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Watch for the Ripples, Not Just the Splash: How the EU Position on Investment Arbitration Has Affected the Enforcement of Awards

- **ABSTRACT:** *The European Commission's attempts to end intra-European Union (EU) investment arbitration, and the decisively helping hand lent by the Court of Justice of the European Union (CJEU) have produced massive splashes, rightfully attracting much attention. However, the ripples after the several splashes have had limited effects. This paper briefly outlines the splashes and goes on to analyze the ripples: investment tribunals retaining jurisdiction and issues around recognition and enforcement within and outside the EU. Although the judgments of the CJEU have had limited effects outside the EU, they have made it more difficult to enforce intra-EU awards within the EU and sometimes also outside of it. The study also examines some of the tools used by the EU to effectively shut the door on intra-EU investment arbitration, which mostly burden its Member States, such as infringement proceedings and decisions on unlawful state aid.*
- **KEYWORDS:** recognition, enforcement, execution, Achmea, Komstroy, PL Holdings, intra-EU investment arbitration.

Observing the evolution of the relationship between European Union (EU) law and international investment arbitration, we see that there have been moments in the last five years that constitute massive steps toward sealing the fate of intra-EU investment arbitration once and for all. The first part of this paper presents some of the more important moments, which could be regarded as enormous splashes. Splashes, as several actions were needed so that the ripples were felt within the system and the position of the EU was actually felt. At first, the ripples seemed to have little effect on international investment arbitration. The ripples have definitely been felt in the

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procedure for the recognition and enforcement of the arbitral awards, which is the focus of this study.

Due to the fact that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) have their own particularities regarding the recognition and enforcement of arbitral awards, the aim of this study is to examine some of the effects that the EU's *attitude* toward these procedures has had. It should be noted that the splashes posed by some of the developments in EU law, although with limited effects on the jurisdiction of arbitral tribunals, have had serious effects on recognition and enforcement. The aim of this study is to explore the ripples these splashes have produced regarding the procedures in the above international agreements. The paper first turns to the splashes, which many regard as the most important moments in this long-drawn-out and tumultuous relationship between EU law and intra-EU international investment arbitration. The second part examines the ways in which these splashes have been ignored by investment arbitration tribunals and some of the reasons why they continued to retain jurisdiction. In the third part, the matters of recognition and enforcement are considered, with a focus on enforcement within the EU and outside of it, addressing the specifics posited by the provisions of the ICSID Convention and the New York Convention. The fourth part of the paper addresses some of the tools the EU has turned to for persuading not only the international community and third countries' courts, but also its own Member States (MS) to have the ripples wash away all remaining effects of intra-EU investment arbitration. The paper ends with some of the author's afterthoughts on the topic.

1. The splashes: principal moments in intra-EU investment arbitration

The matter of EU law and intra-EU investor-state arbitration has a number of aspects to it, which have been discussed at length in the legal literature, as shown in the sources utilized in this study. One important factor in this conflict is the enlargement of the EU in 2004, 2007, and 2013. These states had been encouraged to enter into bilateral investment treaties (BITs) prior to their accession, which resulted in a large number of BITs becoming intra-EU BITs.² Further, the Treaty of Lisbon extended exclusive EU competence to foreign direct investment.³ This, although formally not linked to intra-EU BITs, brought with it an appetite for the EU to clarify its stance in the matter of resolution of intra-EU investment disputes via arbitration based on international

2 See Nagy, 2019, p. 2. Korom, 2020, pp. 56–59.

3 It must be noted that even before this transfer of competence, EU MS had an obligation to align their BITs with EU law, as the following cases demonstrate: ECJ Case C-118/07 (Commission v Finland) [2009] ECR I-1301, I-1335 and I-10889; ECJ Case C-205/06 (Commission v Austria) [2009] ECR I-1301; ECJ Case C-249/06 (Commission v Sweden) [2009] ECR I-1335.

investment agreements. The European Commission (Commission) entered the picture first, by intervening before investment arbitration tribunals as *amicus curiae*, in an attempt to persuade arbitrators to refuse to establish jurisdiction. Despite the failure of these attempts, the Commission continues to lobby arbitral tribunals with its arguments. Moreover, the Commission attempted to police the EU MS as to their own attitudes toward intra-EU investment arbitration. Nonetheless, these attempts were not that successful at the early stages, as will be shown below. The Court of Justice of the European Union (CJEU) brought heavy blows to the system via its judgments, which constituted the basis for more action from the part of the Commission. These will also be presented succinctly. In searching for the proper way to address the matter of intra-EU investment arbitration, with help from the CJEU and MS, the Commission now seems to be finding its voice. This voice, nonetheless, appears to be loud enough only regarding MS, for the time being.

In a number of investor-state dispute settlement (ISDS) cases between the EU MS and investors from other EU MS, respondents have argued that through the membership, EU law actually replaced intra-EU BITs. Arbitral tribunals, however, did not budge. It is noteworthy that during the period of accession to the EU some of the EU MS, or future EU MS had been asked to bring their BITs into line with EU law, which also extended to what would become intra-EU BITs (such as the Romania–Czech Republic BIT, around 2008, and Romania–Slovakia BIT, around 2005). However, at the time these amendments happened, the Commission did not have a strong opinion regarding the incompatibility of these treaties with EU law, a position which took some years to crystallize. It was around this time that the Commission started getting involved as *amicus curiae* supporting the EU MS in their ISDS cases.

In *Micula*, one of the most notorious cases in which the Commission intervened,⁴ the procedure was based on the Sweden–Romania BIT.⁵ The case was filed in October 2005, prior to Romania’s accession to the EU. The ICSID Tribunal established jurisdiction, finding the claimants’ position admissible in September 2008. Pursuant to this, the Commission intervened in 2009 via an *amicus curiae* brief, stating that the state aid scheme established by the respondent (Romania), of which the claimants were beneficiaries (and the premature withdrawal of which constituted the basis of the claim), was incompatible with the Community rules on regional aid. At this point, the Commission—one might argue in hindsight—seemed to be testing how much investment arbitration tribunals were willing to defer to EU law. In 2013, the Tribunal awarded the claimants compensation; the claimants sought the enforcement of the award in 2014. However, the Commission intervened via a Decision and prohibited

4 There was another case in which the European Commission had formulated its opinion as *amicus curiae* within an investor-state arbitration proceeding along the lines of the primacy of EU law and its interpretation by the European Court of Justice, while also touching on the matter of the termination of intra-EU BITs. See: Partial Award in Eastern Sugar B.V. v The Czech Republic, SCC Case No. 088/2004.

5 See: Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20.

Romania from executing the award and ordered it to recover the compensation that it had already paid pursuant to the award.⁶ By the time the Decision ran its course from the initiation of procedures related to it in March 2014, until the adoption of the Decision itself in March 2015, Romania had in part implemented the arbitral award, by means of offset. During this time, Romania also filed an application for the annulment of the arbitral award before an ICSID annulment committee, while the claimants pursued the execution of the award in front of the courts of the host state, other EU MS, and third countries. The Decision on state aid was a major intervention from the Commission in reasserting EU law to the detriment of investment arbitration. Nevertheless, its position on the matter had limited effects. Subsequently, the Decision was also annulled by the General Court of the EU in 2019,⁷ allowing for the enforcement of the Award to continue.⁸

Although the splash was significant, the ripples had limited effects. However, the above case was only one of the fronts on which the Commission intervened. There came other opportunities for other institutions to intervene and reassert the position of EU law, which ran in parallel with the above case. The CJEU stepped in firmly trying to find the appropriate language and means to reinforce the position of EU law preached tirelessly by the Commission to no avail. The case known as *Achmea* brought the opportunity for the CJEU to set out in more detail what was going to happen to intra-EU investment arbitration.

The *Achmea* case saw a previous intervention from the Commission. In *Eureko* (later *Achmea*) v. Slovakia—relying on observations submitted in the *Eastern Sugar* case—the Commission made a submission in the investment arbitration case⁹ stating that intra-EU BITs constituted an “anomaly within the EU internal market”,¹⁰ arguing that “a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law.”¹¹ The position of the Commission converged with that of many MS, who had put forward similar arguments in some of the cases filed against them: arbitration clauses in intra-EU investment agreements are not compatible with EU law, because such clauses could have an adverse effect on the integrity of EU law, violating some of its core elements such as the principle of mutual trust and

6 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013.

7 Judgment of the General Court of 18 June 2019 – ECLI:EU:T:2019:423 – in cases T-624/15, T-694/15 and T-704/15. The annulment was mainly due to the finding that Romania had granted the state aid (incentives) before its accession to the EU and before it became bound by EU rules on state aid.

8 This annulment is now itself under review in an appeal pending before the CJEU, under number C-638/19.

9 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*).

10 See Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, *Achmea BV v The Slovak Republic*, para. 177.

11 *Id.* para. 180.

the principle of the autonomy of EU law.¹² However, the arguments of the Commission did not affect the tribunal and ultimately had no bearing on the award itself. In the meantime, to get all states in line, the Commission also launched infringement proceedings against some MS to abolish their intra-EU BITs, and called on all MS to terminate theirs.¹³

For this position to finally have some effect, the CJEU stepped in (via a request for a preliminary ruling by the German Federal Court of Justice) with a judgment in a case where 16 MS and the Commission intervened. The CJEU judgment essentially stated that arbitration clauses within intra-EU BITs are contrary to EU law.¹⁴ This finally prompted genuine EU-wide action. A Communication was published where the Commission addressed the European Parliament and the Council concerning the protection of intra-EU investment¹⁵ and laid out the arguments against intra-EU investment arbitration in a clearer manner. It is noteworthy that—already at this point—the Commission was stating that national courts were “under the obligation to annul any arbitral award rendered on [the basis of intra-EU BITs] and to refuse to enforce [them].” Most EU MS “officially” joined the Commission in its point of view via a declaration, basically restating the essence of the decision in *Achmea*: “[a]n arbitral tribunal established on the basis of investor-state arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.”¹⁶ However, a massive splash in its own right, the ripples of the *Achmea* judgment were not impressive, as investment arbitration tribunals kept ignoring it.¹⁷ This is no surprise, as the above arguments can hardly be regarded as persuasive in the realm of international law.

The judgment was followed by the Agreement for the Termination of *Bilateral Investment Treaties* between the EU MS (Termination Agreement),¹⁸ which in large part ended discussions on the limits of the applicability of the CJEU judgment in *Achmea*.

12 Id. para. 185.

13 Commission asks Member States to terminate their intra-EU bilateral investment treaties, European Commission Press Release, Brussels, 18 June 2015.

14 Judgment of the Court (Grand Chamber) of 6 March 2018 (request for a preliminary ruling from the Bundesgerichtshof – Germany) – *Slowakische Republik v Achmea BV*, Case C-284/16.

15 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment – COM/2018/547 final.

16 Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection. https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (Accessed 16.01.2022.)

There were two other declarations, one made by five MS and the other by Hungary, both on January 16, 2019, which had a different approach as to the applicability of *Achmea* to the ECT.

17 See Gáspár-Szilágyi and Usynin, 2019.

18 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union – SN/4656/2019/INIT. The Agreement was not signed by Austria, Finland, Sweden, and Ireland. The Communication (see *supra* fn.13) already stated that “pursuant to the principle of legal certainty, [MS] are bound to formally terminate their intra-EU BITs.”

To ensure that the MS are able to definitively terminate *any legal effects* of these BITs¹⁹ as soon as possible, the Termination Agreement also provides a means of settling the remaining (pending) cases through “structured dialogue.”²⁰

Even though the *Achmea* judgment appeared to effectively bury intra-EU ISDS, tribunals constituted after the above moments in time did not regard it as impeding them from upholding their jurisdiction. As was argued from the outset, this was “a political judgment, which must be read from the perspective of European Union law,”²¹ and its legal effects were highly limited. Undoubtedly, the judgment was more effective in toeing the line within the EU when it came to intra-EU investment arbitration. A large number of pending cases and cases started after the above steps had occurred as a consequence of *Achmea*. Counsels successfully argued in front of tribunals for considering their case, presenting a situation different from that of *Achmea*.²² Requests for annulment and set-aside proceedings with arguments based on *Achmea* have not been successful either, with counsels managing to persuade arbitrators of the limits of the judgment, bogging it down in its specificities. It now appears that a battle is under way between investment arbitration tribunals and the EU, where tribunals keep deciding on their competence, establishing jurisdiction and settling disputes, while the EU—through the CJEU—scrambles to narrow their jurisdiction. One of the more urgent matters for the EU has to do with the fact that the Termination Agreement only extended to BITs, with no effects on multilateral treaties such as the Energy Charter Treaty (ECT). This constitutes an especially acute problem, as a fairly large number of intra-EU investment arbitration cases are conducted under the ECT. While the Commission and most MS considered *Achmea* to be applicable to the ECT, arbitral tribunals did not agree with this position. The Termination Agreement does not reflect this initial stance of the EU, probably due to the business interests of the MS, and contains express provisions leaving out the ECT, as a matter to be dealt with later.

The position on the ECT intra-EU arbitration required reinforcing. The CJEU was activated once again to close this gap. This happened through the judgment in *Komstroy v Moldova*.²³ In a case having nothing to do with intra-EU investment arbitration, the Grand Chamber extended *Achmea* to the ECT.²⁴ Even though the CJEU considered the

19 “The Commission has decided to open infringement proceedings against Austria, Sweden, Belgium, Luxembourg, Portugal, Romania and Italy for failing to effectively remove from their legal orders the intra-EU Bilateral Investment Treaties (BITs) to which they are contracting parties, so that they cease to produce any legal effects.” – December 2021 infringements package: key decisions – Press release from the European Commission https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 (Accessed 16.01.2022.)

20 Article 9 of the Termination Agreement.

21 Hess, 2018, p. 5.

22 On the narrow interpretation of the judgment see: Hindelang, 2018; Nagy, 2018, pp. 981–1016.

23 Judgment of the Court (Grand Chamber) of 2 September 2021. Republic of Moldova v Komstroy LLC – C-741/19.

24 In all fairness, the Commission via its Communication (see *supra* fn. 13) already laid out arguments for the relevance of *Achmea* to Article 26 of the ECT.

fact that the EU ratified the ECT, which made it a part of EU law, it stated—*obiter dicta*—that the resolution of intra-EU disputes through arbitration would not be compatible with primary EU law. It remains to be seen what the concrete tool will be through which *Komstroy* will gain applicability, as happened in the case of *Achmea* through the Termination Agreement. Until then, the ripples of this splash will continue to have limited effects before arbitral tribunals.

The latest judgment in this “series” was in the case of *Poland v PL Holdings Sarl*, regarded as “another nail in the coffin of intra-EU investor-state arbitration.”²⁵ In *PL Holdings*, the Court held that invalid treaty arbitration clauses could not be circumvented by *ad hoc* agreements of arbitration.²⁶ This decision ultimately buttresses the judgment in *Achmea*, making it impossible for parties to a dispute to circumvent treaty-based arbitration clauses, which are now incompatible with EU law, with an *ad hoc* arbitration agreement. Although narrow on the looks of it, mainly due to the specifics of the case, it must be noted that the CJEU also reiterated the fact that “Member States cannot undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law.”²⁷

The above judgments have many interesting aspects to it, which will not be analyzed in detail, but are undoubtedly important for their applicability and consideration by courts and tribunals. What is key here is that the judgments of the CJEU are binding and must be applied by MS courts, as they are a part of EU law pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU). Further, the Treaty on European Union (TEU) under Article 4(3) prescribes a duty of sincere cooperation, in accordance with which MS courts must assist in carrying out the tasks of the EU. Even though the *Komstroy* judgment in and of itself might not be enough to stop further intra-EU cases based on the ECT²⁸—as we have seen after *Achmea*—and further action is required as to its certainty and applicability in front of investment arbitration tribunals, pursuant to their obligation of sincere cooperation, EU MS courts will probably resist the recognition and enforcement of these arbitral awards (even though the question of intra-EU ECT arbitration was addressed as *obiter dicta*). Nevertheless, through these judgments, the CJEU has reasserted its status as the ultimate judge on the matter of interpretation and application of EU law. Ultimately, in the EU’s view, all these decisions are meant to guarantee the autonomy of EU law and to counter any possibility of its primacy being undermined. In the view of arbitral tribunals, however, the EU’s position is not that convincing.

25 Dózsa, 2021.

26 Judgment in Case C-109/20, *Republiken Polen v PL Holdings Sarl*, paras. 47, 65.

27 *Id.*, para. 52.

28 We have already seen examples of this, where arbitral tribunals have rejected reconsidering jurisdictional objections based on *Komstroy*. See Charlotin, 2021a; Charlotin 2021b. The articles discuss the following cases: *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23; and *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45. In this respect, see also Odermatt, 2021.

2. Retaining jurisdiction

Despite the above judgments and the text of the Termination Agreement, the present situation does prolong some of the uncertainties, putting potential claimants in the position of having to gamble with their cases. The Commission is continually putting pressure on its MS to proceed with the termination of the BITs and also that of their effects. Due to the situation that transpired in the Micula case, it seems that Romania and Sweden are in the spotlight for not ceasing *all of the legal effects produced by the BIT*.²⁹

As briefly detailed above, after *Achmea*, there have been several steps leading to the Termination Agreement, which effectively narrowed the applicability of *Achmea* exclusively to intra-EU BITs. A similar agreement of the EU MS is expected pursuant to *Komstroy*, where the situation is even more complicated because the EU is itself a signatory to the ECT.³⁰ This fact makes the matter more complicated, requiring an added dose of creativity and possibly leaving more room for carve-outs—which have also been a part of the Termination Agreement—for MS looking to protect their own investors, considering the large number of ongoing ECT cases. It is also worth keeping an eye out for what the ongoing negotiations around the ECT might bring, as that might also contain a solution as previewed by *Komstroy*.

There is a non-negligible number of investment arbitration proceedings pending before arbitral tribunals, initiated prior to *Achmea* and even after, where the intra-EU objections have been dismissed. There are dozens of cases in which *Achmea* was invoked in annulment proceedings, and arbitral tribunals rejected its applicability. These cases and the various arguments invoking *Achmea* will not be presented herein; however, it is worth mentioning one of the main reasons for which the *Achmea* judgment has not had an impact in front of the arbitral tribunals.³¹ The rationale put forward by the tribunal in *Electrabel v. Hungary*, as highlighted in *Eskosol v. Italy*, seems to be stating something obvious. In this case, it was retained that

29 Commission urges Austria, Sweden, Belgium, Luxembourg, Portugal, Romania, and Italy to terminate Bilateral Investment Treaties (BITs) with other EU Member States – December 2021 infringement package: key decisions. The Commission is also planning more severe action against Sweden, threatening to refer the case against it to the CJEU.

30 See for example the Award in the following case, where the tribunal had to express an opinion on both the EU membership in the ECT and the applicability of *Achmea*: ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and Infraclass Energie 5 GmbH & CO. KG v. Italian Republic, ICSID Case No. ARB/16/5. Paras. 295 and 336.

31 It must also be observed that there are cases in which respondents addressed national courts in attempts to obtain anti-arbitration rulings. See the successful attempt in *Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d. v. Republic of Croatia (II)* (under UNCITRAL rules), and the attempts in *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22 and *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4 all in front of German courts, relying on Article 1032(2) of the German Code of Civil Procedure. See also Bohmer, 2021.

“a tribunal that ‘has been seized as an international tribunal by a Request for Arbitration ... under the ECT and the ICSID Convention’ is required accordingly to apply the ECT and ‘applicable rules and principles of international law,’ because it ‘is placed in a public international law context and not a national or regional context.”³²

This is one of the reasons why statements from the EU MS, judgments of the CJEU, and arguments from the Commission have not been successful in dismissing intra-EU cases in front of arbitral tribunals.

In many investment arbitration cases, respondents have argued that tribunals do not have jurisdiction in intra-EU cases due to their obligation to settle disputes through awards that can be recognized and enforced. In this sense, respondent EU MS, in compliance with EU law, claim that due to the fact that intra-EU investment arbitration is considered incompatible with EU law, enforcing awards rendered pursuant to such procedures would have them violate EU law. This effectively makes the awards unenforceable in these respondents’ perspective. This argument has not been effective either;³³ however, it sends a message to claimants that respondent MS will not comply with such awards. This is one ripple that successful claimants invariably have to tackle. The foundation for the argument is that arbitral tribunals have a duty to ensure that their awards would be enforceable, which means tribunals should refuse to exercise jurisdiction in case they are unable to produce an enforceable award.³⁴ This argument is only partially applicable, as these awards must also be recognized and enforced by other contracting states, not just the EU MS. It has not either been sufficient in convincing arbitral tribunals to reject jurisdiction. Both the New York Convention and the ICSID Convention provide solid rules on recognition and enforcement. Nevertheless, this procedure tends to become quite cumbersome whenever the obliged party does not comply in good faith.

As has been shown, the decisions of the CJEU in the cases of *Achmea* and *Komstroy*—which seemed to demolish treaty-based intra-EU ISDS, and the *PL Holdings* decision, extending *Achmea* to ad hoc arbitration agreements—have had limited effects

32 See the Decision on Termination Request and Intra-EU Objection in *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, para. 180.

33 For example, in the Award in the *Micula* case (ICSID Case No. ARB/05/20): “The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters.” See para. 340.

34 For example, in the Decision on the Intra-EU Jurisdictional Objection, in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, para. 102. Also in the Decision on the *Achmea* Issue in *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, the Tribunal recognized that it does have a duty to render an enforceable award; however, it concluded that “[t]he enforceability of this decision is a separate matter which does not impinge upon the Tribunal’s jurisdiction.” See para. 230. In *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, the Tribunal found that the claimant’s concerns were “unfounded in relation to award recognition and hypothetical in relation to award enforcement.” See para. 339.

outside the EU, allowing cases to proceed. Although these decisions have, in a sense, sealed the fate of classic intra-EU ISDS, the latter is not over yet.

As tribunals continue to retain jurisdiction in new cases and *Achmea*-based arguments have proven insufficient in annulment proceedings, recognition and enforcement of awards is now front and center. The EU MS now find themselves in a position where complying with one set of rules (EU law) mandates non-compliance with other international treaties to which they are a party. Therefore, in the case of successful awards, the issue becomes where and how will these awards be recognized and enforced. There will be a relatively large number of intra-EU cases in which the party seeking recognition and enforcement will face difficulties; therefore, the question is what options will remain for them. The following sections will explore some of the questions related to enforcement in light of the conundrum faced by the EU MS.

3. Recognition and enforcement

Considering the general principles underpinning the functioning of public international law, as briefly addressed above, treaties ratified must be respected and applied in good faith (*pacta sunt servanda*). Pursuant to this, outside the EU, the EU's position seems to matter little. EU law is viewed as a system parallel to other systems established by international treaties on equal footing.³⁵ Any award handed down by an arbitral tribunal must be considered valid, as long as it was handed down on the basis of valid treaties, respecting all relevant legal provisions.

Considering the position of the EU and the general prohibition affecting the EU MS in complying with the awards, the location chosen for enforcement—within or outside the EU—becomes a highly important factor. Those seeking recognition and enforcement will be interested in testing out different jurisdictions to improve the chances of success in the face of the EU MS' refusal to comply. The complicated situation comes with added difficulty, which also means extra costs for claimants. In the following sections, some of the questions surrounding recognition and enforcement in the current legal climate, both within and outside the EU, are presented.

■ 3.1. Enforcement within the EU

Within the EU, the greatest impediment for enforcement of intra-EU investment arbitration awards stems from the general stance of the Commission and that of the MS, which is also reflected in the CJEU judgments, which have been briefly presented above. The matter of recognition and enforcement has been addressed in some detail within the Termination Agreement concluded after *Achmea*, which contains provisions applicable to this procedure.

35 As argued by the tribunal in *Eskosol*, which also made use of a graphic illustration to convey the structure of public international law. See Decision on Termination Request and Intra-EU Objection in *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, para. 181.

The Termination Agreement puts ISDS proceedings in three different categories: *Concluded Arbitration Proceedings*, *Pending Arbitration Proceedings*, and *New Arbitration Proceedings*.³⁶ Regarding *Concluded Arbitration Proceedings*, it states that these shall not be affected and *shall not be reopened*, in case the award was *duly executed prior to March 6, 2018*, or set aside or annulled before the entry into force of the Termination Agreement. This means that awards that have not been executed will fall into the next category. In the case of *Pending* and *New Arbitration Proceedings*, Contracting Parties to the Termination Agreement have to make a case within judicial proceedings that national courts refrain from recognizing and enforcing the arbitral awards. Thus, pursuant to the Termination Agreement, the EU MS have the obligation to not recognize and to not comply with arbitral awards, and to make a case against their recognition and enforcement by any court, including courts in third countries.³⁷ It is important to note that this only applies to arbitral awards rendered pursuant to intra-EU BITs, which constitute the subject matter of the Termination Agreement, regardless of the rules governing the proceedings. The Termination Agreement does not apply to the ECT. Nevertheless, considering that the CJEU judgments have to be applied by EU MS courts, those seeking recognition and enforcement have faced many difficulties after the *Achmea* judgment, regardless of the Termination Agreement, and are presently facing such difficulties as a result of the *Komstroy* judgment.

However, it is noteworthy that in the period between the handing down of the *Achmea* judgment by the CJEU and the conclusion of the Termination Agreement, there have been successful enforcement proceedings within the EU. This maybe an exceptional case, but it is still relevant that in the *Micula saga*, the Romanian government issued a decision to pay out on the award in December 2019, despite the *Achmea* judgment of the CJEU. In this case, enforcement proceedings have commenced in the UK, where the Supreme Court, overruling the Court of Appeal, decided to lift the stay on enforcement regarding the arbitral award, even though the CJEU General Court's Decision on Annulment³⁸ is under appeal.³⁹ The Court stated that the UK had an obligation toward all signatory states to enforce the award.⁴⁰ The Court also stated that a possible infringement proceeding against it should not preclude it from implementing its obligations pursuant to the ICSID Convention, to which it was a signatory before becoming an EU MS.⁴¹ In a blow to EU institutions, the Court referenced Article 64 of the ICSID Convention and stated that all disputes regarding the interpretation of the Convention should be addressed by the International Court of Justice (ICJ) and not the

36 Article 1 paragraph (4), (5) and (6) of the Termination Agreement defines these categories.

37 Article 7 of the Termination Agreement.

38 *European Food and Others v. Commission*, Judgment ECLI:EU:T:2019:423 – <https://curia.europa.eu/juris/document/document.jsf?docid=215106&doclang=EN>

39 *Judgment in Micula and others (Respondents/Cross-Appellants) v. Romania (Appellant/Cross-Respondent)*, 19 February 2020. <https://www.supremecourt.uk/cases/docs/uksc-2018-0177-judgment.pdf>(Accessed 16.01.2022.)

40 *Id.*, para. 116.

41 *Id.*, para. 116.

CJEU.⁴² It must be noted that the UK was still a member of the EU at this time, formally still bound by EU law (until December 31, 2020).⁴³ However, with one foot out the door, on track to finalizing Brexit, this was also a great opportunity to make a statement regarding its position and take a jab at the EU.

Despite the *Achmea* judgment, it was also reported that courts in Romania⁴⁴ and Belgium have allowed for the enforcement to proceed, albeit with caveats in the latter case, and the Micula claimants managed to seize shares owned by the Romanian state⁴⁵ and freeze accounts of Romanian state-owned entities such as the Romanian air traffic controller.⁴⁶ This seems to be what prompted the Romanian government to give in and decide to pay up the award, despite the EU's opposition.⁴⁷

The above situation regarding ICSID awards has been expected by some scholars, deeming that there are no effective grounds for challenging the awards in front of MS courts in such cases.⁴⁸ The author acknowledges that there remain limited but nonetheless effective grounds in the case of non-ICSID awards, where the matter of public policy must be considered.⁴⁹ The arguments for refusal of recognition and enforcement under the grounds provided by the New York Convention pertaining to the invalidity of the arbitration agreement [Article V(1)(a)] and violation of public policy [Article V(2) (b)] have been previously considered.⁵⁰ As intra-EU BITs have been (or are in the midst of being) terminated pursuant to the Termination Agreement, such arguments might now be considered vis-à-vis *Komstroy* and intra-EU ECT awards.

In the case of ICSID awards, the EU MS will have to face a situation that does not give them much choice: in case they disregard EU law, there are possibilities for sanctions (infringement procedure); however, if they disregard their obligations under the ICSID Convention, they will not have to face any effective sanctions. Furthermore, the EU MS will be able to invoke the primacy of EU law in excusing their non-compliance,

42 *Id.*, para. 110.

43 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – 2019/C 384 I/01.

44 In the Opinion of Advocate General Szpunar delivered on July 1, 2021 (Case C-638/19 P *Commission v European Food and Others*), *Achmea* does not apply to the Micula case as it arose and the proceedings were initiated prior to Romania's accession to the EU. However, the Opinion leaves room for maneuver regarding the issue of state-aid.

45 'Micula Brothers Manage To Seize 67 M Shares Owned By The State At Nuclearelectrica' – Romania Journal, 4 December 2019. <https://www.romaniajournal.ro/business/micula-brothers-manage-to-seize-67-m-shares-owned-by-the-state-at-nuclearelectrica/> (Accessed 16.01.2022.)

46 'Romanian Gov't To Pay EUR 278 M In The Micula Brothers Case After Romatsa's Accounts Frozen' – Romania Journal, 13 December 2019. <https://www.romaniajournal.ro/society-people/romanian-govt-to-pay-eur-278-m-in-the-micula-brothers-case-after-romatsas-accounts-frozen/> (Accessed 16.01.2022.)

47 It is not exactly clear if the award has been paid in totality as Romania claims, or if there is still outstanding debt following the award as ongoing enforcement procedures in the United Kingdom and the United States suggest.

48 Gáspár-Szilágyi, 2018, p. 372.

49 *Ibid.*

50 See Káposznyák, 2020, pp. 69–90.

thus avoiding a damaged international reputation. With this, the EU has effectively undermined the legitimacy of intra-EU investment arbitration.

■ 3.2. Enforcement outside the EU

As successful claimants have to seek enforcement outside the EU, the existence of EU MS assets in third countries such as the United Kingdom, the United States, Switzerland, and Australia now becomes a crucial calculation that has to be made by investors. Due to the legal situation certainly heading toward unenforceability on all fronts, and not just intra-EU BIT-based ISDS, investors have to know for sure not only that they can rely on third countries to enforce arbitral awards, but also that the respondent states have assets in such countries.

The most widely ratified treaties that ensure trust in international investment arbitration are the New York Convention and the ICSID Convention. The efficiency of the recognition and enforcement procedure (one better than the other) makes them essential parts of this ecosystem. Due to the differences in their regulation, these treaties will be analyzed separately.

3.2.1. Enforcement under the ICSID Convention

The enforcement system in ICSID presents a system that is detached from national courts. The Convention does not provide a means for challenging or reviewing the awards handed down under it, making it possible for parties to engage only in a special system of annulment, whereby an ad hoc committee is given authority to discuss some of the limited grounds of annulment that can be invoked under it.⁵¹

During the drafting of the ICSID Convention, regarding Articles 53–55, which are most important to our topic, questions had arisen as to the fact that every country has a different regulation and interpretation of *sovereign immunity*, which would imply differences in the enforceability of ICSID awards. The main purpose of these provisions is to ensure that awards rendered under the procedural rules of the ICSID Convention are recognized in all Contracting States in accordance with their own legislation—as a final judgment of their own domestic courts—and that the Convention respects the domestic legislation of Contracting States regarding enforcement.⁵² Deference to the domestic legislation of the Contracting States makes execution complicated, which is why Article 55 of the Convention was called its Achilles' heel.⁵³

Pursuing this purpose, the regulation in the ICSID Convention mandates the recognition and enforcement⁵⁴ of ICSID awards in Contracting States, without leaving much

51 Annulment proceedings may persuade national courts to stay enforcement proceedings until a final resolution is rendered. More recently, we have seen this in the case *Infrared Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12), in front of United States District Court for the District of Columbia in Civil Action No. 20-817.

52 History of the ICSID Convention. Vol. II-2. 671, 1083.

53 Schreuer et. al., 2009, p. 1154.

54 “[T]he entire award is to be recognized as binding. But only its pecuniary obligations are to be enforced.” Schreuer et. al., 2009, p. 1136.

room for judicial review.⁵⁵ It has been noted that it is not permissible for the enforcing court to refuse enforcement on the grounds of public policy or non-compliance with any national or international law.⁵⁶ The reference to the national laws of the enforcing State in Article 54(3) regarding the execution of an ICSID award is limited to laws of a procedural nature, as established by its drafting history and content.⁵⁷ In any case, however little wiggle room is left there, it does not mean that respondents did (and will) not try to oppose enforcement by invoking the EU position on intra-EU ISDS. Annulment proceedings relying on the Termination Agreement and the retroactive termination of intra-EU BITs have not managed to convince ad hoc annulment committees of the fact that ICSID jurisdiction had been affected.⁵⁸ Although the likelihood of success in annulment proceedings is dim, successful claimants are faced with the difficulties of having to execute awards against states unwilling to comply in good faith.

The *Micula saga* provided an important case in which the US courts had to consider the effects on enforcement of the *Achmea* judgment. In May 2020, the US Court of Appeals for the DC Circuit affirmed the decision of the Federal District Court of Washington DC (rendered in September 2019) that enforcement proceedings had to go forward. The court in this case reiterated that a “federal court is ‘not permitted to examine an ICSID award’s merits, its compliance with international law, or the ICSID tribunal’s jurisdiction to render the award.’” It noted that the court “may do no more than examine the judgment’s authenticity and enforce the obligations imposed by the award.”⁵⁹

This decision of the US courts finds interesting—however, not surprising—answers to some of the questions about the applicability of *Achmea* and the relevance of EU law stance on international investment arbitration. Nevertheless, the decision of the US courts allowing for the enforcement of the award in the *Micula case* despite *Achmea* does not mean that, for other cases, the matter is now cut-and-dry. The analysis of the US courts’ decision in this matter of enforcement has already been done in the scientific literature.⁶⁰ What is noteworthy is that this decision looks at the specifics of the *Micula case* and also relies on the fact that much of the case has to do with matters pre-accession to the EU, as opposed to the matters decided on in the case regarding *Achmea*. The judgment of the General Court of the CJEU, which annulled the Commission’s Decision on state aid, finding that the incentive scheme set up by Romania was not in violation of EU state aid rules, also had a bearing on the US courts’ decision. The US courts have been much more cautious than the UK courts. The above decisions essentially leave room for the consideration of *Achmea* by the US courts in cases

55 Brennkmeijer-Gélinas, 2021, p. 437.

56 Schreuer et. al., 2009, pp. 1140–1141.

57 Id., 1149.

58 See for example: UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary, ICSID Case No. ARB/13/35, Decision on Annulment.

59 Memorandum Opinion of the United States District Court for the District of Columbia, in Case No. 17-cv-02332 (APM), Ioan Micula, et al. v Government of Romania. p. 14.

60 For a succinct review of the main arguments, see: Yanos and Ramos-Mrosovsky, 2021.

where the timeline of events is similar to that in the case of *Achmea*. In this sense, seeking enforcement in front of the US courts will require arguments distinguishing the particular case from *Achmea*.⁶¹

In another ICSID case—*Antin v. Spain*⁶²—requests for enforcement have been made both in the US and Australia. In the latter country, the courts have given the *go-ahead*⁶³ for enforcement.⁶⁴ Successful claimants are seeking enforcement in third countries and will continue to do so, even when they face a state that is not willing to proceed with execution in good faith, as they can still count on courts to apply the ICSID Convention. As a rule, under the ICSID Convention, courts will proceed to enforce an award in case the authenticated award⁶⁵ is presented and the award meets all the requirements for execution that a final judgment of a local court has to meet. This essentially means that there is no room left to consider the arguments of EU law in cases of enforcement of ICSID awards.

3.2.2. Enforcement under the New York Convention

The New York Convention accords limited non-merits grounds for the judicial review of awards rendered at a foreign seat. Nevertheless, these grounds for judicial review are substantially broader than those available in the case of ICSID awards. Under Article III of the Convention, arbitral awards must be recognized as binding and enforced by all courts of state members of the Convention. Enforcement can only be refused on the grounds listed in Article V.

Under the New York Convention, the enforcing court has extensive scope in rehearing the questions pertaining to the arbitration agreement's validity.⁶⁶ This effectively means that national legislation and the practice of different courts can result in the same award being interpreted and reheard in a myriad of different ways, making this quite the gamble for the party seeking enforcement.⁶⁷ Since the Termination Agreement has been concluded, national courts outside the EU will consider the fact that intra-EU

61 As put forward also in Yanos and Ramos-Mrosovsky, 2021.

62 *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31.

63 See Judgment of the Federal Court of Australia [2021] FCAFC 112, of 25 June 2021.

64 As noted by Martin Jarrett: Investment-Treaty Arbitration after *Achmea*. <https://www.youtube.com/watch?v=oxr579pgMTw> (Accessed 16.01.2022.).

65 As defined by Article 53(2) of the ICSID Convention.

66 In this regard, it has been noted that “the enforcing court is required to investigate fully (a) whether the arbitration panel has correctly ascertained the applicable law governing the arbitration award’s existence, validity, and effectiveness; (b) secondly the enforcing court must determine whether the test derived from that applicable law has been correctly formulated; (c) thirdly, the enforcing court must then decide for itself whether that test, when meticulously applied to the facts of the case, establishes that the relevant putative party was truly a party to the arbitration agreement; and at this third stage it is not enough merely to rubber-stamp the arbitration tribunal’s analysis, because it is possible for the party resisting enforcement to show that there was in fact no proper factual support for the conclusion drawn by the arbitral panel.” Andrews, 2012, pp. 244–245.

67 This is illustrated well in the doctrine. See Andrews, 2012, pp. 261–262.

BITs have been terminated in accordance with the standards of international law, and, thus, there is now no arbitration agreement underlying an award they might have to consider. However, there are cases that have been brought and adjudicated under intra-EU BITs that were still in force, which means that the parties will have to contend with a variety of solutions, as the validity of the arbitration agreement will be analyzed in accordance with the law applicable to it (mainly the law of the seat of arbitration). As enforcement may be sought in front of any contracting state, a set-aside proceeding successful in front of one state's courts will not necessarily matter in front of the courts of another state.⁶⁸ This leaves much room for investors seeking enforcement and every jurisdiction where enforcement also means more costs for the investor.

In the case of this study the set-aside arguments related to the arbitrability of a particular claim, namely the validity of the arbitration agreements, and substantive grounds such as the violation of public policy, are the main arguments to be considered. The perpetually evolving concept of public policy is analyzed in accordance with national law and national interest; thus, enforcement may be refused in case the fundamental principles of the legal system in which enforcement is sought can be considered to have been breached in a particular case.

After *Achmea*, it was noted that during the process of recognition and enforcement, domestic courts could make use of the provisions pertaining to the invalidity of the arbitration agreement and that of the violation of public policy stipulated in the New York Convention to refuse enforcement.⁶⁹ The question is how effectively these provisions of the New York Convention can be invoked in front of courts in third countries where the recognition and enforcement of intra-EU awards might be sought. In analyzing whether Article V(1)(a) of the Convention is applicable when arguing that there was no valid consent to arbitration, the analysis will have to be done through the lens of the law of the seat of arbitration. The public policy exception contained in Article V(2)(b) of the New York Convention may also be considered as an argument for refusing recognition and enforcement. As in the case of *Achmea*, it can also be argued in the case of *Komstroy* that Article 344 TFEU and the autonomy of the EU and its legal order must be considered as essential characteristics of the EU and its law, making these a part of EU public policy.⁷⁰ Nevertheless, the outcome is not certain in any case. The obligation of non-EU MS courts to consider EU public policy is a matter of *international comity* (or *comitas gentium*); it does not bind these courts in any case, and they can only choose to consider it.

The reliance on national systems of law for securing recognition and enforcement under the New York Convention is only made worse by the fact that there is no effective sanction for non-compliance with the provisions of the Convention.

68 See the judgment of the US District Court for the Southern District of New York in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production*; or the UK Supreme Court in *Dallah Real Estate & Tourism Holding Co v. Pakistan* (2010) [2010] UKSC 46; [2010] 3 WLR 1472, in Andrews, 2012, pp. 261–262.

69 See Káposznyák, 2020, pp. 69–90. This was also argued in Korom, 2020, pp. 68–69.

70 Case C-741/19, *Republic of Moldova v. Komstroy LLC*, paragraph 43. See also Káposznyák, id.

4. Attempts by the EU to shut the door

As has been noted in scholarly literature, there are mechanisms within the EU to rectify the cases of enforcement of arbitral awards that are incompatible with EU law. The EU is trying to use these to keep the EU MS in line. However, these might also have effects in third countries, as will be discussed below.

The possibility of the Commission launching infringement proceedings pursuant to Article 258 TFEU⁷¹ is one of the more obvious possibilities. This is evidently limited to the EU MS and does not affect third countries. Although exceptional, the infringement proceedings might be useful in intra-EU ECT cases where, despite the *Komstroy* judgment, there is no agreement to settle the extent of application of that decision till date. Thus, successful claimants might also have a window of opportunity to enforce their awards within the EU. In such cases, the EU will have the possibility to launch infringement proceedings to force the MS to recover any payments that have been made. Infringement proceedings may also be compounded with decisions regarding state aid.

Browsing through the ECT cases, we see that several of them have been initiated as a result of the EU MS withdrawing or making changes to incentive regimes in the renewable energy sector. Such is the case of Spain, which has seen a fairly large number of arbitral proceedings initiated against it in the last decade. Many of these cases are intra-EU ECT-based arbitration cases. In such cases, a decision of the Commission on state aid could make enforcement even more cumbersome outside of the EU.

The argument of state aid has been used and abused. It is important to note that there is a distinction between state aid and compensation for damages, as AG Szpunar noted in his July 1, 2021 opinion. Although the arguments proposed by AGs have not been widely embraced by the CJEU regarding the aforementioned cases, the arguments proposed by the AG might be useful for those seeking recognition and enforcement of intra-EU awards in third countries.

It should also be noted that, although ultimately, the US courts allowed for enforcement proceedings to continue in the *Micula* case, one of the most important factors in the suspension of enforcement was the EU stance on state aid. This was also enough to preclude courts in Sweden from enforcing the award.⁷² Arguments concerning this have also been used in other cases to convince courts in third countries to refuse recognition and enforcement. This argument has been used even in cases where the issue underlying the dispute did not involve state aid declared incompatible with EU law. In this sense, it is noteworthy that in the case *Infrastructure Services*

71 Gáspár-Szilágyi, 2021, pp. 683–684. The author argues that the uniform application of EU law outside and even within the EU is a *fiction*, however noting that there are mechanisms within the EU to stop the enforcement of awards that misapply and misinterpret EU law, and are able, thus, to affect its uniformity and effectiveness.

72 Bermann, 2020, p. 322.

Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31, pursuant to the award, the Commission launched an investigation into the aid scheme from which the investors benefited, to preclude the enforcement of the arbitral award.⁷³ Due to the changes to the renewable energy subsidy scheme applied by Spain and other EU MS, through which they effectively breached their obligations to ensure fair and equitable treatment to foreign investments (at least from an international investment law perspective), the results of an investigation by the Commission into these schemes will have an important impact. Declaring the previous schemes incompatible with EU state aid rules, the affected EU MS will be asked to take back the amounts paid as compensation on the basis of these arbitral awards. Investors will have to make their calculations and see if it is still worth the risk of going into investment arbitration proceedings in such scenarios, as enforcement will continue to be a massive challenge. The extra costs generated by these complications will definitely be a deterrent.

When making such calculations, investors will surely note that the procedures for recovering the money once paid are even more cumbersome. It takes a lot of time to investigate cases of state aid, and the decision of the Commission can be contested with genuine chances of success (as shown by the case of Romania in the *Micula saga*). It is only after the decision is confirmed that the Commission can order the MS to recover the payments made (or executed). In case of non-compliance, the intervention of the Court of Justice will be sought, which further prolongs the process. A judgment still does not guarantee that the MS will be able to recover the unlawful and incompatible state aid. As time passes, the probability of recovering it reduces massively. In case of failure to recover the unlawful state aid, the CJEU may impose penalties on the MS.⁷⁴ It ultimately seems that if successful investors manage to proceed with the enforcement, the burden is borne by the MS, which will see further costs piled up in case of non-compliance with recovering the “state aid.” It seems that even if more arbitral awards are classified as state aid, this will also be a very long road to walk.

In any case, trust in the international investment arbitration system will be waning in the EU, as the legitimacy of the system has been undermined making enforcement ever more difficult. This effect might not show in the short term, but will effectively contribute to shutting the door on intra-EU investment arbitration, even before we see other, comparable dispute resolution mechanisms enacted.

73 See State Aid – Spain – State aid SA.54155 (2021/NN) – Arbitration award to Antin – Spain – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union Text with EEA relevance – C/2021/5405. Official Journal of the European Union, 05.11.2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.450.01.0005.01.ENG&toc=OJ%3AC%3A2021%3A450%3ATOC (Accessed 16.01.2022.).

74 Although not an investment arbitration case, the Judgment in Case C-51/20 Commission v. Greece, illustrates well the difficulties faced by Member States when they do not properly engage in recovering unlawful state aid.

5. Afterthoughts

Seeing the difficulties faced by investors with enforcement, it is obvious why ICSID might remain the preferred avenue for arbitration, especially considering its operation as a self-contained system. However, risks still exist in the case of ICSID awards. It remains to be seen on a case-by-case basis how much non-MS courts will be willing to tackle some of the issues that have come up, apply Article 54 of the ICSID Convention, or choose to defer to EU courts as a matter of international comity.

Looking from the EU's perspective, we see that the issues around the incompatibility of investment arbitration and EU law have been argued since the *Eastern Sugar* arbitration. One does not need to be a *seer* to predict that issues around enforcement may also arise, as the legitimacy of the system in intra-EU cases has been constantly chipped at. The CJEU judgments that have produced these huge splashes, which are the easily observable inflection points of the EU's change of attitude, essentially stem from the interpretation of the existing EU law. Not that hockey legend Wayne Gretzky's famous saying has ever constituted some sort of principle or guidance in investment arbitration; however, paraphrasing it seems fitting in that claimants rather prefer to *skate to where the puck has been*. Although the stance of the Commission has been well known for years and has repeatedly been made clear, EU investors still insist on using investment arbitration, as arbitral tribunals are still retaining jurisdiction; this is despite all the difficulties that successful claimants will ultimately face during recognition and enforcement. The answer to why investors are still willing to risk it can be found in the EU legal regime itself, which does not in any case accord superior protection to intra-EU investors. This attitude of the EU, which seeks to dismantle intra-EU investment arbitration without providing for a viable, comparable, or at least an imperfect substitute, has been criticized as a step that actually holds back the European project.⁷⁵ Although the stammering of the CJEU still makes it possible for investors to *skate to where the puck has been* as regards ISDS, its fate is sealed. The lack of a comparable intra-EU system will prompt new investors to *go treaty-shopping* and seek protection by structuring their investments through third countries. It can also be expected that existing ones will seek to restructure their investments to obtain the level of protection they would be comfortable with.

It remains to be seen how much the investors will seek to use the *structured dialogue* regulated in the Termination Agreement. In the present situation, it seems like a sensible option that they should try to pursue. However, this does not exclude enforcement proceedings, as these might also be of use as leverage during negotiations under the structured dialogue. As the CJEU judgments and the Termination Agreement have made such a huge splash, with their ripples being felt, especially in the field of recognition and enforcement, structured dialogue might deserve more attention. It

75 Nagy, 2018, p. 983.

might be the quicker and easier way toward the payment of the awards. It might also lead to new diplomatic channels for enforcement, and lobbying and political pressure in this process to gain more importance.

Bibliography

- Andrews, N. (2012) *The Three Paths of Justice: Court Proceedings, Arbitration and Mediation in England*. Dordrecht, Heidelberg, London, New York: Springer.
- Bermann, G. A. (2020) 'Understanding ICSID Article 54', *ICSID Review – Foreign Investment Law Journal*, 35(1-2), pp. 311–344.
- Bohmer, L. (2021) 'Uniper seeks to halt anti-arbitration proceedings before German courts by requesting provisional measures from newly-constituted ICSID Tribunal', *IAReporter*, 6 December 2021.
- Brenninkmeijer, M., Gélinas, F. (2021) 'The problem of execution immunities and the ICSID Convention', *Journal of World Investment & Trade* 22, pp. 429–458.
- Charlotin, D. (2021) 'ICSID Tribunal regrets clash between fundamental norms of EU law and ECT arbitration, but dismisses Spain's request to reopen intra-EU issue in vire of Komstroy decision', *IAReporter*, 7 December 2021.
- Charlotin, D. (2021) 'ICSID Tribunal hearing claims by state-owned German banks against Spain declines to reconsider intra-EU decision in light of the CJEU's Komstroy decision', *IAReporter*, 13 December 2021.
- Dózsa, D. (2021) 'The protection of Intra-EU investment after *PL Holdings*. *C'est la vie?*', Available at: <https://eulawlive.com/op-ed-the-protection-of-intra-eu-investment-after-pl-holdings-cest-la-vie-by-daniel-dozsa/> (Accessed 16 January 2022)
- Gáspár-Szilágyi, Sz. (2018) 'It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, *Achmea BV*.', *European Papers*, Vol. 3, pp. 357–373.
- Gáspár-Szilágyi, Sz., Usynin, M. (2019) 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's *Achmea* Judgment', *European Investment Law and Arbitration Review Online*, 4(1), pp. 29–65.
- Gáspár-Szilágyi, Sz. (2021) 'Between Fiction and Reality: The External Autonomy of EU Law as a "Shapeshifter" after Opinion 1/17' *European Papers*, 6(1), pp. 675–692.
- Hess, B. (2018) 'The Fate of Investment Dispute Resolution after the *Achmea* Decision of the European Court of Justice', *MPILux Research Paper* (3), Available at: <https://ssrn.com/abstract=3152972> (Accessed 16 January 2022)
- Hindelang, S. (2018) 'The Limited Immediate Effects of CJEU's *Achmea* Judgement', Available at: <https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/>, DOI: 10.17176/20180309–092343. (Accessed 16 January 2022)
- History of the ICSID Convention. Vol. II-2. Available at: <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf> (Accessed 16 January 2022)
- Káposznyák, A. (2020) 'Intra-EU Arbitral Awards After *Achmea*: Recognition and Enforcement Within the European Union Under the New York Convention' in Meškić, Z., Kunda, I., Popović, D. V., Omerović, E. (eds.) *Balkan Yearbook of European and International Law 2019*. Cham, Switzerland: Springer, 2020.
- Korom, V. (2020) 'The Impact of the *Achmea* Ruling on Intra-EU BIT Investment Arbitration – A Hungarian Perspective' *Hungarian Yearbook of International Law and European Law*, (8)1, 53–74.

- Martin Jarrett: Investment-Treaty Arbitration after Achmea. Available at: <https://www.youtube.com/watch?v=oxr579pgMTw> (Accessed 16 January 2022)
- Micula Brothers Manage To Seize 67 M Shares Owned By The State At Nuclearelectrica – Romania Journal, 4 December 2019. Available at: <https://www.romaniajournal.ro/business/micula-brothers-manage-to-seize-67-m-shares-owned-by-the-state-at-nuclearelectrica/> (Accessed 16.01.2022.)
- Nagy, Cs. I. (2018) ‘Intra-EU bilateral investment treaties and EU law after Achmea: „Know well what leads you forward and what holds you back”, *German Law Journal*, 19(4), pp. 981–1016.
- Nagy, Cs. I. (2019) ‘Intra-EU BITs after Achmea: A cross-cutting issue’ in Nagy, Cs. I. (ed.) *Investment Arbitration in Central and Eastern Europe: Law and Practice*. Edward Elgar Publishing, 2019.
- Romanian Gov’t To Pay EUR 278 M In The Micula Brothers Case After Romatsa’s Accounts Frozen – Romania Journal, 13 December 2019. Available at: <https://www.romaniajournal.ro/society-people/romanian-govt-to-pay-eur-278-m-in-the-micula-brothers-case-after-romatsas-accounts-frozen/> (Accessed 16.01.2022.)
- Schreuer, C., Malintoppi, L., Reinisch, A., Sinclair, A. (2009) *The ICSID Convention – A Commentary. Second Edition*. Cambridge: Cambridge University Press.
- Yanos, A. A., Ramos-Mrosovsky, C. (2021) ‘Intra-EU Investment Treaty Disputes in US Courts: Achmea, Micula and Beyond’. Available at: <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2022/article/intra-eu-investment-treaty-disputes-in-us-courts-achmea-micula-and-beyond> (Accessed 16 January 2022)
- Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic).
- Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union – SN/4656/2019/INIT.
- Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, Achmea BV v The Slovak Republic.
- Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40.
- Case C-741/19, Republic of Moldova v Komstroy LLC.
- COMMISSION DECISION (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013.
- Commission asks Member States to terminate their intra-EU bilateral investment treaties, European Commission Press Release, Brussels, 18 June 2015.
- COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Protection of intra-EU investment – COM/2018/547 final.
- Decision on Termination Request and Intra-EU Objection in Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50.
- Decision on the Intra-EU Jurisdictional Objection, in Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14.
- Decision on the Achmea Issue in Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

- Decision on Termination Request and Intra-EU Objection in Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50.
- December 2021 infringements package: key decisions – Press release from the European Commission https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 (Accessed 16 January 2022)
- Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection. https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (Accessed 16 January 2022)
- ESPF BETEILIGUNGS GMBH, ESPF NR. 2 AUSTRIA BETEILIGUNGS GMBH, AND INFRACLASS ENERGIE 5 GMBH & CO. KG v. Italian Republic, ICSID Case No. ARB/16/5.
- European Food and Others v Commission, Judgment ECLI:EU:T:2019:423 – <https://curia.europa.eu/juris/document/document.jsf?docid=215106&doclang=EN> (Accessed 16 January 2022)
- Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31.
- Infrared Environmental Infrastructure GP Limited and others v Kingdom of Spain (ICSID Case No. ARB/14/12), United States District Court for the District of Columbia in Civil Action No. 20-817.
- Judgment of the Court (Grand Chamber) of 6 March 2018 (request for a preliminary ruling from the Bundesgerichtshof – Germany) – Slowakische Republik v Achmea BV, Case C-284/16.
- Judgment of the Court (Grand Chamber) of 2 September 2021. Republic of Moldova v Komstroy LLC – C-741/19.
- Judgment in Case C-109/20, Republiken Polen v PL Holdings Sàrl.
- Judgment in Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent), 19 February 2020. <https://www.supremecourt.uk/cases/docs/uksc-2018-0177-judgment.pdf> (Accessed 16 January 2022)
- Landesbank Baden-Württemberg and others v. Kingdom of Spain, ICSID Case No. ARB/15/45.
- Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23.
- Memorandum Opinion of the United States District Court for the District of Columbia, in Case No. 17-cv-02332 (APM), Ioan Micula, et al. v Government of Romania.
- Opinion of Advocate General Szpunar delivered on 1 July 2021 (Case C-638/19 P Commission v European Food and Others).
- Partial Award in Eastern Sugar B.V. v The Czech Republic, SCC Case No. 088/2004.
- Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20.
- Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d. v. Republic of Croatia (II).
- RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4.
- State Aid – Spain – State aid SA.54155 (2021/NN) – Arbitration award to Antin – Spain – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the

Functioning of the European Union Text with EEA relevance – C/2021/5405. Official Journal of the European Union, 05.11.2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.450.01.0005.01.ENG&toc=OJ%3AC%3A2021%3A450%3ATOC (Accessed 16 January 2022)

- Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22.