 et seq). Contrary to the Respondents' legal position, by contrasting the alternatives of "interpretation" or "application" of EU law as a mere possibility, the CJEU has adopted a broad and comprehensive notion of the extent to which EU law must be implicated (see Lang, EuR 2018, 525, 532). According to this view, the autonomy of Union law is adversely affected not only where EU law may form the standard of the arbitral tribunal's assessment, but also where there is a possibility that EU law may only become relevant for a determination of the subject-matter of the assessment (see Classen, EuR 2018, 361, 365 et seq; Lang, op cit, 537 et seq). In this respect, the distinction between taking EU law into account as a standard and taking it into account as a fact – on which the case law of investment arbitration tribunals relies – is, from the outset, irrelevant, particularly given the CJEU's efforts to comprehensively secure its interpretative monopoly (see Lang, op cit).

Furthermore, although the CJEU, in its Opinion concerning CETA (Opinion of 30 April 2019, 1/17, quoted acc to Juris), considered permissible an examination by an investor-State arbitration tribunal of EU law and domestic law of a Member State so long as, in accordance with Article 8.31(2) CETA, the law in question is not being interpreted, but is merely taken into account as a fact (op cit, para 131), the CJEU, at the same time, emphasised, with reference to the Achmea Judgment, that the principle of mutual trust was not applicable to relations between the Union and a non-Member State covered by CETA (op cit, paras 126 et seq, 129), and pointed out that the CETA tribunal was obliged to follow the prevailing interpretation given to the domestic law by the courts or authorities of the Contracting Party concerned (op cit, para 131). The CJEU's explanations in this regard justify the conclusion, that, in relations between Member States inter se, the rules restricting an arbitral tribunal's power to examine EU law cannot, by virtue of the principle of mutual trust, be subject to lower standards than those that exist in the text of the CETA agreement – that is, if the principle of mutual trust that applies in that context does not exclude treating EU law as a fact in the first place.

Under these standards, the submission of investment disputes to an arbitration tribunal under Article 9(2) of the BIT violates EU law. The possibility that such arbitration tribunal may have to apply EU law cannot be reconciled with the autonomy of EU law, which, in accordance with CJEU jurisprudence, must be respected. Consequently, there is no need to resolve the question whether, by establishing a decision-making competence outside the EU judicial system, the BIT additionally violates the principle of mutual trust and thereby independently infringes EU law (apart from considerations as to the law that is to be applied and interpreted).

The possibility that an arbitral tribunal called upon to decide under Article 9(2) of the BIT may inter alia have to apply EU law is already triggered by the fact that one cannot exclude the application of EU law as part of Member State law (see CJEU, Judgment of 6 March 2018, C–284/16, para 31), given that Member State law can play a role in the assessment of an investment measure, generally as at least a threshold question or interpretation criterion. A relevant reference in the BIT to EU law appears already in Article 11(1) of the BIT, which limits the BIT's applicability to those investments that are made in accordance with the law of the Member State. Accordingly, an arbitral tribunal is already obliged to assess the investment under EU law when examining the legality of the investment under either Croatian or Austrian law. In addition, Article 11(2) of the BIT excludes the BIT's application when it is contrary to EU

law. Therefore, in this context too, the tribunal must take EU law into account as a standard for comparison.

Contrary to the Respondents' legal position, the possibility of appreciating EU law as a fact – advocated by investment arbitration tribunals and confirmed by the CJEU in the CETA Opinion for relations with third countries – does not change the fact that the disputes encompassed by the BIT may relate to the interpretation or application of EU law within the meaning of the Achmea Judgment. The decisive factor in this regard is the material distinction between the regulatory content of CETA and the BIT, which is already manifest in the express provision of Article 8.31(2) CETA that the CETA arbitral tribunal may consider the law of a contracting party (merely) as a fact. In addition to this, the rule in Article 8.31(2) CETA, which was emphasised by the CJEU in the CETA Opinion and according to which the CETA tribunal must follow the prevailing interpretation given to the domestic law by the courts or authorities of the Contracting Party concerned, constitutes another specific rule aimed at preventing divergence by arbitral tribunals from the standards developed by the CJEU such that the uniform interpretation of EU law may be ensured. By contrast, in the absence of corresponding safeguards, the present BIT can neither guarantee that the arbitral tribunal truly will apply EU law exclusively as fact, nor ensure that, in interpreting or applying EU law, the arbitral tribunal will observe the standards laid down by the CJEU. An alternative view according to which the effectiveness of a Member State's obligation to arbitrate is contingent on a merely gradual distinction between the treatment of EU law either as a standard of assessment or as a fact (see Lang, EuR 2018, 525, 538), would create insurmountable delimitation difficulties in arriving at the threshold decision on the admissibility or inadmissibility of an arbitration proceeding because the extent to which the arbitral proceedings may depend on an interpretation and/or application of EU law is impossible to determine in advance. Against this background, and contrary to the legal position of the Respondents, the rule in Article 11(2) cannot be seen as providing an appropriate standard that would ensure that the arbitral tribunal will not be required to interpret and apply EU law.

According to the CJEU's judgment in the Achmea case, the adverse effect on the autonomy of EU law associated with the submission of an investment dispute to an arbitral tribunal cannot be cured either through the exercise of the tribunal's own powers, or those of State courts after the arbitral award has been issued.

First, an arbitral tribunal called upon to decide under an intra-EU BIT itself lacks the power to make a reference for a preliminary ruling to the CJEU under Article 267 TFEU, given that the arbitral tribunal cannot be regarded as a "court or tribunal of a Member State" within the meaning of Article 267 TFEU (CJEU, Judgment of 6 March 2018, C 284/16, para 43 et seq, esp paras 45 et seq and 49). In this regard, the CJEU's judgment is directly transferable to an arbitration tribunal constituted under the present BIT.

Second, according to the CJEU, the possibility to have questions of EU law clarified in a preliminary ruling procedure under Article 267 TFEU in the course of the review of the arbitral award by a Member State court is insufficient because such possibility is contingent on the choice of arbitral seat and the national law applicable at that seat (CJEU, op cit, paras 50, 52). In line with this, in its decision following the Achmea Judgment, the Federal Court of Justice (Judgment of 31 October 2018, I ZB 2/15, para 36, quoted acc to Juris) assumed that the CJEU

did not consider as sufficient judicial review that could be carried out only to the extent permitted by national law in a specific case. Accordingly, it is irrelevant whether, under any seat-dependent national law, and in particular under the Section 1050 ZPO in force in German law, the arbitral tribunal has the option of having a question of interpretation of EU law submitted to the CJEU via a State court possessing the reference powers pursuant to Article 267 TFEU.

The consequence of the incompatibility of Article 9(2) of the BIT with EU law is that the submission of disputes to a private arbitration tribunal as provided in Article 9(2) of the BIT no longer applies from the date of the Applicant's accession to the EU and there is thus no effective offer by the Applicant to conclude an arbitration agreement. In this respect, the Senate concurs with the Federal Court of Justice ruling in connection with the Achmea Judgment (Judgment of 31 October 2018, I ZB 2/15, esp paras 20, 26 et seq, 40 et seq), which the Senate considers fully applicable. An agreement concluded by an EU Member State with another State cannot, from the accession of the latter State to the EU, apply in the relations between those States to the extent that it is contrary to EU law (Federal Court of Justice, op cit, paras 20 and the references therein). The rule in an intra-EU agreement that is incompatible with the provisions of EU law simultaneously ceases to apply as a rule of international treaty law, without the need for that agreement to first be terminated (Federal Court of Justice, op cit, para 40 and the references therein).

Finally, an effective conclusion of an arbitration agreement also cannot be derived from the principle of good faith.

At the time of their investments made after the Applicant's accession to the European Union, the Respondents should have foreseen that BIT provisions may no longer be fully applicable due to the primacy of EU law (see Federal Court of Justice, op cit, para 45). Neither has it been shown or can otherwise be established that, after its accession to the EU, the Applicant has created a specific relationship of trust that could possibly stand in the way of its reliance on the inapplicability of the BIT's arbitration clause. Nor can such duty of trust for the benefit of the Respondents be derived, in particular, from the fact that the EU Commission did not initially object to the existing BITs at the time of the accession of the new Member States (see Federal Court of Justice, op cit, para 47), nor from the fact that the Applicant has not yet terminated the BIT (see Federal Court of Justice, op cit, para 51).

Likewise, the Respondents cannot find support for their bad faith argument in the alleged systemic defects of the Applicant's judicial system, manifesting themselves, in particular, in the omission of the necessary references under Article 267 TFEU and the possibility that the Respondents were deprived of effective legal protection by the courts in relation to the amendment of the insolvency law about which they complained. This is because any such defects of the Applicant's justice system, even combined with the prejudice they are said to entail for the Respondents' rights, do not in any way alter the fact that the submission of disputes to a private arbitration tribunal outside the EU judicial system as provided in Article 9(2) of the BIT is contrary to EU law as interpreted in the Achmea Judgment. Accordingly, it is likewise irrelevant whether or not, in the factual universe of this case, the "exceptional circumstances" alleged by the Respondents stand in the way of applying the principle of mutual trust to the Applicant's justice system: under the Achmea Judgment, this cannot have

the legal consequence of enabling the Senate – a court of another Member State – to displace the jurisdiction of the Applicant's courts by establishing the jurisdiction of a private arbitration tribunal that is incompatible with EU law. CJEU case law does not provide a basis for such a transfer of competences from national courts to private arbitral tribunals. Accordingly, the Federal Court of Justice did not consider the raising of doubts as to the impartiality and effectiveness of Member State courts to be an appropriate justification for a departure from the Achmea Judgment in individual cases (Federal Court of Justice, Judgment of 24 October 2019, I ZB 2/15, para 8, quoted acc to Juris).

Given the above reasoning, there is no need for the Senate to refer the matter to the CJEU for a preliminary ruling pursuant to Article 267 TFEU because the application of EU law in accordance with the standards of the CJEU's Achmea Judgment and the supplementary explanations in the CETA Opinion set out above is so obvious as to leave no scope for any reasonable doubt ("acte clair", see, e.g., CJEU, Judgment of 9 September 2015, C–160/14, para 38 et seq and the references therein, quoted acc to Juris).

The costs decision is based on § 91 ZPO.

According to Section 3 ZPO and the Senate's established case law, the value of the dispute shall comprise one fifth of the merits claim in the arbitration proceedings, in which, according to their 14 February 2020 Notice of Arbitration, the Respondents intend to claim damages of at least EUR 26 million.