

The Termination of Intra-EU Investor-state Arbitration and the Enforceability of Intra-EU Awards in the United States District Courts

Abstract

Over the past 20 years, the gradual termination of ISDS mechanisms in intra-EU BITs and the ECT have received considerable attention within the EU. The CJEU judgments in *Achmea*, *Komstroy* and *PL Holdings* accelerated this termination process. This article aims to contribute to the debate.

After providing an assessment of how the EU anti-investment arbitration policy started and is gradually leading to a complete termination of intra-EU investment arbitration, the article analyses arbitral tribunals' possible reaction to *Komstroy*. The article proposes that nothing suppresses tribunals of the jurisdiction to hear intra-EU disputes under Article 26 ECT and *Kompetenz-Kompetenz*. At the same time, the possibility for tribunals to render awards that are enforceable within the EU is seriously at stake. Aware of that, European investors are seeking enforcement of favourable intra-EU awards outside the EU. One of the preferred venues is the US District court for the District of Columbia which, however, has not yet taken a firm position on the matter. The article concludes that while arbitration under the intra-EU BITs is barely breathing, under the ECT investors should prefer the recourse to ICSID. In the final section, it discusses whether the enhanced protection of international investment law is still offered to European investors while investing in the EU.

Keywords: Energy Charter Treaty, *Komstroy*, *PL Holdings*, intra-EU BITs, intra-EU investor-state arbitration, EU law, United States District Courts

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I Introduction

The gradual termination of intra-EU investor-state arbitration has received considerable attention within the European Union (EU) over the past 20 years. It is a debate mostly encouraged by the EU institutions and EU legal order for establishing the priority and autonomy of EU law over international investment law.

In 2018, the Court of Justice of the European Union (CJEU) accelerated the termination process by rendering the judgment in the *Slowakische Republik v Achmea BV* (*Achmea*) case.¹ In *Achmea*, the CJEU held that Investor State Dispute Settlement (ISDS) provisions in the fashion of Article 8 of the Netherlands-Slovakia Bilateral Investment Treaty (BIT)² were incompatible with EU law. The Member States and the European Commission (Commission) interpreted the judgment as extending to all intra-EU BITs, without a BIT-by-BIT analysis, as well as to the Energy Charter Treaty (ECT).³ However, this approach missed the point that *Achmea* is one of the rare investment arbitration cases which involved EU law, and specifically the freedom of establishment and free movement of capital.⁴ In this sense, *Achmea* should have been construed quite narrowly

¹ Case C-284/16 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158, para 31. The case in front of the CJEU originated from the interpretation of an intra-EU BIT concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and inherited by the Slovak Republic after the dissolution of Czechoslovakia. The offer to arbitrate in the BIT gave rise to arbitration proceedings over Slovakia's breach of the BIT's expropriation standard carried out by implementing various legislative measures. Those measures allegedly constituted a systematic reversal of the previous liberalisation of the Slovak health insurance market that had pushed Achmea (formerly Eureko B.V.) to invest in the Slovak Republic's health insurance sector. The question referred by the German *Bundesgerichtshof* was whether EU law would prevent the application of an arbitration clause (Art. 8 Netherlands-Slovakia BIT), which allowed an investor from one of those Member States to bring proceedings against a Member State before an arbitral tribunal, and the jurisdiction of which the Member States have undertaken to accept. The CJEU, giving a concise reasoning, held that articles 267 and 344 TFEU should be interpreted as precluding the application of an arbitration clause, such as Art. 8 of the Netherlands-Slovakia BIT, so far as it allowed for the resolution of investment disputes by way of arbitration. The CJEU, within its reasoning, also strengthened its opinion that arbitral tribunals within the scope of intra-EU BITs, 'cannot be regarded as a "court or tribunal of a Member State" within the meaning of Art. 267 TFEU.'

² In its relevant parts, Article 8 Netherlands-Slovakia BIT reads that '[e]ach Contracting Party hereby consents to submit a dispute referred to in paragraph 1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.'

³ The *Energy Charter Treaty* [1994] 2080 UNTS 100. The ECT is a mixed agreement that was signed on 17 December 1994 and entered into force on 16 April 1998. At present 54 members are part of the ECT, including the EU, the Euratom, 26 EU Member States and 26 non-EU members. The ECT is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. Originally, the ECT was intended to foster energy exchanges in the Eurasian context, particularly between the developed economies of Western Europe, Japan, and the emerging economies of the former CIS. See, Graham Coop, 'Energy Charter Treaty and the European Union: Is Conflict Inevitable?' (2009) 27 (3) *Journal of Energy & Natural Resources Law* 404–419, 405 DOI: <https://doi.org/10.1080/02646811.2009.11435222>.

⁴ Freedoms that are codified in the Treaty on the Functioning of the European Union (TFEU) respectively in Article 49 (right of establishment) and Article 63 (free movement of capital).

instead. Nonetheless, in an escalation of a little more than 2 years after *Achmea*, the Commission and the Member States adopted a series of political acts⁵ that culminated in the signature by almost all the Member States of the Agreement for the Termination of Bilateral Investment Treaties (Termination Agreement).⁶

The most recent acts on the termination of intra-EU investor-state arbitration process are represented by the CJEU judgments in *Republic of Moldova v Komstroy LLC (Komstroy)*⁷ and *Republiken Polen v PL Holdings Sàrl (PL Holdings)*.⁸ While in *Komstroy* the CJEU

⁵ *Declarations of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (2019 Declarations) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 31 March 2022. The 2019 Declarations were extremely dangerous (because they may have undermined the interpretation of the BITs in the application of *The Vienna Convention on the Law of the Treaties* (VCLT) and eventually impacted on legal certainty) and potentially tremendously influential (because they may have constituted the object of an authentic interpretation with the aim of amending a treaty).

⁶ *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union* [2020] OJ L169 (Termination Agreement or TA). 23 of the 27 Member States signed the Termination Agreement. Beside the UK (which at the time of the signature had withdrawn from the EU), Austria, Finland, Ireland, and Sweden are the EU Member States that did not sign the Termination Agreement. The Contracting Member States have instead made some strong decisions within the Termination Agreement. They terminated sunset clauses included in intra-EU BITs (Art. 3 TA). They generally provided for retroactivity of the Termination Agreement and thus for retrospective extinguishment of arbitral jurisdiction in pending proceedings (Art. 4 TA). Overall, they firmly exercised their sovereign power in a manner which may seem to be oriented to thwart investor-state arbitration in the state's favour. Similarly, they seem to be asking investors to renounce the rights acquired by starting an investor-state dispute or the pecuniary right acquired by an award issued in their favour. In the best scenario, investors would still have transitional remedies to have their case reconsidered, either by an amicable settlement mechanism or by national courts, the results of which may differ from the protection received under the intra-EU BITs regime and the compatibility of which with EU law (especially for the structured dialogue) is debatable (Artt. 8 to 10 TA).

⁷ Case C-741/19 *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655. This article would only focus on the *dictum* in *Komstroy* where the CJEU held the incompatibility of the ISDS provision in the ECT with EU law. The jurisdictional arguments and the case between Moldova and the Ukrainian company Komstroy (formerly Energolians) will not be addressed in this analysis. For the sake of completeness, it suffices to note briefly that the disputes between Komstroy and Moldova arose out of Komstroy's action to recover outstanding payments related to a series of contracts for the supply of electricity to Moldova, by Energolians. After the Paris-seated arbitration tribunal awarded Komstroy \$ 46.5 million in damages, Moldova proceeded to annul the award before the *Cour d'appel de Paris*. The court of appeal annulled the award on the ground that the contract for the sale of electricity did not constitute investment for the purposes of the ECT, and Komstroy appealed to the *Cour de cassation*. The French Supreme Court quashed the judgment on the ground that the court of appeal misinterpreted the definition of investment. Hence, on remand, the Court of Appeal started a preliminary ruling procedure and submitted four questions before the CJEU to clarify the definition of investment under the ECT. The CJEU concluded that the ECT 'must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an "investment" within the meaning of those provisions.'

⁸ Case C-109/20 *Republiken Polen v PL Holdings Sàrl* [2021] ECLI:EU:C:2021:875 (provisional text). For what is relevant for the present article, the judgment is briefly analysed in this article in Ch. V Conclusions, below.

extended *Achmea* to the ECT and concluded for the incompatibility with EU law of the ISDS provision included in Article 26 ECT,⁹ in *PL Holding* the CJEU extended the incompatibility beyond the ISDS provisions included in an investment treaty, and held *ad hoc* arbitration agreements entered between an investor and a Member State (the content of which is identical to the ISDS provisions in that treaty) to be invalid. However, in the aftermath of *Komstroy* and *PL Holdings*, nothing suggests that an arbitral tribunal, in deciding on their own jurisdiction, will act any differently to that in the aftermath of *Achmea*. Arbitral Tribunals seized with a jurisdictional objection on the ground of the mentioned CJEU case law would still be able to assume jurisdiction on the matters under the principle of *Kompetenz-Kompetenz*. What seems to be at stake is nevertheless the possibility for those arbitral tribunals to render awards that will be final and enforceable, especially within the borders of the EU. Investors may in fact eventually be expropriated of their final awards and see their economic rights frustrated by the impossibility to enforce the awards, neither under the ICSID Convention nor the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention).

In the delineated environment, this article aims to contribute to the debate on the relationship between EU law and international investment law by providing a critical analysis of intra-EU investment arbitration. A commentary will first be provided on how (Ch. II) the EU anti-investment arbitration policy started, and how (Ch. III) it is gradually leading to a complete termination of intra-EU investor-state arbitration. It will then address (Ch. IV) the enforcement of intra-EU awards outside the EU and more specifically within the United States District Court of the District of Columbia (D.D.C.). The conclusion (Ch. V) will summarise the new challenges that European investors will incur by investing in the EU and whether a possibility still exists for investors to receive the enhanced protection of investment law treaties while investing in the EU.

II The EU Anti-investment Arbitration Attitude. How It Started...

The accession of the twelve Central and Eastern European Countries to the European Union¹⁰ turned the BITs concluded between the then Member States and those countries into intra-EU BITs. These intra-EU BITs, which remained intact in their substance and

⁹ For present purposes here, the primarily relevant ones are paragraphs (3)(a) and (6) of Article 26, which respectively state '(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration... in accordance with the provisions of this Article' and '(6) [a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'

¹⁰ Malta, Cyprus, Slovenia, Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, and Hungary acceded to the EU in 2004; Bulgaria and Romania acceded in 2007. See generally, Carrie E. Anderer, 'Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty' (2010) 35 (3) *Brooklyn Journal of International Law* 851–882.

effect,¹¹ soon became the main legal source of protection for West European investors.¹² At the same time, Member States called to respond to investment arbitration claims started to assert the incompatibility of intra-EU BITs with EU law.¹³

Meanwhile, the Commission promoted an anti-investment law arbitration approach through the exercise of its Treaty obligations stemming from Article 17 TEU.¹⁴ First, the Commission expressed its view by using political acts.¹⁵ Second, it participated in investment arbitration as *amicus curiae*, where its role of a non-disputing party in support of Respondent Member States turned into ‘a second respondent more hostile to [the investors] than [the host state] itself’.¹⁶ In these proceedings, the Commission used recurrent legal arguments regarding both substance and procedure.¹⁷ It used to argue that the investment standards included in intra-EU BITs were incompatible with the EU Treaties because (i) their application may have affected the already complete set of rules on investment protection provided for by EU law,¹⁸ and (ii) the intra-EU BITs’ investment standard could constitute a violation of the requirement of equal treatment of nationals and non-nationals under the EU fundamental freedoms.¹⁹ Last, under a public international law perspective,²⁰ the Commission used to infer that intra-EU BITs and the EU Treaties share the same ‘subject

¹¹ Csongor I. Nagy, ‘Extra-Eu BITs and Eu Law: Immunity, “Defense of Superior Orders”, Treaty Shopping and Unilateralism’ in Csongor I. Nagy (ed), *Investment Arbitration and National Interest* (Council on International Law and Policy 2018, Indianapolis, 137–148) 138.

¹² Csongor I. Nagy, ‘Intra-EU BITs after Achmea: a Cross-Cutting Issue’ in Csongor I. Nagy (ed), *Investment Arbitration in Central and Eastern Europe: Law and Practice* (Edward Elgar 2019, 1–13) 2.

¹³ Juliane Kokott, Christoph Sobotta, ‘Investment Arbitration and EU Law’ 2016/18 Cambridge Yearbook of European Legal Studies 3–19, 9 DOI: <https://doi.org/10.1017/cel.2016.5>. As discussed by Lavranos, the first case in which the Commission has participated in the debate was *Eastern Sugar v Czech Republic*, started in 2004 (award issued in 2007). See generally, Loukas A Mistelis, Nikolaos Lavranos, ‘The World after the termination of intra-EU BITs’ (2020) 5 European Investment Law and Arbitration Review 196–214, 197, DOI: https://doi.org/10.1163/24689017_008.

¹⁴ Art. 17(1) of the *Treaty on European Union* (TEU), according to which the Commission has an obligation to ensure the Treaties’ application and oversee the application of EU law.

¹⁵ European Commission, ‘Spain Support for electricity generation from renewable energy sources, cogeneration and waste’ 10.11.2017 C(2017) 7384 final (letter).

¹⁶ ICSID Case No ARB/07/19 *Electrabel S.A. v Republic of Hungary* Award (25 November 2015), para 234.

¹⁷ *Ibid.* For an analysis of the Perspective of the Commission on intra-EU BITs, Ursula Kriebaum ‘The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective’ (2015) (1) ELTE Law Journal 27–35.

¹⁸ European Commission (n 15) paras 160–162.

¹⁹ As well as the general principle of non-discrimination on the ground of nationality pursuant to Article 19 TFEU. In this sense, intra-EU BITs were said to provide preferential treatment to investors from certain Member States and not to others, even though both nationals may be in comparable situations.

²⁰ At the time, the idea was reinforced by the fact that the intra-EU BITs have ‘some commonality’ with the EU freedom of establishment and the free movement of capital. George A. Bermann, ‘Navigating EU Law and the Law of International Arbitration’ (2012) 28 (3) *Arbitration International* 398–446, 432ff, DOI: <https://doi.org/10.1093/arbitration/28.3.397>.

matter' for the purposes of Articles 30(3)²¹ or 59(1)²² VCLT. In this sense, the accession of both the BIT's parties to the EU would have had the effect of automatically terminating the BIT as an earlier agreement, incompatible with the EU Treaties,²³ or at least disapply those provisions of the BIT that were incompatible with the subsequent EU Treaties.²⁴

A different set of Commission's arguments used to be strictly related to the ISDS mechanism included in intra-EU BITs. In general terms, the Commission stated that the very idea of investor-state arbitration is incompatible with EU law. The offer to arbitration included in intra-EU BITs would in fact provide for a parallel jurisdiction for intra-EU investor-state disputes and would remove those disputes from the basic system of judicial remedies provided by the EU Treaties. Moreover, due to the lack of competence of an arbitral tribunal to start a preliminary ruling procedure in the sense of Art. 267 TFEU,²⁵ intra-EU investor-state arbitration may improperly apply EU law. This may also prevent the full effectiveness and autonomy of EU law and thus violate the overarching principles of mutual trust between Member States.²⁶ Last, the Commission has used what was identified by an author as the 'circularity argument'.²⁷ According to this argument, a foreign final award which orders the Member State to pay damages or compensation, but which *de facto* has the effect of reinstating forms of state aid, would constitute state aid itself and it would not be enforceable within the Member States because of being in breach of EU law.

²¹ Article 30(3) VCLT reads that 'when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.

²² Article 59(1) VCLT reads that 'a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:/(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or/(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.'

²³ Art. 59 VCLT.

²⁴ Art. 30 VCLT; Kriebaum (n 17) 29, 31.

²⁵ Art. 267 TFEU reads in relevant parts that the CJEU 'shall have jurisdiction to give preliminary rulings concerning:/(a) the interpretation of the Treaties;/(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;/Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.' As generally explained in one of the EU institutional websites, the preliminary reference procedure is a mechanism provided by the Treaties that creates a 'dialogue between the CJEU and national courts.' The preliminary ruling proceeding aims to (1) 'provide national courts with assistance on questions regarding the interpretation of EU law.' (2) 'to contribute to a uniform application of EU law' across the Member States; and (3) 'to create an additional mechanism – on top of the action for annulment of an EU act (set out in Article 263 TFEU) – for an ex-post verification of the conformity of acts of the EU institutions with primary EU law (the Treaties and general principles of EU law).' Rafał Mańko, 'Preliminary reference procedure' [2017] European Parliamentary Research Service (EPRS) 1–12, 1, accessible at <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2017\)608628](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2017)608628)> accessed 31 March 2022.

²⁶ Kokott, Sobotta (n 13) 10ff; *Achmea* (n 1) para 56.

²⁷ Tamás Kende, 'Arbitral Awards Classified as State Aid under European Union Law' (2015) (1) ELTE Law Journal 37–56, 50 ff.

Although some of these arguments may be perceived far back in the history of European investment law and some of them have been largely superseded by arbitral tribunals (i.e., the ‘public international law’ argument),²⁸ they are nevertheless important because they shaped the Commission and Member States’ anti-investment arbitration policy. They also summarise well-reasoned defences against investors’ claims in intra-EU investor-state disputes and show the directions in which the dismantling of intra-EU investor-state arbitration took place over time. The process has been occurring one piece at a time and started exactly with the attempt to eliminate intra-EU BITs.

III ...And How It Is Leading to the Termination of Intra-EU Investor-state Arbitration

It is no surprise that the dismantling of investor-state arbitration started tackling investment arbitration. ISDS provisions are ‘the most essential provisions’ in the BITs,²⁹ which cannot find any corresponding rule in the EU Treaties. More importantly, investment arbitration, revolving around the ‘arbitration without privity doctrine’,³⁰ is something ‘dramatically different from anything previously known in the international sphere’.³¹ In practice, by creating an effective and compulsory (at least for the state party to the dispute) mechanism for the resolution of investment disputes, ISDS provisions generally empower the aggrieved investors to invoke ‘compulsory arbitration to secure a binding award’³² against the host state; ‘whether or not any specific agreement has been concluded with the particular complainant’,³³ and without any home states’ (diplomatic) intervention or consent.

In addition to that, arbitral tribunals are creatures of international law, and they have the power to decide their own jurisdiction under the principle of *Kompetenz-Kompetenz*. From an EU law point of view, *Kompetenz-Kompetenz* produces the feared effect of removing investor-state disputes from the jurisdiction of national courts, and thus from a commonly agreed system of judicial remedies enshrined in the EU Treaties,³⁴ which primarily

²⁸ Csongor I. Nagy, ‘Intra-EU Bilateral Investment Treaties and EU Law After Achmea: “Know Well What Leads You Forward and What Holds You Back”’ (2018) 19 (04) German Law Journal 982–1116, 1002; ICSID, Case No. ARB/07/22 *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary* Award (23 September 2010); SCC, Case No. 088/2004 *Eastern Sugar B.V. (Netherlands) v The Czech Republic* Partial Award (27 March 2007); SCC, Case No. V 2014/168 *GPF GP S.à.r.l. v Republic of Poland* Award (29 April 2020).

²⁹ *Eastern Sugar B.V.* (n 28) para 165. See also *GPF GP S.à.r.l.* (n 28) para 366.

³⁰ Paulsson Jan, ‘Arbitration without Privity’ (1995) 10 (2) Foreign Investment Law Journal 232–257, 256, DOI: <https://doi.org/10.1093/icsidreview/10.2.232>.

³¹ *Ibid.*

³² Jeswald W. Salacuse, ‘The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990) 24 (3) The International Lawyer 655–675, 672.

³³ Paulsson (n 30) 233.

³⁴ *Achmea* (n 1) para 55.

includes the possibility to start a preliminary ruling before the CJEU for the request of an interpretation on the correct application of EU law.³⁵

These considerations were at the very heart of the CJEU rulings in the cases *Slowakische Republik v Achmea BV* and *Komstroy v Moldova*, which respectively denote the CJEU's invalidation of the ISDS mechanism included in intra-EU BITs and the attempt to invalidate Art. 26 ECT.

1 The CJEU Strikes ISDS Mechanism in Intra-EU BIT: *Slowakische Republik v Achmea BV*

In *Achmea*, the CJEU affirmed the principle that Articles 344³⁶ and 267 TFEU preclude ISDS provisions in intra-EU BITs, in the fashion of Article 8 of the Netherlands-Slovakia BIT, for their incompatibility with the EU overarching principles of mutual trust among Member States and the autonomy of EU law. The EU Commission,³⁷ and most of the Member States³⁸ have attempted to interpret *Achmea* extensively. They stated that all investment agreements (either based on intra-EU BITs or the ECT) which could give rise to an intra-EU arbitration proceeding (notwithstanding its type, whether *ad hoc* or institutional) are incompatible with the basic principles of EU law. The expansive effects attributed to *Achmea*, and its impact were overrated, nonetheless. Many factual and legislative elements in the case showed that *Achmea* should not have been interpreted extensively under the perspective of either EU law or investment law.

From an EU law perspective, the factual and legal background to *Achmea*'s award fell within the scope of the freedom of establishment and free movement of capital. The case concerned a request for damages brought by *Achmea*, a subsidiary of a larger Dutch insurance group, on the ground of the limitation of the company's freedom of establishment. In fact, *Achmea* was prohibited from distributing profits generated by private sickness insurance activities due to a legislative ban imposed by the Slovak Republic and obtained by reversing the liberalisation of the private sickness insurance market.³⁹ Moreover, the Slovak measure infringed the freedom of payments and repatriation of profits, which, in line with the *Gebhard* jurisprudence, are considered corollaries of the overarching freedom of establishment.⁴⁰ On these grounds, investors would have had a different cause of action

³⁵ *Achmea* (n 1) paras 49, 56.

³⁶ Article 344 TFEU limits the Member States' power to 'submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. In this sense, Article 344 creates a monopoly over the interpretation and application of EU law that excludes any other courts or tribunal from that exercise.

³⁷ European Commission, 'Protection of intra-EU investment' (Communication) COM(2018)547/2.

³⁸ 2019 Declarations (n 5) para III.

³⁹ *Achmea* (n 1) para 8.

⁴⁰ Nagy (n 28) 994; Case 55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1994] ECLI:EU:C:1995:411, para 25.

based on national law rather than investment law.⁴¹ As such, solely on these grounds, the CJEU was able to conclude that the arbitral tribunal in *Achmea* could be ‘called on to interpret or indeed to apply EU law’.⁴²

From an investment law perspective, despite the existence of a commonality of ISDS provisions in different intra-EU BITS, ISDS provisions are often worded differently, and it is preferable to avoid generalising a sole idea of an ISDS provision with the aim of providing an extensive application of *Achmea*. Major differences also exist in the law applicable to the disputes. Some ISDS provisions explicitly provide for the application of the rules of the relevant BIT and the general principles of international law,⁴³ while others do not include any rule on the applicable law at all, which will be determined under the applicable arbitration rules. In this way, certain intra-EU investment arbitration may never deal with the application or interpretation of EU law.⁴⁴ On the contrary, ISDS provisions in the fashion of Article 8(6) of the Netherlands-Slovakia BIT included as law applicable to the dispute the law ‘in force of the Contracting Party concerned’ and the provision of ‘other relevant Agreements between the Contracting Parties’.⁴⁵ EU law could therefore find application or interpretation in assessing the breach of investors’ rights by an arbitral tribunal, either as part of national law or a ‘subsequent Agreement between the States Parties’ to the Netherlands-Slovakia BIT.⁴⁶

Application of EU law could also have derived from the parties’ specific choice of arbitral seat. Article 8 of the Netherlands-Slovakia BIT provided solely for *ad-hoc* arbitration according to the United Nations Commission of International Trade Law rules (UNCITRAL),⁴⁷ which allowed the parties to choose the seat of the arbitration and thus ‘the law applicable to the procedure governing judicial review of the validity of the award’.⁴⁸ By choosing Germany as the *lex loci arbitri*, the parties provided the possibility for EU law

⁴¹ *Achmea* (n 1) paras 35–36.

⁴² And thus, eventually undermining the full effectiveness and autonomy of EU law. However, the scope of application of the investment standards stemming from the Netherlands-Slovakia BIT could safely be deemed broader than EU law itself. See in this sense *Achmea* (n 1) paras 40–42; Nagy (n 28), 988 ff.

⁴³ See for example Article 8 of the 1998 Italy-Slovakia BIT (terminated); or Article 9 of the 2000 Slovenia-Italy BIT (terminated).

⁴⁴ N. Lavranos, T. Singla, ‘Achmea: Groundbreaking or Overrated?’ (2018) 16 (6) German Arbitration Journal 348–357, 350.

⁴⁵ Article 8(6) of the Netherlands-Slovakia BIT.

⁴⁶ Johann R. Basedow, ‘The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration’ (2020) 23 (1) Journal of International Economic Law 271–292, 274, DOI: <https://doi.org/10.1093/jiel/jgz025>.

⁴⁷ Art. 8(2) Netherlands-Slovakia BIT, in the part that reads, ‘(2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement’ and Art. 8(5) Netherlands-Slovakia BIT which reads, ‘(5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law’ (UNCITRAL).

⁴⁸ *Achmea* (n 1) para 51.

to apply, and for Germany to revise the award (with the consequence that a preliminary ruling procedure could be started).⁴⁹

To conclude, if a ground-breaking aspect were to be found in *Achmea*, it was the reinforcement of the idea that no substitute for a case-by-case analysis should exist on investor-State disputes based on BITs. The assimilability of other investor-state disputes with *Achmea* should have depended on the wording of the BIT at issue, the choice of arbitral rules and the seat of arbitration within or outside the EU. In this sense, no *a priori* incompatibility between intra-EU BITs and EU Law could have been inferred, neither from the CJEU case law nor by application of any of the general rules of interpretation under Article 31 VCLT. Nonetheless, neither the Member States nor the CJEU has implemented a *narrow* interpretation of *Achmea*. The Member States signed the Termination Agreement or took the obligation to get rid of all their intra-EU BITs in the foreseeable future in a different manner; the latter has recently extended the arguments used in *Achmea* to the ISDS mechanism contained in the ECT when it rendered its judgement in *Komstroy*.

2 The CJEU (Attempt to) Strike the ISDS Mechanism in the ECT: *Komstroy, LLC v Moldova*

The relevance of the choice of the seat of arbitration within the Member States for determining the invalidity of intra-EU ISDS provisions has recently been confirmed in *Komstroy*. There the CJEU took the controversial decision to affirm in an *obiter dictum* the invalidity of the ISDS clause included in the ECT. The position taken by the CJEU in *Komstroy* is problematic, primarily because the case did not involve any intra-EU disputes, nor had at issue any jurisdictional question on the compatibility of Article 26 ECT with EU law. In *Komstroy*, the CJEU was nevertheless able to assume jurisdiction over the dispute because the sole choice of France as arbitral seat ‘entail[ed]’ for the purposes of the procedure to set aside the award, the application of EU law,⁵⁰ and therefore the possibility for the CJEU to be ‘in principle required to give a ruling’ under Article 267 TFEU.⁵¹

On these grounds, the CJEU nonchalantly moved from discussing the four questions referred by the *Cour d’appel de Paris* about the existence of an investment for the purposes of the ECT, to analysing why Articles 344 and 267 TFEU invalidate the ISDS provision

⁴⁹ Nagy (n 28) 994. The author here favours ‘a pretty narrow’ interpretation of the judgment in *Achmea*. He suggested that *Achmea* should only refer to ‘dispute settlement clauses providing for ad hoc arbitration’ and thus clauses contained in intra-EU BITs referring to institutional (either ICSID or investment) arbitration under the ECT should not be automatically or analogically interpreted as inconsistent with EU law. In addition, he argued that the (in)compatibility of Article 8 of the Netherlands-Slovakia BIT with EU law is highly dependent on the wide freedom of choice of the *lex loci arbitri* provided to the parties: the parties may have equally chosen a place of arbitration outside the EU and thus have circumvented the possibility for one of the Member States to start a preliminary ruling and consequently carry out an annulment proceeding.

⁵⁰ *Komstroy* (n 7) para 34.

⁵¹ *Komstroy* (n 7) para 35.

included in Article 26 ECT in a dispute between a Member State and an investor of another Member State concerning an investment made by the latter in the first. On this last matter, the CJEU undoubtedly reaffirmed with enhanced clarity those principles put forward in *Achmea*.⁵² These includes the arguments on (1) the autonomy of EU law with respect to Member States and international law;⁵³ (2) the ‘objective of securing the uniform [and consistent] interpretation of EU law’ and the full effect of the law established by the EU Treaties;⁵⁴ and (3) the facts that the arbitral tribunal do not constitute tribunal for the purposes of referral under Article 267 TFEU.⁵⁵ The CJEU therefore concluded that ‘Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State’.⁵⁶

By reproducing the same arguments used in *Achmea*, *Komstroy* is nevertheless a decision entirely formulated from the perspective of EU law. The CJEU, in *Komstroy*, completely disregarded any international law analysis. More importantly, *Komstroy* analogises arguments used to declare the invalidity of intra-EU BITs that are different in nature from the ECT. The ECT is technically what it is known as a mixed agreement.⁵⁷ It is true that a few similarities exist between the ECT and the Netherlands-Slovakia BIT. Professor Basedow, analysing the applicability of the ECT in intra-EU investment arbitration, has recalled some of them.⁵⁸ First, he noted that the ECT and Netherlands-Slovakia BIT are both international treaties among EU Member States. Second, they both provide for the establishment of a conventional investment tribunal of a comparable nature. Third, both arbitral tribunals fall outside Art. 19 TEU, and thus they cannot request a preliminary ruling from the CJEU.⁵⁹ Nevertheless, a significant element differentiates the two treaties. The Dutch–Slovak BIT forms part of the national law of the contracting Member States, whereas the ECT, due to the EU presence as a contracting party to the ECT, is an international agreement which forms part of EU law.⁶⁰ In the first scenario, if a conflict between EU law and the intra-EU BIT arises, EU law, having primacy over national law, will prevail. In the latter scenario, the EU ‘is bound by the ECT in the light of its obligation of “strict observance and development of international law” under Art. 3(5) TEU’⁶¹ and thus the ‘ECT should, at least in principle, prevail over European law’.⁶²

⁵² *Komstroy* (n 7) paras 42–59.

⁵³ *Komstroy* (n 7) paras 42–44.

⁵⁴ *Komstroy* (n 7) para 46.

⁵⁵ *Komstroy* (n 7) para 51.

⁵⁶ *Komstroy* (n 7) para 66.

⁵⁷ Basedow (n 46) 272.

⁵⁸ Basedow (n 46) 275.

⁵⁹ *Ibid.* Those similarities, according to the author, also individuate the reasons at the basis of many scholars’ and policymakers’ belief that the ECT is ultimately contrary to EU law.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

This ‘significant difference’⁶³ is one of the main arguments against the impracticability of mirroring the arguments used in *Achmea* in cases involving the ECT. This significant difference also suggests that, when interpreting the ECT,⁶⁴ importance should be given to the common intention of all the contracting parties of the ECT (intra and extra-EU) and not only to the EU Member States parties in ‘an analogous way to the provision of [intra-EU BITs]’, as the CJEU seems to suggest.⁶⁵ The suggested BIT-by-BIT analysis in the case of the ECT should thus be carried out considering the ECT as a multilateral treaty as a whole and not as a cluster of many BITs.

An additional problem that the case in *Komstroy* raises is that the entire opinion on the incompatibility of the ECT with intra-EU disputes is not part of the dispositive portion of the judgment. It is instead a *dictum* (in the sense of EU law) that is not binding on any Member State courts. Moreover, the entire judgment does not constitute a precedent within the EU.⁶⁶ In sum, as some authors have advanced, the opinion in *Komstroy* ‘provides scant and inconsistent reasoning’ and it ‘may... be considered to be based on political considerations rather than a sound and reasoned interpretation of the law’.⁶⁷ In this last sense, *Komstroy* is no different to the other political acts put in place by the Institutions of EU Law and the Member States.⁶⁸

3 Arbitral Tribunals Strike Back: The Arbitral Tribunal Response to ‘Achmea Objections’

The recent judgment in *Komstroy* raises the question of how arbitral tribunals will react to the CJEU’s *dictum*. At present, nothing suggests that the arbitral tribunal reaction to *Komstroy* will be any different to that of arbitral tribunals in the aftermath of *Achmea* when asked to resolve the so-called Achmea objections.⁶⁹

⁶³ Ibid.

⁶⁴ In accordance with Article 31 VCLT.

⁶⁵ *Komstroy* (n 7) para 64.

⁶⁶ The CJEU judgments do not form a precedent in the common sense of the term, since the CJEU is based on a system that is for the most part of a civil law tradition. Tamás Szabados, ‘Precedents’ in EU Law – The Problem of Overruling (2015) (1) ELTE Law Journal 125–146, 125 ff.

⁶⁷ Gibson Dunn & Crutcher LLP, ‘Intra-EU Arbitration Under the ECT is Incompatible with EU Law According to the CJEU in Republic of Moldova v Komstroy’ [2021] Lexology <<https://www.lexology.com/library/detail.aspx?g=2bef6789-1ad1-4944-968e-5ce57e67b2a7>> accessed 31 March 2022.

⁶⁸ Declarations (n 5).

⁶⁹ The term *Achmea objection* generally indicates a jurisdictional objection brought by the Member State in arbitration proceedings on the grounds of the principle in *Achmea*. All arbitral tribunals seized with the question to ‘independently assess whether the parties consented to arbitrate’ in intra-EU arbitration proceedings rejected Achmea objections and confirmed their jurisdiction under the principles of Kompetenz-Kompetenz and international law. *GPF GP S.à.r.l.* (n 28) para 345.

A few jurisdictional decisions are summarised here to exemplify this trend.⁷⁰ For instance, in *Marfin Investment Group v The Republic of Cyprus*,⁷¹ the Achmea objection was dismissed on the grounds that the Cyprus-Greece BIT and its arbitration clause was valid because EU law was not the law applicable to the case. In *UP and C.D. Holding Internationale Hungary*,⁷² the arbitral tribunal instead used the argument that the CJEU never intended to extend *Achmea's* principle to institutional arbitrations, included ICSID arbitration, because it did not mention them anywhere in the judgment.⁷³ In *GPF GP Sàrl v The Republic of Poland*, a case which arose out of Poland's alleged breach of the Belgium-Luxembourg Economic Union (BLEU)-Poland BIT, the Achmea objection was also dismissed.⁷⁴ Here, the arbitral tribunal first analysed the compatibility between Article 9 BLEU-Poland BIT (an offer to arbitrate clause almost identical to Article 8 of the Netherlands-Slovakia BIT) and Articles 267, 344 TFEU, and Article 19 TEU. Although the arbitral tribunal started from the statement that interpretation of successive treaties, without termination or amendment of the precedent one, should be carried out in such a manner 'that avoids or at least minimizes conflicts of norms'⁷⁵, it concluded in favour of a case-by-case analysis. Moreover, the arbitral tribunal stated that Articles 344 and 267 TFEU, play 'at most [...] as a carve out [...] as opposed to a complete preclusion' in respect of the sole dispute involving the interpretation or application of EU law.⁷⁶

A similar approach was taken by ICSID tribunals in a dispute involving the ECT before *Achmea*.⁷⁷ This is the case of *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*.⁷⁸

⁷⁰ Additional examples of intra-EU BITs cases are analysed in Sophie Lemaire, Malik Laazouzi, 'Chronique de jurisprudence arbitrale en droit des investissements' (2019) 2 *Revue de l'Arbitrage* 552–617.

⁷¹ ICSID Case No. ARB/13/27 *Marfin Investment Group v Cyprus* award (26 July 2018). This is probably the first case where an arbitral tribunal has decided on the Achmea objection.

⁷² ICSID Case No. ARB/13/35 *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v Hungary* Decision on jurisdiction (3 March 2016).

⁷³ *Ibid.*, paras 252 ff.

⁷⁴ The dispute arose out of some of Poland obligations in relation to an investment made by private equity investor with the aim of developing a real estate project in Warsaw. The arbitral proceeding was conducted under the SCC Arbitration rules. *GPF GP S.à.r.l.* (n 28) para 8.

⁷⁵ *Ibid.*, paras 371–375.

⁷⁶ *Ibid.*, para 381.

⁷⁷ Most of them involved Spain and its special legislation that, starting from the '90s, has established a special regime for renewable energy production which sought to encourage and promote foreign investment in the renewable energy sector. More recently, Spain changed course and revoked such incentives and issued a series of decrees that reformed the energy sectors in ways that run directly counter to foreign companies' interest. Spain's behaviour led foreign companies to start a few arbitral proceedings in front of various ICSID tribunals.

⁷⁸ ICSID Case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* Award (16 May 2018). The case was about a limited corporation based in the Netherlands whose business focuses in developing renewable energy sources. *Masdar* invested € 79.37 million in three solar panels projects in Spain which had started offering financial inducements and regulatory incentives to companies such as *Masdar* to encourage investment in its territory. In 2012, after Spain changed course and revoked such incentives, *Masdar* started an arbitration proceeding in front of ICSID, claiming that Spain's actions had violated its obligation under the ECT to accord investors from signatories States fair and equitable treatment.

In *Masdar Solar*, the tribunal rejected Spain's jurisdictional argument based on *Achmea* and concluded that Spain was liable for €64.5 million in damages plus interest to *Masdar*. More importantly, the ICSID tribunal rejected Spain's jurisdictional objection by fully adopting the argument used in AG Wathelet's Opinion in *Achmea*.⁷⁹ The tribunal stated that *Achmea*'s application is limited to Article 8 Netherlands-Slovakia BIT and any other intra-EU ISDS provision in the fashion of Article 8 Netherlands-Slovakia BIT.⁸⁰ The Tribunal then concluded that *Achmea* 'does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party'.⁸¹

After the judgement in *Achmea*, the first ECT case where the *Achmea* Objection was raised (and denied) is *Vattenfall AB and others v Federal Republic of Germany*.⁸² At the time the case was ready to be decided on the merit, the CJEU issued the judgement in *Achmea*, and the Tribunal was obliged to decide first on the jurisdictional objection. The Tribunal dismissed Germany's jurisdictional objection on the grounds of different subsequent logical arguments.⁸³ For present purposes, it suffices to report the following ground. After having determined its own competence to decide the jurisdictional matter, the Tribunal affirmed that EU law constitutes international law because it is 'rooted in International Treaties'.⁸⁴ Nonetheless, the Tribunal did not find its application to the case because (1) EU law does not constitute general law applicable to the interpretation and application of clauses included in a mixed agreement;⁸⁵ (2) EU law could not find application under Article 31(3)(c) VCLT as 'relevant rules of international law applicable in the relations between the parties', because 'it is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules, [...] external to [that] treaty [...], which would contradict the ordinary meaning of its terms'.⁸⁶ And (3) even '*arguendo*' that EU law would be applicable to the dispute at hand, the

⁷⁹ *Masdar Solar* (n 78) para 680.

⁸⁰ *Masdar Solar* (n 78) para 679.

⁸¹ *Ibid.*

⁸² ICSID Case No. ARB/12/12 *Vattenfall AB and others v Federal Republic of Germany* Decision on the *Achmea* Issue (31 August 2018). The Decision was taken in the context of an intra-EU investment dispute between *Vattenfall AB* and other investors and the Federal Republic of Germany which was commenced by the Request for Arbitration dated 14 May 2012 under the ICSID Convention. The dispute arose out of Germany's decision to phase out the use of nuclear energy which, according to *Vattenfall*, resulted in the breach of several obligations under the ECT.

⁸³ Konstantina Georgaki, 'The Decision on the *Achmea* Issue in *Vattenfall v Germany* or: How to Escape the Application of the CJEU's Decision in *Achmea* in Three Steps' [2018] OXFORD Business Law Blog <<https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/decision-achmea-issue-vattenfall-v-germany-or-how-escape-application>> accessed 31 March 2022.

⁸⁴ *Vattenfall AB* (n 82) para 146. In this sense the Tribunal agreed with the arbitral tribunal in *Electrabel* (n 16).

⁸⁵ *Vattenfall AB* (n 82) paras 158,167. Considering otherwise would create a set of rules applicable to intra-EU dispute and a different set of rules applicable to ECT disputes involving extra-EU countries, hence contravening to the systemic coherence of the ECT and the principles of *pacta sunt servanda* and good faith.

⁸⁶ *Vattenfall AB* (n 82) para 154.

CJEU in *Achmea* did not stretch the CJEU's rationale to encompass also intra-EU disputes under the ECT.⁸⁷

The *Vattenfall's* tribunal, being the first to deal with the *Achmea* objection, certainly started a trend that was confirmed in later ICSID decisions.⁸⁸ In *Landesbank Baden-Württemberg and others v Kingdom of Spain*,⁸⁹ the Tribunal rejected the argument sustained by Spain⁹⁰ and stated that there is nothing in the text of the ECT that exclude the application of the ECT in intra-EU situations.⁹¹ Thereby, it affirmed that the differences between the ICSID Tribunal, as a tribunal established according to Art. 25 ICSID Convention and 26 ECT, and the *ad hoc* tribunal in *Achmea* are more significant than their similarities.⁹² It thus concluded in favour of the priority of the ECT over EU law.⁹³ More importantly, the tribunal in *Landesbank* correctly noted that, differently from the tribunal in *Achmea*, which had its seat in Germany, ICSID tribunals derive their 'authority from Article 25 of the ICSID Convention', have 'no national "seat"' and they are not 'subject to the jurisdiction of [any] national court'.⁹⁴

Overall, the approach maintained by arbitral tribunals in their decisions before and after *Achmea* has been of the kind that excludes a broad extension of the principle in *Achmea* to the applicability of ECT in intra-EU investment arbitration. The line of case law, examples of which are analysed above, shows that the various ICSID tribunals' awards have been consistent in considering that the ECT does not operate under EU law but under international law on the grounds of (1) the need for a harmonious application of the ECT rules to all Contracting Parties (intra e extra EU); and (2) with respect to the principle of non-discrimination.⁹⁵ In the aftermath of *Komstroy*, nothing suggests that arbitral tribunal would act differently. Nothing in *Komstroy* will prevent an arbitral tribunal from acquiring jurisdiction in intra-EU disputes brought to them under Article 26 ECT. Arbitral tribunals are not bound by the CJEU's judgments, and they will still be able to affirm their jurisdiction

⁸⁷ *Vattenfall AB* (n 82) para 167.

⁸⁸ Lavranos, Singla (n 44) 354.

⁸⁹ ICSID Case No. ARB/15/45 *Landesbank Baden-Württemberg and others v Kingdom of Spain* Decision on the Intra-EU Jurisdictional Objection (25 February 2019).

⁹⁰ Among others Spain, brought the arguments that (i) 'EU law establishes its own system of investor protection within the context of the internal market, which is superior to the protection offered by the ECT or any bilateral investment treaty.' (ii) the EU law protection system 'prevails over that of any other international treaty' including the ECT. It (iii) went on to argue that Art. 26 ECT does not provide an offer to arbitrate from the side of Spain and that 'when the ECT was signed, the Member States were unable to enter into obligations between themselves as regards the internal market because they had transferred their sovereignty in that area to the EU'. *Landesbank* (n 89) para 43.

⁹¹ *Ibid*, para 113.

⁹² *Ibid*, para 146.

⁹³ *Ibid*, para 148.

⁹⁴ *Ibid*, para 150.

⁹⁵ *Ibid*, 156 ff.

over intra-EU ECT disputes.⁹⁶ What seems to be ultimately at stake is nevertheless the possibility for arbitral tribunals to render awards that will be final and enforceable, especially within the borders of the EU.

IV Enforceability of Intra-EU Awards in the United States District Courts

The enforcement of international arbitration awards is regulated by international conventions and national arbitration laws. Two main conventions regulate the enforcement of investor-state awards.⁹⁷ (i) The ICSID Convention, according to which ICSID awards are treated ‘as if they were a final judgment of a court’ in the ICSID Contracting state where enforcement is sought.⁹⁸ (ii) The New York Convention which applies to awards issued in *ad hoc* investor-state arbitration proceedings; it facilitates the enforcement of awards within the NY Convention’s contracting states; and limits domestic courts’ refusal to enforce to the grounds enlisted in Article V NY Convention.⁹⁹

1 Enforceability of Intra-EU Awards against a Member State’s Assets within and outside the EU

Within this framework, the CJEU case law on the invalidity of ISDS mechanism in intra-EU disputes suggests that domestic courts within the EU will likely proceed by not enforcing awards rendered in intra-EU investor-state arbitration under the ICSID Convention, nor the NY Convention. Although the ICSID Convention does not permit ‘any other remedy

⁹⁶ While the present article was under review, a first ICSID tribunal decided on Spain’s request to reconsider a decision on jurisdiction, liability, and directions on quantum on the ground of the CJEU judgment in *Komstroy*. ICSID Case No. ARB/16/18 *Infracapital FI S.À R.L. and Infracapital Solar B.V. v Kingdom of Spain* Decision on Respondent’s Request for Reconsideration Regarding the Intra-Eu Objection and the Merits (1 February 2022). In line with the position proposed in this article, the ICSID tribunal in *Infracapital FI* found ‘the judgment [in *Komstroy*] entirely irrelevant to the Tribunal’s rulings on jurisdiction and on liability.’ *Infracapital FI* para 116.

⁹⁷ For a detailed analysis of the enforcement of intra-EU awards before the judgement in *Komstroy* and the Termination Agreement, see generally Julian Scheu and Petyo Nikolov, ‘The setting aside and enforcement of intra-EU investment arbitration awards after Achmea’ (2020) 36 (2) *Arbitration International* 253–274 DOI: <https://doi.org/10.1093/arbint/aiaa016>.

⁹⁸ Per Article 54 ICSID Convention, ICSID awards are not subject to judicial review by the Contracting State where enforcement is sought, and the awards are enforceable ‘as if they were a final judgement of a court in that State’.

⁹⁹ For present purposes, Article V allows domestic courts to refuse enforcement of a foreign award where the arbitration agreement ‘is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’ [Art. V(1)(a) NY Convention]; and in the case in which the award is contrary to the public policy of the state where enforcement is sought [Art. V(2)(b) NY Convention].

except those provided in [Article 53] Convention',¹⁰⁰ a Member State's court requested to enforce an intra-Eu BIT investment award may in fact be bound to disapply Article 54 ICSID Convention under the principle of supremacy of EU law over domestic and international treaty.¹⁰¹ On a different level, Article V(1)(a) NY Convention would similarly allow the Member State's court to refuse enforcement of an award that was rendered under an arbitration agreement that 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.¹⁰² In addition to that, enforcement may also be refused on the ground that the decision in *Achmea* and the *dictum* in *Komstroy* constitute public policy of the state (as EU public policy) where enforcement is sought, pursuant to Article V(2)(b) NY Convention.¹⁰³

For these reasons, European investors, constrained from seeking enforcement of favourable intra-EU awards within the EU, started filing for enforcement in extra-EU countries' courts where Member State's attachable assets are located and, in principle, not protected by any state immunity doctrine.¹⁰⁴ Enforcement of many intra-EU awards has been sought before the U.S. State District Court for the District of Columbia.¹⁰⁵ The D.D.C.

¹⁰⁰ Article 53 ICSID Convention.

¹⁰¹ Scheu, Nikolov (n 97) 267 ff. However, this would most likely not be the case in the ECT scenario, where the ECT would probably prevail for the obligations arising out of the EU being a party of the ECT.

¹⁰² Article V(1)(a) NY Convention.

¹⁰³ With regard to *Achmea*, the conclusion is reached by Scheu, Nikolov (n 97) 270. However, what constitutes EU public policy is debated in the doctrine. Although it is now settled case law that many competition law and consumer law provisions are part of EU public policy, the CJEU has not decisively defined the width of EU public policy. In sum, the CJEU Cases C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECLI:EU:C:1999:269, C-168-05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECLI:EU:C:2006:675 and C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [209] ECLI:EU:C:2009:615 show that the CJEU, by holding when a EU law provision is 'mandatory', also decides the degree of EU law intrusion on Member States' freedom to determine their own public policy concept. In practice, Article V(2) (b) NY Convention is applied narrowly, 'sparingly' and with 'extreme caution.' See on the point, Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 3647–3652.

¹⁰⁴ Scheu, Nikolov (n 97) 270.

¹⁰⁵ As of January 2022, seven intra-EU awards enforcement proceedings can be found in Westlaw that are pending in front of the D.D.C. and in six of them enforcement of the awards is sought against Spain. *Infrastructure Servs. Luxembourg S.A.R.L. v Kingdom of Spain*, No. CV 18-1753 (EGS) 2019 WL 11320368 at *1 (D.D.C. Aug. 28, 2019); *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, 397 F. Supp. 3d 34 (D.D.C. 2019); *Novenergia II - Energy & Env't (SCA) v Kingdom of Spain* No. 18-CV-01148 (TSC) 2020 WL 417794 at *1 (D.D.C. Jan. 27, 2020); *CEF Energia, B.V. v Italian Republic* No. 19-CV-3443 (KBJ) 2020 WL 4219786 at *1 (D.D.C. July 23, 2020); *NextEra Energy Global Holdings B.V. v Kingdom of Spain*, No. 19-cv-01618 (TSC), 2020 WL 5816238 at *1 (D.D.C. Sept. 30, 2020); *9REN Holding S.A.R.L. v Kingdom of Spain* No. 19-CV-01871 (TSC) 2020 WL 5816012 at *1 (D.D.C. Sept. 30, 2020); *InfraRed Env't Infrastructure GP Ltd. v Kingdom of Spain* No. CV 20-817 (JDB) 2021 WL 2665406 at *1 (D.D.C. June 29, 2021). In all the proceedings mentioned, the D.D.C. granted the Respondent Member State's motion to stay, given the ongoing annulment proceedings either at ICSID or at the seat of arbitration; and considered the interest of judicial economy and international comity. In addition to that, other European investors have petitioned the D.D.C. to enforce arbitration award against the Kingdom of Spain. These includes *RWE Renewables GMBH et al v. Kingdom of Spain*, 1:21-CV-03232 and *Aes Solar Energy Cooperatief U.A. et al v. Kingdom of Spain*, 1:21-CV-03249.

has nevertheless avoided taking a position on the faith of intra-EU awards and their enforceability, as the next subchapter explains.

2 Enforcement of Intra-EU Awards at the United State District Court, District of Columbia

Most intra-EU awards where enforcement is sought at the D.D.C. arose out ECT cases and involved ICSID awards.¹⁰⁶ In the U.S., enforcement of ICSID awards is regulated by Federal Statute. Title 22 of the U.S. Code ‘implements the treaty obligations of the United States, as contracting party of the ICSID’¹⁰⁷ and applies in place of Rules 9 and 10 of the Federal Arbitration Act (FAA).¹⁰⁸ Pursuant to 22 USC § 1650a, Federal Courts must accord ICSID awards ‘full faith and credit as if the award were a final judgment of [...] one of the several States’.¹⁰⁹ 22 USC § 1650a also determines the exclusive jurisdiction of Federal Courts on the enforcement of ICSID awards.¹¹⁰ However, ‘Section 1650a cannot fairly be read as serving as an independent source of subject matter jurisdiction over a foreign sovereign’.¹¹¹ Additional requirements for jurisdiction, service of process and venue, are instead assumed from the relevant provisions of the Foreign Sovereign Immunity Act of 1976 (FSIA).¹¹² ‘The FSIA provides that “[s]ubject to existing international agreements to which the United State is a party”, foreign sovereigns ‘shall be immune from the jurisdiction of the courts of the [US]’ and subject to the enumerated exceptions to this grant of immunity.¹¹³ Two of those exceptions are relevant here, the so-called (i) ‘waiver exception’ and (ii) ‘arbitration exception’. Under the waiver exception, the immunity does not apply when the sovereign state has ‘waived its immunity either explicitly or by implication’.¹¹⁴ Some courts have interpreted foreign sovereigns to have impliedly waived their immunity when they entered the ICSID Convention and accepted the enforcement mechanism provided by ICSID.¹¹⁵ On a different level, the arbitration exception deprives the foreign sovereign of immunity when an action is brought either ‘to enforce an agreement made by the foreign state with

¹⁰⁶ All the listed proceedings in note 105, except for *CEF Energia, B.V.* (n 105) involve ICSID intra-EU awards.

¹⁰⁷ Title 22 of the United States Code outlines the role of foreign relations and intercourse in the United States Code.

¹⁰⁸ The FAA is instead applicable to the enforcement of awards under the NY Convention. *Infrastructure Servs. Luxembourg S.A.R.L.* (n 105) at *2.

¹⁰⁹ 22 USC § 1650a(a).

¹¹⁰ 22 USC § 1650a(b).

¹¹¹ *Mobil Cerro Negro, Ltd. v Bolivarian Republic of Venezuela*, 863 F. 3d 96, 113 (2d Cir. 2017)

¹¹² The FSIA is codified at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602–1611.

¹¹³ 28 USC 1604, 1605. *Masdar Solar* (n 105) 38.

¹¹⁴ 28 USC 1605(a)(1)

¹¹⁵ *Blue Ridge Invs., L.L.C. v Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) citing *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993), as amended (May 25, 1993) according to which the foreign sovereign “‘must have contemplated enforcement actions in other [Contracting] states,” including the United States’.

or for the benefit of a private party to submit to arbitration' or 'to confirm an award made pursuant to such an agreement to arbitrate' if the agreement or award is subject to a treaty. As per the rule on venue, it suffices to note here that, under the FSIA, any civil action against a foreign state can always be brought in front of the D.D.C., notwithstanding the defendant's contact, presence of its assets, or residency of the parties within the district.¹¹⁶ In sum, two conditions must be met to establish jurisdiction over a foreign sovereign under the FSIA: (1) The applicability of an exception from jurisdictional immunity established by the FSIA and (2) proper service on the foreign sovereign 'in accordance with the FSIA's provisions'.¹¹⁷

Within the delineated framework, it is easy to understand how the lack of a valid agreement to arbitrate an intra EU-investor state dispute may result in the district court's lack of subject matter jurisdiction over the dispute: by losing the possibility to apply one of the exceptions to sovereign immunity under the FSIA, the general immunity rule will protect the foreign sovereign from the investors' action to enforce the award. Aware of this possibility and with no intention to provide a premature holding on the merit of enforceability of intra-EU awards within the US borders, the D.D.C. has so far avoided acquiring jurisdiction on the disputes brought in front of it by European investors. The D.D.C. has instead preferred to order the *stay* of all the proceedings started in front of it. In order to do so without acquiring jurisdiction beforehand over the dispute, the D.D.C. considered the motions to stay as a threshold, non-jurisdictional ground, which allows the district court to '[bypass] questions of subject matter and personal jurisdiction, when considerations of convenience, fairness and judicial economy so warrant'.¹¹⁸ Then, with similar reasoning and holding, the D.D.C. has decided to wait for the ICSID Committees to determine the EU law matter on the pending annulment proceedings and not 'delve prematurely into EU case law, international treaties and sovereign constitutions'¹¹⁹ and 'cross-border piecemeal litigation'¹²⁰. The D.D.C. reached analogous conclusions also with regard to enforcement of intra-EU awards that fall within the scope of the NY Convention,¹²¹ and even though the basis for the enforcement of the awards is found in the different set of

¹¹⁶ 28 USC 1391(f)(4) that reads: '(4) the United States District Court for the District of Columbia'. This is likely to be one of the main factors that encouraged investors to seek enforcement of ICSID awards at the D.D.C., to avoid the cost and delay of a removal.

¹¹⁷ Exceptions that are enumerated in 28 U.S.C. § 1608. Moreover, the district court in *Mobil Cerro* held that the relationship between 22 USC § 1605a and the FSIA, in the case of enforceability of ICSID awards, does not give rise to any problem of compatibility. *Mobil Cerro Negro, Ltd.* (n 111) 115.

¹¹⁸ *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007).

¹¹⁹ *Masdar Solar* (n 105) 38; *NextEra Energy* (n 105) 3; *9Ren* (n 105) 2. The D.D.C. also generally noted that a stay of proceedings before the ICSID Committee decided on the annulment of the awards would delay the district court proceedings. However, the delay would still be shorter than if the D.D.C. were to confirm the award and afterwards the ICSID set it aside.

¹²⁰ *Masdar Solar* (n 105) 40.

¹²¹ *CEF Energia* (n 105).

rule codified in Rule 9 FAA.¹²² Also, in these cases where intra-EU awards are rendered by *ad hoc* tribunal, the D.D.C. preferred to order the stay of the proceedings.

To conclude, the D.D.C. may have become one of the favourite extra-EU courts for the enforcement of intra-EU awards for European investors. It is also, with high probability, the default venue for seeking intra-EU awards enforcement within the United States. However, the D.D.C. did not take any position on whether the intra-EU agreements contained in the intra-EU BITs and Art. 26 ECT are valid for the purposes of enforcement of the intra-EU awards. It does not seem that any decision on this topic will be ripe until one of the appointed ICSID Committees will render a ruling on the annulment of the awards on the grounds of *Achmea* or *Komstroy's* objection. It can however be expected that any ICSID ruling against the Member States may have major effects on the principles of enforceability and finality of the intra-EU awards in the US District Courts, and it will eventually encourage the D.D.C. to take a position on the merit of the matter.

V Conclusions

The process of terminating Intra-EU investor-state arbitration is far from being over. The shifts that *Achmea*, *Komstroy* and *PL Holdings* created in intra-EU investment arbitration have certainly contributed to accelerating this process. All the EU institutions and Member States' actions seem ultimately to be oriented to protecting the Member States rather than investors.

On the intra-EU BITs' front, with the progressive entry into force of the Termination Agreement in most Member States, intra-EU BITs are barely breathing. Investment law substantive standards and the ISDS mechanism will soon be replaced by the EU Treaties' substantive principles and Member States' national courts' remedies. This change would leave no arbitration choice to European investors. After *Republiken Polen v PL Holding S.à.r.l.*,¹²³ European investors seem to have lost even the last possibility to resort to investment arbitration through the signature of an *ad hoc* arbitration agreement included in a contract between the investor and the Member State with the same content as the ISDS provision in the treaties. This was a possibility that, right after *Achmea*, still seemed to be viable for European investors. The award rendered in the SCC case *PL Holding*

¹²² 9 USC 201-208. Rule 9 FAA transpose and ratify the NY Convention in the U.S. Consistent with the pro-arbitration FAA policy and USC 9 207, the FAA limit the refusal of enforcement and recognition of the awards on the ground limited in the NY Convention, including the mentioned cases of an invalid agreement to arbitrate pursuant to Article V(1)(a) NY Convention. A third relevant ground to refuse enforcement under the NY Convention may also be the cases in which the award has not yet become binding on the parties or has been set aside or suspended under Article V(1)(e).

¹²³ *PL Holdings* (n 8).

S.à.r.l. v Poland endorsed the position,¹²⁴ which was also confirmed by Sweden's national court when it rejected Poland's action for setting aside the *PL Holding* award on the ground of the incompatibility of Article 9 of the BLEU-Poland BIT with EU law.¹²⁵ At first, the *Svea Court of Appeal* (*Svea*) in fact reasoned that the judgement in *Achmea* only precluded Member States from entering an arbitration agreement in the form of a ISDS provision stemming from a Treaty. According to the *Svea*, however, nothing in the TFEU precluded a Member State from entering into an arbitration agreement based on the private law principle of party autonomy.¹²⁶ The decision was welcomed as revolutionary because the *Svea*, with its argument, limited the effect of *Achmea* over an agreement to arbitrate that was equal to Art. 8 Netherlands-Slovakia BIT. The *Svea* also superseded the argument used in *Achmea*, according to which Member States' consent to arbitration could derive solely from a treaty.

However, the *Svea* reasoning was problematic *ab initio* from a theoretical point of view. Although a parallel may be found between investment arbitration and commercial arbitration,¹²⁷ the two law fields do not actually correspond. Even justifying the presence of a valid arbitration agreement based on parties' autonomy, in the case of investment arbitration, awards would still express rules and principles of public international law,¹²⁸ which may

¹²⁴ SCC Case No. 163/2014 *PL Holdings v Republic of Poland* Partial Award (28 June 2017). The Tribunal rejected the jurisdictional objection based on the invalidity of a treaty under Articles 30 and 59 VCLT, by considering that (i) the objection was untimely (para 306); and, more importantly, that (ii) the "intra-EU BIT" defence' was without merit (paras 309–317). The Tribunal eventually decided in favour of the investors and awarded damages to *PL Holding* for the forced sale of the investor's shareholding in the Polish FM Bank PBP (for PLN 653,639,384).

¹²⁵ Case No. T 8538-17 and No. T 12033-17 *Republic of Poland v PL Holdings S.à.r.l.* Svea Court of Appeal (22 Feb. 2019). The judgement in favour of the investors was subsequently appealed in front of the Swedish Supreme Court (Högsta Domstolen), which started the preliminary ruling procedure in front of the CJEU.

¹²⁶ Case No. T 8538-17 and No. T 12033-17 p. 43. The SVEA interpreted *Achmea* and the TFEU as not precluding 'as such... Poland and PL Holdings from entering into an arbitration agreement and participating in arbitral proceedings regarding an investment-related dispute'. In other words, they '[do] not preclude arbitration agreements between a Member State and an investor in a particular case: a Member State is, based on party autonomy, free – even though the Member State is not bound by a standing offer as such as that in [the relevant intra-EU BITs] – to enter into an arbitration agreement with an investor regarding the same dispute at a later stage, e.g. when the investor has initiated arbitral proceedings. An arbitration agreement and arbitral proceedings between, on the one hand, an investor from a Member State and, on the other hand, a Member State, is therefore as such not in violation of the TFEU.' What they preclude is instead 'that Member States conclude agreements with each other, meaning that one Member State is obligated to accept subsequent arbitral proceeding with an investor and that the Member States thereby establish a system where they have excluded disputes from the possibility of requesting a preliminary ruling, even though the disputes may involve interpretation and application of EU law'.

¹²⁷ Giuditta Cordero Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009, Oxford) part VIII Ch 39, DOI: <https://doi.org/10.1093/acprof:oso/9780199571345.003.0039>.

¹²⁸ Moss (n 127) 784.

widely limit the sovereign power of the host state and have a large political significance in Member States' international relations.¹²⁹ For these reasons, Member States' consent to arbitrate based on party autonomy may still have the effect of removing investment disputes concerning the application and interpretation of EU law from the EU 'system of judicial remedies'¹³⁰. Such arbitration proceedings would still contravene the EU overarching principles used in *Achmea*.

As it could be expected, the decision was later appealed in front of the Högsta Domstolen (Swedish Supreme Court), which sent a request for a preliminary ruling to the CJEU, to resolve the question of compatibility of *ad hoc* arbitration agreements with the autonomy of EU law.¹³¹ On October 2021, the CJEU eventually held in *PL Holding S.à.r.l.* that Articles 267 and 344 TFEU preclude Member States from concluding an *ad hoc* arbitration agreement with an intra-EU investor, the content of which is identical to the invalid ISDS provision included in an intra-EU BITs, and which allows the investor to continue the arbitration proceeding.¹³² Lastly, the CJEU stressed that deciding otherwise would 'in fact entail a circumvention of the obligations arising for [the Member States] ... under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in ... *Achmea*'.¹³³ In this sense, it seems that European investors have the sole recourse to national courts as a viable remedy to their intra-EU investment disputes.

On the different front of the ECT, this analysis seems also to suggest that, at least where still possible under the ECT, European investors are recommended to have recourse to the ICSID self-contained arbitration system. In principle, although the Member States have an obligation to request the annulment of intra-EU awards in any court where enforcement is sought, choosing a place of arbitration with no seat may increase the opportunity of having a final and enforceable intra-EU award, at least outside the EU. In any event, the termination of the protection afforded by the ECT is not a question of if but how it will be carried out in the foreseeable future. A revision and modernisation of the ECT has been discussed

¹²⁹ On the contrary, commercial arbitration, even when one of the parties is a State, regulates private and commercial law matters which are less invasive of the state's public international law power.

¹³⁰ *Achmea* (n 1) para 55

¹³¹ *PL Holdings* (n 8) para 37. In details, the Högsta Domstolen asked the CJEU whether 'Articles 267 and 344 TFEU, as interpreted in *Achmea*, mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor – where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States – by virtue of the fact that the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?'. The full request for preliminary ruling can be read at <<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=225602&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=300488>> accessed 31 March 2022.

¹³² *PL Holdings* (n 8) para 70.

¹³³ *PL Holdings* (n 8) para 47.

for some time now.¹³⁴ Any proposed amendment or termination for the EU or its Member States may thereby create barriers for EU investors to invest directly in renewable energy¹³⁵ while still relying on arbitration. Those European investors that still want to pursue a pro-investment policy within the EU may ultimately consider structuring their investments into Member States EU countries through vehicles incorporated outside the European Union and, where possible, use the protection afforded by extra-EU BITs.

¹³⁴ A proposal for the modernisation of the energy charter treaty by the EU Commission has been in place at least since 2019 <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2049>> accessed 31 March 2022. In 2020, the Commission even presented its EU proposal for the ECT modernisation <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148>> accessed 31 March 2022. On the topic of withdrawal from the ECT, see Nathalie Bernasconi-Osterwalder, 'Energy Charter Treaty Reform: Why withdrawal is an option' [2021] Investment Treaty News in IISD which can be accessed at <https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/#_ftn6> accessed 31 March 2022. On December 14, 2021, The Energy Charter Conference at its 32nd Statutory Meeting took note of the Progress Report of the Modernisation Group 2021 in the 'Decision of The Energy Charter Conference' CCDEC 2021 21 NOT. The CCDEC 2021 Decision also set out a schedule for the negotiation on the modernisation of the ECT for 2022.

¹³⁵ Investments that are much needed within the European Union to meet the Paris Agreement goals. See Loukas A. Mistelis, Nikolaos Lavranos, 'The World after the Termination of Intra-EU BITS' (2020) 5 European Investment Law and Arbitration Review 196–214, 208–209 DOI: https://doi.org/10.1163/24689017_008.