CASE NOS T 8538-17 AND 12033-17

SVEA COURT OF APPEAL

REPUBLIC OF POLAND

Claimant

-and-

P L HOLDINGS S.À.R.L.

Respondent

OPINION OF JUGDE FIDELMA MACKEN

I have been asked to furnish my legal opinion on an issue or issues of European Union law arising from the subject matters dealt with below, and for the purposes of being filed with the Svea Court of Appeal of Stockholm in the above entitled proceedings.

Preliminary

a. I am conscious that in furnishing an expert opinion on Union law, it is appropriate that I set out my qualifications for doing so. Attached to this opinion is a curriculum vitae, signed and dated.

b. I understand fully the obligations imposed upon me as a person giving an expert opinion, even when not appointed by the Court hearing the matters arising, but instead by one of the parties to an action.

c. I am a member of the Bar of Ireland and also of the Bar of England and Wales, and – prior to being appointed to the bench, first in Ireland, and then at the Court of Justice of the European Union ("CJEU") – I practised over a significant number of years, *inter alia,* in the fields of Constitutional Law, Commercial Law, Intellectual Property Law, and European Union law. I spent more than five years as a judge of the CJEU, and during part of that time acted as President of the Third and Sixth Chambers. I sat in the formation of the Court in many Grand Chamber cases dealing with extremely important matters of European Union law, and was the juge rapporteur in a significant number of cases during that time. Although familiar with principles of international law, including as to how these relate to the law of the European Union, I do not purport to be an expert in international law. I am an experienced arbitrator, having been involved in national and in world-wide arbitrations, both during practice, and since I retired as a judge of the Supreme Court of Ireland.

d. I have no connection whatsoever, neither personal nor professional, with any of the named parties or any of the legal representatives in the action in the title to this opinion, or in any other action which may have been commenced elsewhere concerning the matters in the present action commenced before the Svea Court of Appeal of Sweden, set out in the title to this opinion. Nor do I know any person who may give evidence in those proceedings, whether orally or otherwise.

e. I am not now, and was not in the past, connected in any way with the above proceedings, nor with any corresponding proceedings in any other Member State, nor with the underlying arbitration, which led to the Partial and Final Awards made in the arbitration, which are the subject of these proceedings (the "Arbitration Awards"). My only connection is as the provider of this opinion on European Union law.

<u>The background facts</u>

1. Along with many other countries, Poland – prior to becoming a member of the Union on its accession to it in 2004 – entered into a bilateral investment treaty with existing Member States of the Union, in this case, the

Grand Duchy of Luxembourg and the Kingdom of Belgium ("the BIT"). This treaty is similar to others entered into between other Eastern European States (called at the time "Accession States"), with existing Member States, predominantly in the years immediately prior to accession, and at a time when the Union was encouraging existing Member States to invest in the infrastructural or other programmes of the newly emerging Accession States). The provisions of the BIT, the subject of the claim and arbitration award, are also found in similar treaties made between Accession States and certain existing Member States in the period in question.

2. A particular feature of these bilateral investment treaties, are the provisions relating to disputes and how they are to be resolved. By and large, such disputes are agreed to be resolved through arbitration of one type or another, as expressed in those treaties. In order for such arbitration to be possible, the States party to these BITs have consented to limit their sovereignty by agreeing to arbitrate disputes occurring with investors from another state.

3. Typically, after the accession of new Member States to the Union in the period between 2004 and 2006 (or shortly thereafter), some or other of the new Member States may have terminated the treaties. Investments in new Member States have, however, led to disputes under the bilateral investment treaties, and subsequently to damages by way of arbitral awards pursuant to arbitration clauses invoked by investors pursuant to those treaties. Other Member States may have chosen not to terminate the treaties in force but may have deprived investors of other benefits or of property, allegedly also giving rise to damages and to claims pursuant to arbitration clauses in those treaties.

4. Briefly, in relation to such arbitral awards, they have been contentious for some time. Some Member States, but also the Commission of the European Union, have expressed the view that such awards are contrary to Union law and are therefore, unenforceable.

5. In the present proceedings, I am not personally aware of the detail of all of the facts and matters arising in support of the particular arbitration claim. I have however been instructed in relation to these by Anna-Maria

Tamminen of Hannes Snellman Attorneys Ltd and by Martin Wallin and Julia Tavaststjerna of Wallin & Partners for the Republic of Poland in the Swedish set aside proceedings, and I am satisfied that all such matters disclosed to me are true and accurate.

6. I am instructed that in the case mentioned in the title to this opinion, the parties entered into an arbitration agreement pursuant to Article 9 of the BIT. Shortly after the awards of the arbitral tribunal being made on 28 June 2017 (for the Partial Award) and on 28 September 2017 (for the Final Award - the Final award incorporating the earlier Partial award), the Republic of Poland initiated invalidation and set aside proceedings in Sweden to challenge the awards, on multiple grounds.

7. Simultaneously, PL Holdings, the claimant, applied, *ex parte*, to the High Court of England and Wales, seeking an order for the recognition the Final award (and I assume for its eventual possible enforcement).

8. Coincidentally, the CJEU determined that arbitration clauses providing for the resolution of disputes arising under bi-lateral investment treaties (BITs) between Union Members – called "Intra-EU BITs", are not compatible with Union law, and are instead precluded by EU law. The CJEU declared this law in its judgment made in a reference to it, pursuant to Article 267 of the Treaty on the Functioning of the European Union (the "TFEU") concerning set aside proceedings initiated in Germany against an award made on the basis of a BIT made between the Kingdom of the Netherlands and the Republic of Slovakia (case C-284/16 – 6 March 2018). The underlying arbitration proceedings against Slovakia were brought by an investor incorporated in the Netherlands, Achmea, pursuant to Article 9 of that BIT. I will deal with the detail of this judgment later in this opinion.

9. Arising from that history, I have been asked to give an Opinion on certain issues of European Union law, having regard to the various matters set forth above, and to relevant aspects of the Achmea judgment, and I now do so.

10. In the circumstances, it seems to me appropriate and logical to consider first the judgment of the CJEU in the Achmea case, being the most recent decision of that Court, and then to give my opinion on how that

decision may or should affect the approach of any national court of a Member State, when making its decision in an application for invalidation or set-aside of an arbitral award made pursuant to an intra-EU BIT and in relation to an arbitration brought by and investor under such a BIT.

B. The Achmea Judgment

1. First, in order to understand the Achmea judgment, I am of the view that it is not helpful to isolate the so-called "essential" findings, which the CJEU reached, as the entire basis for the judgment is found in the set of considerations and prior case law referred to and relied upon by the Court. It is only by analysing and appreciating these matters referred to by the Court in its detailed determination of the law that the decision of the CJEU can properly be understood and then applied.

2. It should be mentioned, first, however, that Achmea is a decision primarily made in respect of Union law. It is not a decision made primarily in respect of arbitration, nor from the particular point of view of arbitration, although its decision arose against the background of arbitration. This distinction is important.

3. Next I point out that the judgment in Achmea is the most recent in a series of cases which have come before the CJEU, usually in the form of a reference to that Court from the courts of a Member State – in the Achmea case, from the Bundesgerichtshof, (that is, the Federal Court of Justice of Germany) – and concerning bilateral investment treaties (see, eg the series of cases I mention later, from an earlier period).

4. The Achmea context is therefore a relatively familiar one for the CJEU in the field of BITs, which in that case entered into force in 1992 (before the Slovak Republic had been created and thus before it acceded to the EU in 2004). The BIT in question was made between the Kingdom of the Netherlands and the then Czech and Slovak Federative Republic. (In passing I mention that the rights and obligations of the BIT passed to the Slovak Republic as the successor State to the Czech and Slovak Federative Republic in early 1993).

5. A dispute arose between a qualifying investor within the BIT, Achmea, and the Slovak Republic, in 2007, as a result of alleged losses that the investor claimed to have suffered. For the purposes of this part of my opinion, the nature of the dispute is not especially relevant. Achmea invoked the arbitration clause in Article 8 of the BIT, and brought proceedings against the Slovak Republic. The Slovak Republic objected to the jurisdiction of the arbitral tribunal on the basis of lack of jurisdiction, but this objection was dismissed by the arbitral tribunal. An award was made on 26 October 2010 in favour of the investor by the arbitral tribunal appointed under Article 8 of the BIT.

6. Under the German Civil Code of Procedure (German law applied to the arbitration, pursuant to agreement between the parties to seat the arbitration in Frankfurt), the binding award could only be set aside if one of the grounds set out in Paragraph 1059(2) of that Code was present. In that particular case, those two grounds were (a) invalidity of the arbitration agreement, and/or (b) the award being contrary to public policy.

7. The judgment of the CJEU refers to the fact that the Bundesgerichtshof declared that, since the BIT constituted an agreement between Member States, the provisions of EU law, in the case of conflict, would prevail over those of the BIT, in matters governed by the provisions of Union law. This is a correct comment in law in my opinion.

8. The reference from the Bundesgerichtshof to the CJEU also states that the Slovak Republic had expressed doubts as to the compatibility of the arbitration clause with certain provisions of the TFEU, being Articles 18, 267 and 344, as well as the obligation found in Article 4(3) of the Treaty of the European Union ("TEU"). I do not at this point need to repeat these views.

9. As a result of the foregoing exposé, the Bundesgerichtshof stayed the proceedings and referred the following three questions to the CJEU, in the following terms:

> ***"(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning***

investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

(2) Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?"

10. Questions 1 and 2 were considered together by the CJEU, given the commonality of the two questions.

11. The brief answer to questions raised was yes to both questions. In passing, the CJEU did not consider it necessary to go further than these two questions.

12. Before considering the reasoning of the CJEU which needs to be considered in detail, there are two matters I should clarify. The first is that, although the referring court in its reference set out in some considerable detail its arguments supporting its view that the principles of Union law – including its preliminary reference procedure – could be adequately protected, even in the case of an arbitration as provided for in Article 8 of the BIT in question, the Court did not accept those arguments. It did not, and does not usually, directly reject the arguments, but nevertheless – having set them out – proceeded to adopt a reasoning and a result contrary to that expressed by the referring court.

13. It is also important to clarify that the Court did not either accept any propositions contrary to its own reasoning, as set out in the Advocate General's opinion, and dealt with this in line with its usual practice in that regard. Generally, if the Court decides to adopt the proposals set out in an

Opinion, it will expressly refer to aspects of the Opinion with which it is in agreement, and indeed even on occasion, expressly adopt the wording in the Opinion. When however, the Court does not accept the propositions of the Advocate General – and there is no obligation on the Court to do so - the Court does not then expressly refer to the Opinion. The function of the Opinion is to set out all the law in favour and against the arguments presented by the parties, so that the Court has before it all of the possible range of views it may wish to consider. The Court does not however directly contradict or reject the proposals made. It instead presents its own legal reasoning. It might be said that it, by implication, does not accept the views expressed in the Opinion. It is not the case that the Court, in the absence of any direct rejection of propositions of law set out in the Opinion, leaves such propositions intact as good or valid propositions of Union law.

14. In the present case the Court clearly came to the views which it did, on the basis of the reasoning set out, including that in relation to the provisions of Article 267 and of Article 344 and others, and it is clear that the arguments on those same or other Articles, or case law, proposed by the Advocate General in his Opinion, which represented a different approach to that of the Court, were not adopted as representing Union law, which is constituted instead exclusively and solely by what appears in the judgment of CJEU and in its ruling on the issues raised. It would therefore be incorrect and misleading for a party to rely on extracts from the Opinion of the Advocate General as representing good Union law, if those extracts or propositions contained in them sought to be relied upon, conflict in any way with that of the Court.

Reasoning of the Judgment:

15. In its detailed reasoning the CJEU first sets out the fundamental principles and norms of Union law, which must be taken into account in order to determine the appropriate approach the Court should adopt in assessing the issues raised by Questions 1 and 2, and therefore, its eventual response. These fundamental principles and norms are set forth in clear

terms, and in my opinion, are vital to an understanding of the judgment. I synopsize these as follows:

(a) An international agreement cannot affect the allocation of powers fixed by the Treaties, or consequently, the autonomy of the EU legal system. The observance of that system is ensured by the Court;

(b) That principle of autonomy is enshrined in Article 344, TFEU, by which Member States undertake not to submit disputes concerning the interpretation/application of the Treaties, to methods other than those provided for in the Treaties (citing Opinion 2/13 – Accession of the EU to the ECHR – para 201 (and the cases cited there);

(c) Further, the autonomy of EU law is justified by the essential characteristics of the EU and its law – in particular relating to the constitutional structure and the nature of that law;

(d) EU law stems from an independent source of law – the Treaties – by its primacy over the laws of Member States, and by the direct effect of a series of provisions applicable to Member States and their nationals;

(e) Those characteristics have given rise to a structured network of principles, rules, and mutually interdependent legal relations, binding the EU and its Member States reciprocally, and binding on the Member States in relation to each other (citing in respect of all of these latter the above Opinion 2/13, *supra).*

16. As a result of the above, EU law is based on the following premises -

(a) that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded (as stated in Article 2 TEU);

(b) that these premises imply and justify the existence of mutual trust between the Member States that those values will be recognised, and therefore, that the law of the EU that implements them will be respected;

(c) that, in that precise context, the Member States are obliged, by reason, *inter alia,* of the principles of sincere cooperation set out in

Article 4(3) TEU, to ensure in their respective territories, the application of and respect for EU law,

(d) that, for those purposes, the Member States are obliged to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU;

(e) that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law;

(f) that it is for the national courts and tribunals, and the CJEU, in accordance with Article 19 TEU, to ensure the full application of EU law in all Member States, and to ensure judicial protection of the rights of individuals under the law (citing Opinion 1/09 on an Agreement creating a unified patent litigation system; Opinion 2/13 supra, and Case C-64/16, *Associacao Sindical dos Juizes Portuguese* judgment). The judgment then continues:

> ***"37. Therefore, the judicial system (of the EU) as thus conceived, has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (and) thereby service to ensure its consistency, its full effect and its autonomy, as well as, ultimately, the particular nature of the law established by the Treaties.***
>
> ***38. The first and second questions referred for a preliminary ruling must be answered in the light of those considerations".***

(emphasis added)

17. It is essential to set out the above reflections of the CJEU in Achmea, since the responses to the questions posed by the referring court cannot be isolated from these detailed and reasoned considerations.

18. From those considerations, and the questions posed by the referring court, the judgment sets out the three issues it must consider as:

(i) first, whether the disputes in question "are liable to relate to the interpretation or application of EU law";

(ii) secondly, (a) whether an arbitral tribunal of the type mentioned under Article 8 of the BIT is situated within the judicial system of the EU, and (b) whether it can be regarded as a 'court or tribunal' within a Member State; and

(iii) finally, whether an arbitral award made by such a tribunal is, according to Article 19 TEU "subject to review by a court of a Member State" (thereby ensuring – if it were that questions of EU law can be the subject of the preliminary procedure mechanism to the CJEU).

19. The Court found on the first issue that, on the basis of the applicable law being made up of both the law in force in every Member State, and the law as derived from the international agreement, the arbitral tribunal referred to in Article 8 of the BIT may indeed be called upon to interpret or apply EU law, particularly as it concerns fundamental freedoms (including the freedom of establishment, and the free movement of capital).

20. On the second issue, the Court explained that the consequences of a tribunal within the meaning of Article 267 being set up by a Member State is that its decisions are subject to mechanisms capable of ensuring the full application of Union law. However, the tribunal in the Achmea case was not part of the judicial system of either the Netherlands, or Slovakia. It was precisely the exceptional nature of its jurisdiction, compared to that of the courts of those Member States, which constituted a principal reason for the existence of Article 8 of the BIT. The Court found that a tribunal such as that referred to under Article 8 was, therefore, not a court or tribunal of a Member State within Art. 267 of the TFEU.

21. Dealing with the third of the relevant issues, the CJEU considered whether the arbitral award itself was, in accordance with Article 19 of the TEU in particular, subject to review by a Court of a Member State, thereby ensuring that questions of EU law which it might have to address could be

submitted to the CJEU by means of a reference for a preliminary ruling. It found that it was not subject to such review.

22. In that regard, it relied upon the fact that the decision of the arbitral tribunal being final pursuant to Article 8(7) of the BIT; that the arbitral tribunal may determine its own procedure pursuant to UNCITRAL rules; and that the arbitral tribunal is itself to choose its seat (and consequently the law applicable to the procedures governing judicial review of the validity of the award).

23. Contrasting the BIT arbitration in issue with commercial arbitration, the Court distinguished them on the basis that the latter may limit access to court for reasons of efficiency of the arbitration, but only in compliance with fundamental provisions of EU law, by always being subject to a reference for a preliminary ruling by the courts at the seat of arbitration, if it engages any aspect of Union law. On the contrary, in the case of an arbitration pursuant to a provision similar to Article 8 of a BIT, these are derived from the terms of a treaty, by which Member States themselves agree to remove from jurisdiction of their own courts (and hence from the system of judicial remedies – including the preliminary reference procedure - which Article 19(1) of the TEU requires them (the Member States) to abide by in fields covered by EU law).

24. While the Court so dealt with the issue as in the last paragraph, when doing so it is vital to bear in mind the obligations it referred to as placed on Member States pursuant to the mutual trust which exists between them, and to the obligations of loyalty to the Union, both pursuant to the terms of the Treaty, as interpreted by the CJEU. That includes, in particular, the provisions of Article 344 of the Treaty, which prohibits the very approach represented by the terms analogous to of Article 8 in BITS entered into between Member States. Articles 344 is in starkly clear terms namely:

> ***"Member States undertake <u>not to submit</u> a dispute concerning the interpretation or application of the Treaties to <u>any method of settlement</u> other than those provided for therein." (emphasis added)***

25. This provision makes it clear that neither a Member State nor any other party – including a party seeking to implement an award made

pursuant to a "method of settlement" not provided for within the Treaties – may ignore its terms, or render this Article of the TFEU meaningless, undermine it in any way, or ignore the clear meaning of its wording.

26. In such circumstances, the CJEU made clear that the considerations applicable to purely commercial arbitrations cannot be applied to an Article 8 BIT arbitration.

27. The Court concluded in respect of the third issue that the Member State parties to an intra-EU BIT treaty, instead established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

28. The Court also drew a distinction between intra-EU BIT arbitration and submission to the decisions of a court which is created or designated by international agreements concluded by the Union itself, provided, however, that the autonomy of the EU and its legal order is respected (citing Opinion 1/91 in which such autonomy did exist, and Opinions 1/09 and 2/13 of the CJEU in which such autonomy was not).

29. Against that backdrop the CJEU found that, quite apart from the fact that such a tribunal is not, in European Union law, a court or tribunal of a Member State, the very possibility of submitting a dispute concerning or relating to EU law under an agreement concluded (not by the EU, but by Member States), by means of Article 8 of the BIT, calls 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, which is ensured by the preliminary reference procedure provided for in Article 267 of the TFEU, and is also not compatible with the principle of sincere cooperation referred to in the earlier part of its judgment.

30. By way of conclusion, the Court found that provisions such as Article 8 of the BIT have an adverse effect on the <u>autonomy</u> of EU law.

31. In consequence, the CJEU ruled that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement

concluded between Member States, such as Article 8 of the BIT, under which the Member States have agreed that an investor of one Member State may bring proceedings against another Member State before an arbitral tribunal, whose jurisdiction that Member State has undertaken to accept.

C. Questions for Consideration in my Opinion

(i) Was the decision in Achmea based on established jurisprudence and case law of the Court of Justice of the European Union?

1. In my opinion, the decision of the Court, based upon a series of earlier Opinions and case law of the Court, on the particular characteristics of the EU legal system, including, its autonomy and uniformity, and its supremacy over national systems – whether national or constitutional law or legal procedural mechanisms for the implementation of arbitral awards – as well as on its preliminary reference system, dictates that the judgment is fully applicable to any and all arbitral awards granted pursuant to a provision similar to Article 8 in BIT of the type leading to the award subject to the proceedings in Sweden. The judgment is not limited to the invocation of an arbitral tribunal's jurisdiction or to the arbitral proceedings that follow, but goes beyond that to include the consequent award itself, in the absence of any possibility of that award being reviewed for its compliance with Union Law, pursuant to the provisions of Article 267 of the TFEU, under the preliminary reference procedure.

2. That conclusion must also extend to any mechanism by which the beneficiary of the award seeks to avoid having its legality or validity within Union law challenged, for example, by means of an application to have the award recognised or enforced, as well as by any failure to set aside or annul such an award. If not, the judgment of the Court, and also the Union law principles and mechanisms, would be undermined.

3. Whether one agrees with the consequences of the decision or not, or whether one considers that some parts of the judgment might have been

explained in some other, different, or more expansive or even clearer manner. It is not possible legitimately to condemn or challenge the approach actually taken, the invocation of principles already well-established and adopted in the case law, as those being applicable to the decision, or to the application of those principles to the particular characteristics of the tribunal in issue under the BIT in the Achmea case.

4. The principles which the CJEU stated should be taken into account in adopting the correct approach to the questions posed (that is questions 1 and 2, being the necessary questions), are all based on a series of previous cases stretching back more than 25 years, and, in addition, on several formal Opinions of the Court. Those Opinions are different to usual references, in that they are requested by any one of the Commission, the Council, a Member State, and/or the Parliament (in appropriate cases). They are almost invariably dealt with by a Grand Chamber consisting of the President, the Vice President, and the Presidents of all five-member chambers, of which at present there are several.

5. Further, they are always the subject of the (separate) Opinion of an Advocate General of the Court, frequently of the First Advocate General. These Opinions are frequently – at least since the establishment of the position of Vice President of the Court – allocated to that judge. It is fair to say that they are, as a general rule, considered to be of very great importance in the decision making process of the CJEU.

6. In the Achmea present reference (which the Court also allocated to a Grand Chamber), the CJEU cites, in turn, several Opinions of the Court decided since as early as 1991, and in each of those Opinions, issues concerning in particular the autonomy of the EU legal order, and of the importance of dispute resolution entities falling within the ambit of "courts or tribunals" of the Union, have been at the forefront, as well as the preliminary reference procedure, which has been in operation since the very early days of the Court, as a discrete integral mechanism of the European Union legal system.

7. In considering Opinion 1/91 EEA Agreement – concluded with the Union – and Opinions 1/09 and 2/13, all of which concerned, *inter alia,* the

issue of whether their dispute resolution systems could constitute "courts or tribunals" of the Member States, and whether the preliminary reference procedure might be undermined - and thereby the Union's uniformity and supremacy - the Court had a clear basis from an established stream of case law upon which it was fully entitled to rely, and did rely, quite apart from its independent findings as to the nature of the particular arbitral tribunal within Article 8 of the BIT. The principles derived by the Court from these Opinions were supplemented by findings in additional case law invoked by the Court, which it is not necessary for me to repeat in this opinion.

8. It is therefore the position that – without it being necessary to cite in detail each of the several formal earlier Opinions of the CJEU, or its more regular case law – the Court had ample prior statements and findings on Union law, upon which to rely in coming to the view, which it did. Moreover, it does not appear to have failed to have regard for any case law or Opinions, which it ought to have taken into account.

9. I can find no basis upon which the judgment should not be fully implemented in any other similar situation, such as the present proceedings mentioned in the title to this Opinion, which arises pursuant to a BIT made between the Grand Duchy of Luxembourg and the Kingdom of Belgium on the one hand and the Republic of Poland on the other, incorporating very similar provisions.

10. It is also important to point out that the decision in Achmea did not suddenly come about in the recent past. In an earlier period, the Commission had brought a series of cases concerning extra-EU BITs about which it had concerns etc. They include: C-205/06 Commission v Austria (Grand Chamber, 3 March 2009); Case C-249/06 Commission v Sweden (Grand Chamber, 3 March 2009); Case C-118/07 Commission v Finland (Second Chamber, 19 Nov., 2009, all dealt with one after the other by the Court. It is true that these concerned extra-EU BITS, but this distinction is not of such importance to alter the similarities, or to affect the outcome of Achmea in any way.

11. The CJEU had also made it abundantly clear in earlier case law, including in Case C-459/03, that pursuant to the provisions of Article 344, Member States must comply with the obligations imposed upon them under

that provision. In that case the Commission was relying for the first time on Articles 292 EC (now Article 344), which requires Member States to undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for therein, as set out earlier in this opinion.

12. The Court (Grand Chamber) ruled in the Commission's favour by holding that Ireland had disregarded its exclusive jurisdiction, by opting for the resolution of a dispute (arbitration). Ireland's breach of Article 292 also lay in its breach of its obligation of loyal cooperation by means of a mechanism, which would allow for any preliminary reference, or without appropriate consultation. While it is true that the Convention in question was one to which the Union had subscribed, that did not represent an excuse for proceeding contrary to Article 292. The CJEU held that the obligation of loyal cooperation had been breached because of the absence of any proper consultation with the Union (through the Commission) prior to entering the arbitration arrangement. Prior consultation would have permitted the Union, for example, to ensure that any arbitration agreement would contain appropriate terms to ensure compliance with the provisions of the Treaties, or with Union law procedures, including the possibility of a reference being made to the CJEU from an appropriate court or tribunal.

13. In conclusion therefore, in my opinion the CJEU had ample basis upon which to reach the decision that it did in the Achmea case.

(ii) What significance should the CJEU's judgment have for a national court deciding to invalidate/set aside an award when brought on the basis of an invalid arbitration provided for in an intra-EU BIT, and why.

1. The answer to this question is clear. As in the case of all decisions of the CJEU – in particular those which concern or relate to the interpretation and/or application of the Treaties, both the TEU and the TFEU – and specifically those which have been responded to by means of the preliminary

reference procedure, the decision of the CJEU in the Achmea case is binding on all Member States and on all relevant courts and tribunals within the Member States, as well as on all Member State Bodies.

2. The reasons for this are clear.

3. In the Treaties, the obligation and responsibility for the interpretation and application of Union law vests, in the final analysis, in the CJEU. See Article 19 (2) of the TEU: "… ***(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions***"**. National courts are bound to apply European Union law – not only within the terms of the Treaties, but also of Regulations and Directives, as interpreted and/or applied by the CJEU.**

4. In the event that there is doubt about a Union law, or doubt about the correct application of that law, a national court is obliged, pursuant to the case law of the CJEU, to make a reference to that Court for delivery of a response (see Case C-283/82 CILFIT). That obligation is equally clear. It obliges courts from which there is no further appeal to refer the matter to the CJEU, and grants liberty to lower courts to make such a reference. A court that fails to make a reference or which wrongly withdraws a reference already made, breaches its obligations in European Law, according to the clear case law of the Court (see Case C-224/01, Köbler and cases mentioned therein).

5. If it were possible to avoid making such a reference by merely establishing a mechanism, which would have the object or effect of evading actual consideration of the applicable Union law, the effect of the preliminary reference procedure would be wholly undermined. The fact therefore that the arbitral tribunal has not, in fact, dealt with issues of EU law, provided the dispute is one which may or might raise issues of that law is sufficient for the CJEU to consider it precluded by the Treaties. The statement by the CJEU itself makes it clear, on its face, that it is not a requirement that the settlement method adopted did not lead to Union law issues being actually considered.

6. Moreover, the present proceedings, as I understand them, arise from the alleged wrongful expropriation of shares owned by the claimant in an

undertaking based in Poland, for which the claimant sought to refer a claim in damages to the arbitral tribunal for decision under Article 8 of the BIT.

7. It is for the Union to decide what does or does not come within the ambit of EU law, and for the CJEU to make a determination on this. It has long been established that this determination is not, in general, to be made by Member States – despite their argument to the contrary on several occasions - as this could lead to the possibility of different and even varying/conflicting decisions, which would undermine the uniformity of EU law. It follows inexorably that it cannot be either for an arbitral tribunal, or for a party to an arbitration, to determine whether a matter comes within Union law – and therefore must be the subject of a reference to the CJEU if not clear – or not.

8. In an analogous area of EU law concerning in the exclusive competence of the Union to make laws, the CJEU has, on a number of occasions, examined the extent to which matters have been brought within the legislative or other ambit of EU law. The case law does not apply directly to the issues arising under the BITs but is helpful in determining briefly and clearly that the dispute in issue involves issues of Union law. It concerns *inter alia,* the freedom of movement of capital, the investment of that capital, the right in individuals or undertakings not to have the property expropriated, at the very least without compensation. These latter rights are established clearly as part of the four freedoms of Union law, and also form part of the fundamental rights guaranteed by the Charter of Fundamental Rights.

9. Consequently, they fall within the clear ambit of EU law (as did the matters in issue in the Achmea judgment and which were recited by the CJEU there), in areas in which the EU has clearly provided for, either pursuant to the Treaty provisions (including the Charter), or by legislation in its Regulations or Directives, and the same approach is reflected in cases of the CJEU such as the opinion of the Advocate General in Case C-240/09 on the Aarhus Convention – covering brown bear protection, and the right of access to court; in formal Opinion 2/15 on Free Trade Agreement between the European Union and the Republic of Singapore, on, *inter alia,* foreign investment, but also on certain limited aspects of air transport, and several other similar cases almost too numerous to mention.

10. In such circumstances, there could be under EU law no requirement that the arbitral tribunal of the type in issue, is precluded by EU law only in circumstances where it has, in fact, considered EU law as part of its process, but instead, as is stated in Achmea, it is sufficient if the subject matter is one which "may concern the application or interpretation of EU law".

(iii) The implications of the Achmea judgment for Member States

1. A judgment of the CJEU, once delivered is binding from the date of its delivery on all Member States.

2. In some cases, parties apply for a temporal limitation of the judgment. In the Achmea case, no application was made.

3. In my view, the effect of the Achmea judgment is, in turn, that a decision reached pursuant to a clause of the type set out in Article 8 of the BIT (and the subject of the Achmea judgment), but which has been declared invalid, is precluded by EU law, and cannot thereafter be relied upon by a party seeking to do so, for the reasons next set forth.

4. The correct status of the Achmea judgment is that it is declaratory of the legal position, which had always existed, namely, that such a clause is invalid as being precluded by European Union law. That declaration is not confined to those agreements which may be entered into only after the declaration has been made, or to arbitral awards declared or made into the future. It is instead declaratory of the invalid status of all such clauses whensoever entered into. It is a declaration of what European Union law is and always was, but which remained undeclared – or undeclared with sufficient clarity - until that judgment.

5. It is for the national court (the Bundesgerichtshof in Germany) to apply the decision of the Achmea judgment in full. It would be impossible for the German Court to resist doing so, without being in breach of a judgment of the CJEU rendered as a statement on the interpretation and/or application of EU law, and/or without being in breach of its obligation of loyal cooperation

under the provisions of Union law. Indeed it is fundamental to an understanding of findings in Achmea, that they are directed equally to the protection of the national courts, which – under the preliminary reference procedure, enter into a dialogue – as the CJEU describes it – with the CJEU, in implementing the provisions of Union law and in guaranteeing the several principles of that law as enunciated in Achmea.

6. In so far as any step further to, or beyond, the award itself, it seems to me that a correct interpretation of the judgment and of Union law, as declared, is that it has further effects. Based on Achmea, Member State courts will have to conclude that at least arbitration clauses in intra-EU BITs can provide no valid basis for an arbitration agreement. In such clear circumstances, this should in turn, lead to the invalidation/setting aside of an award made pursuant to that invalid clause, in accordance with the terms of the applicable provision of law at the seat of arbitration.

7. The question may arise as to whether Member States are *required* to invalidate or set aside such an award. The clear implication of the judgment in Achmea is that they must. In my opinion, it is in complete contradiction of the finding of invalidity of such a clause by the CJEU in Achmea, for a Member State not to invalidate or set aside an award based on arbitration clause, precluded by Union law. The finding that such an arbitration clause is invalid in Union law cannot, under the same law, carry with it a subsequent or consequential ruling that the award made pursuant to such invalidity nevertheless has a lawful status.

8. The Union had adopted both uniformity of EU law and supremacy of EU law as principles and norms of its law for many many years. Those principles, and in particular that of supremacy of European Union law has also resulted in a requirement on the part of Member States to disapply an offending law. That offending law, as in the case of the arbitral award in issue, may well be found in BITs entered into between Member States, but the European Union treaties between the same Member States have legal priority and supremacy over the former, in the same way as the Union also has over terms of national legislation which is inconsistent with Union law.

9. Under the doctrine of primacy of Union law – a fundamental norm of Union law - the CJEU established many years ago the principle or norm that, where a domestic legal rule is incompatible with EU law, this rule must be immediately disapplied, without awaiting formal revocation (otherwise required by the national law). [See C-6/64, Costa v. ENEL [1964] ECR 585; C-106/77, Simmenthal [1978] ECR 629]. This same principle must apply to a term in an intra-EU BIT, which is equally found to be invalid in Union law, and/or to an award made pursuant to such an invalid clause, as well as to any consequential attempt to recognise or enforce such an award.

10. Indeed, it is part of the fundamental reasoning of the CJEU in Achmea, that the national courts of the Member States must be in a position to exercise their powers within the ambit of the overall system of EU law described in the judgment as set out earlier in this Opinion. In that regard, it is important to bear in mind the terms of paragraph 37 of the Portuguese judges case cited in detail in the Achmea judgment set out earlier, in which the particular role of the national courts in the dialogue which exists between the national courts and the CJEU is guaranteed and, if necessary, protected. Those national courts of the Member States are obliged to apply the full effects of the judgments of the CJEU so that Union law is not simply applied uniformly, but also effectively.

11. Seeking artificially to divide or separate the findings of invalidity of such arbitral clauses in intra-state BITs from the logical and legal results or consequences of that invalidity, by seeking to rely upon an award flowing from an invalid arbitration clause, or, for example, by failing to invalidate or set aside an award made pursuant to that invalid clause, so declared by the CJEU, does not, in my opinion, meet the long-established principle of effectiveness, as well as of primacy of Union law, by failing to disapply forthwith.

12. I do not leave to one side, however, or ignore, the case law of the CJEU in an earlier case (see, Eco Swiss China v Benetton International, Case C-126/97), concerning arbitration and the possible annulment of an arbitral award. In that case the CJEU made statements to the effect that, in general, it is preferable for the purposes of the efficiency of such arbitrations, that there should be limited grounds for permitting annulment of an award.

13. The Eco Swiss case concerned commercial arbitration between private commercial parties, where the Member State was not involved in the choice of such parties to remit to arbitration or not, and the parties themselves were not obliged to opt for arbitration. Because of its particular characteristics, it was also not, under the judgment, a "court of tribunal" within the meaning of these terms in European Union law.

14. The issue before the CJEU in that case was whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 85 (now 101) of the Treaty (competition prohibition), although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, including inconsistency with public policy (which in essence in that case would not include domestic competition law).

15. Nevertheless, and even in the case of such an arbitration the CJEU held in paragraphs 36 – 38 of the judgment, that in light of the importance of Article 85, and its wording and status within the Treaty, a national court would be obliged to take this into account, and stated, in that regard:

> ***"Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void."***
>
> ***"It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.***
>
> ***That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member***

States, provides that recognition and enforcement of an arbitration award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(l)(c) and (e) and 11(b) of the New York Convention).

***For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of <u>public policy</u> within the meaning of the New York Convention*.**"

(emphasis added)

16. The conclusion to be drawn from the Eco Swiss case therefore is that, in general, in a wholly private arbitration, there is no setting aside by the Member State of the normal rules relating to the disposition of proceedings, by means of arbitration or otherwise, and even where the parties have – without obligation to pursue an arbitration as a means of resolving a dispute – a national court is nevertheless obliged, to consider whether a particular dispute involves Union law (in that case then Article 85 (now 101) of the applicable Treaty), either independently because of the fundamental importance of the provision, or because that Article (in light of its importance), falls within the ambit of the term "public policy" and that public policy is one of the grounds for setting aside such an award.

17. In my opinion, the question which arises is whether such statements of Union law found in the Eco Swiss decision, apply also to the situation arising in the Achmea case, and by extension, to any application made in the present proceedings for annulment or setting aside of the relevant award.

18. I am satisfied that the findings in Achmea fall clearly within the ambit of the ruling in the Eco Swiss decision, apply also in the case of an arbitral award made pursuant to an invalid arbitration clause in a BIT of the type under consideration in the proceedings in which this Opinion is furnished.

19. This conclusion is based on my Opinion that, having regard to the very nature of the Achmea reference, and to the principles and norms of Union law set out at the outset of the Court's reasoning in that decision, as subsequently applied to the two questions posed by the Bundesgerichtshof, the preliminary reference procedure highlighted by the CJEU in that case, important and essential as it is to the protection of the autonomy of Union law, to the uniformity and supremacy of Union law, and to the direct effect of Union law, at the very least – and without going further – is of such fundamental importance within the context of the Union legal system and its dispute resolution process, that it cannot be considered otherwise than as falling within the ambit of "public policy" in the same manner as Article 85 of the Treaty was also considered to be of such fundamental importance. This sacrosanct preliminary reference procedure cannot be undermined, without also undermining the earlier recited rationale for its existence by the CJEU, as stated in Achmea, and as recited earlier in this Opinion.

20. Moreover, as in the case of Eco Swiss, the framers of the Treaty considered the position of the preliminary reference procedure to be of such importance that it led them to draft a provision prohibiting the adoption of *inter alia,* arbitration provisions, in adopting the following terms in Article 344 - already cited, but important to restate here-:

> ***"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".***

21. In the circumstances, I am of the opinion that not only must an arbitral award made pursuant to such an arbitration be refused recognition, but also such an award cannot, under Union law, either be permitted to remain on any public record as an express proposition of its validity, but must instead be subject to a successful annulment or set-aside application, as appropriate under national procedural law of a Member State

Nothing further occurs.

FIDELMA MACKEN SC

22 October 2018

Dublin and London