CHAPTER 5

The CJEU's Case Law on Intra-EU Investment Arbitration and the Importance of the Place of Arbitration

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§5.01 *ACHMEA* AND ITS IMMEDIATE CONSEQUENCES

The landmark ruling of the Court of Justice of the European Union (CJEU) in *Slovak Republic v. Achmea*[1] has been at the core of the debate on the relationships between European Union (EU) law and investor-State arbitration for almost five years.[2] The ruling was followed by several other decisions of the CJEU—examined in the following paragraphs—which confirmed its content and expanded its scope.

Departing from Advocate General Wathelet's Opinion,[3] the March 6, 2018 judgment held that the investor-State dispute settlement provision contained in Article 8 of the Bilateral Investment Treaty (BIT) between the Netherlands and the Slovak Republic is incompatible with fundamental principles of EU law, such as those

1. Case No. C-284/16, *Slovak Republic v. Achmea BV*, March 6, 2018.
2. Ex multis, *see* E. Gaillard, *L'Affaire Achmea ou les conflits de logiques* (CJEU 6 mars 2018 aff. C-284/16), 3 Revue critique de droit international privé 616 (2018); B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, 3 Max Planck Institute Luxembourg for Procedural Law Working Paper Series 2018; J.R. Basedow, *The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration*, 23 Journal of International Economic Law 271 (2020); E. Sipiorski, *Conflicting Conceptions of Constitutionalism: Investment Protection from the European Union and International Perspectives*, 66 Netherlands International Law Review 219 (2019); R.F. Bodenheimer, *K.H. Eller, Unionszentrismus und ISDS*, Recht des Internationalen Wirtschaft 786 (2018); A. Briguglio, *Achmea and the Day after Achmea*, 3 Rivista dell'arbitrato 504 (2018); A. Carlevaris, A. Ciampi, *Beyond Achmea: Implications for EU Member States, Arbitrators, National Courts and European Investors*, 4 Rivista dell'arbitrato 661 (2020).
3. Opinion of AG Wathelet in Case C-284/16, *Slovak Republic v. Achmea BV*, 19.9.2017, ECLI:EU:C:2017:699.

enshrined in Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). Article 267 TFEU empowers—or, in the case of last instance courts, requires—the courts of EU Member States to refer matters pertaining to the interpretation of the EU Treaties or to the validity and interpretation of acts of the EU institutions to the CJEU for a preliminary ruling. Article 344 TFEU prevents Member States from submitting disputes concerning the interpretation or application of the EU Treaties to any other settlement method.

The CJEU took the view that the dispute settlement provision contained in the Netherlands-Slovakia BIT is incompatible with the above-mentioned provisions insofar as an arbitral tribunal established under the BIT may have to apply and interpret EU law but does not qualify as a "court or tribunal of a Member State" in the meaning of Article 267 TFEU, and thus cannot request a preliminary ruling from the CJEU. As a result, intra-EU investment arbitration does not guarantee the uniform application and interpretation of EU law, which the CJEU regards as a fundamental principle of EU law.

The ruling had several immediate consequences, including the following.

Shortly after the CJEU delivered its judgment, the Commission's views on its effects were summarized in the Communication "Protection of intra-EU investment" of July 19, 2018.

On October 31, 2018, the German Federal Supreme Court implemented the judgment and annulled the arbitral award in *Achmea v. Slovak Republic* on the ground of invalidity of the arbitration agreement.[4]

In three declarations published on January 15 and 16, 2019 ("January 2019 Declarations"), the EU Member States declared their intention to terminate intra-EU BITs, draw the attention of arbitral tribunals in ongoing intra-EU arbitral proceedings initiated by "their" investors to the consequences of *Achmea* and pursue annulment or non-enforcement of existing intra-EU arbitral awards. While twenty-two Member States, including the United Kingdom (UK), assumed these obligations also with regard to intra-EU arbitral proceedings on the basis of the multilateral Energy Charter Treaty (ECT), others issued separate declarations stating that they did not wish to anticipate the CJEU's assessment in this respect. The Declaration of January 15, 2019, signed by twenty-two Member States, recognizes that the *Achmea* judgment has legal consequences in intra-EU arbitral proceedings brought not only under BITs but also under the ECT.[5] Finland, Luxembourg, Malta, Slovenia, Sweden and Hungary disagreed as regards the ECT.[6]

4. BGH, October 31, 2018—I ZB 2/15, paras. 25–28. On January 24, 2019, the same *Bundesgerichtshof* rejected *Achmea's* complaint and confirmed its previous ruling.
5. *Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in* Achmea *and on Investment Protection in the European Union*, available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf and https://bit.ly/2QXx36m.
6. *Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in* Achmea *and on Investment Protection in the European Union*, available at https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf and https://bit.ly/2Xi4C7H, and *Declaration of the Government of Hungary, of 16 January 2019, on the Legal Consequences of the Judgment of the*

After *Achmea*, numerous arbitral awards based on intra-EU BITs and the ECT were rendered, both by the International Centre for the Settlement of Investment Disputes (ICSID) and non-ICSID arbitral tribunals. Several of these awards have been challenged before ICSID ad hoc committees and national courts. Some decisions, almost systematically rejecting jurisdictional objections based on *Achmea*, have already been rendered in these proceedings.

On May 5, 2020, twenty-three (of the by then twenty-seven) EU Member States signed an international agreement for the termination of intra-EU BITs ("Termination Agreement"),[7] which entered into force on August 29, 2020. It provides for the termination of 123 intra-EU BITs, and, "[f]or greater certainty," it also terminates the sunset clauses contained in those BITs as well as in recently terminated BITs,[8] all of which "shall not produce legal effects" (Articles 2.2 and 3). The Contracting Parties explicitly confirm that arbitration clauses in intra-EU BITs are contrary to EU law and thus inapplicable as of the date on which the last of the parties to the relevant intra-EU BIT became a Member State of the EU (Article 4).

Further to the conclusion of the Termination Agreement, not all of the intra-EU BITs have been terminated and the ratification process is underway. Even if it entered into force with respect to all signatory States, the Termination Agreement would significantly reduce intra-EU investment arbitrations, but not completely eliminate them. Austria, Finland, Ireland, Sweden and the UK have not (yet) signed the Termination Agreement.

§5.02 *KOMSTROY* AND INVESTOR-STATE ARBITRATION UNDER THE ECT

On September 2, 2021, the CJEU issued its ruling in *Republic of Moldova v. Komstroy*[9] concluding that, as a matter of EU law, Article 26 of the ECT is not applicable to intra-EU disputes. The CJEU's Decision largely follows the reasoning in *Achmea*.

In October 2019, the Paris Court of Appeal made a request to the CJEU for a preliminary ruling addressing three questions pertaining to set-aside proceedings

Court of Justice in Achmea *and on Investment Protection in the European Union*, available https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/190116-bilateral-investment-treaties-hungary_en.pdf. The two January 16, 2019 Declarations note that "the *Achmea* judgment is silent on the question of the investor-state arbitration clause in the ECT … it would be inappropriate, in the absence of a specific judgment in this matter, to express views as regards the compatibility with Union law of the intra-EU application of the Energy Charter Treaty."

7. *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*, SN/4656/2019/INIT, OJ L 169, May 29, 2020, 1–41, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29.
8. Attached to the Termination Agreement is a forty-six-page double annex: Annex A lists the 123 intra-EU BITs in force at the time of the conclusion of the Agreement; Annex B lists the BITs that have already been terminated and with respect to which a sunset clause may be in force.
9. Case C-741/19, *Republic of Moldova v. Komstroy, a company the successor in law to the company Energoalians*, 2.9.2021, ECLI:EU:C:2021:655.

brought by Moldova in respect of an award rendered in a Paris-seated arbitration under the UNCITRAL Rules against it for certain breaches of obligations under the ECT.[10]

Only one of the three questions referred to by the Paris Court of Appeal ultimately was addressed by the CJEU, i.e., whether the definition of "investment" in Article 1(6) of the ECT requires any economic contribution on the part of the investor in the host State. The ruling found, in essence, that an economic contribution was required. However, the CJEU also set out its views on whether Article 26 of the ECT is compatible with EU law insofar as it provides for arbitration between EU-based investors and EU Member States. This question was not referred to by the Paris Court of Appeal, nor was it directly relevant to the questions before the CJEU, which concerned investments in a non-EU Member State. This separate question had, however, been raised by the Commission, together with certain EU Member States acting as interveners in the CJEU proceedings.

The ruling indicates that intra-EU arbitration under the ECT is incompatible with EU law.[11]

First, following its reasoning in *Achmea*, the CJEU explained that in order to preserve the autonomy of EU law, as well as its effectiveness, national courts of EU Member States may make a preliminary reference to the CJEU pursuant to Article 267 of the TFEU. This referral procedure was described as the "keystone" of the EU judicial system with the "objective of securing the uniform interpretation of EU law, thereby ensuring its consistency, its full effect and its autonomy."

Second, the CJEU reasoned that because the EU is a Contracting Party to the ECT, the ECT itself is an "act of EU law." As such, an ECT tribunal would necessarily be required to interpret, and even apply, EU law when deciding a dispute under Article 26. This reasoning seems inconsistent with the Opinion No. 1/17, in which the CJEU accepted that tribunals acting under the EU-Canada Comprehensive Economic and Trade Agreement (CETA)—though standing outside the judicial system of the EU—could nonetheless interpret and apply the CETA itself without running afoul of EU law.[12] In *Komstroy*, the CJEU does not explain how CETA, to which the EU is also a party and should likewise be considered an "act of EU law," is compatible with EU law, but the ECT is not.

Third, having found that an ECT tribunal would need to apply EU law because the ECT is an "act of EU law," the CJEU then ascertained whether an ECT tribunal is situated within the judicial system of the EU such that a preliminary reference could be made to the CJEU to ensure the effectiveness of EU law. The CJEU held that, in "precisely the same way" as in *Achmea*, ECT tribunals are outside the EU legal system,

10. Request for a preliminary ruling from the *Cour d'appel de Paris*, Case C-741/19, *Republic of Moldova v. Komstroy, a company the successor in law to the company Energoalians*, October 8, 2019.
11. *See* J. Odermatt, *Is EU Law International? Case C-741/19 Republic of Moldova v. Komstroy LLC and the Autonomy of the EU Legal Order*, available at https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2021_I_025_Jed_Odermatt_00522.pdf; J. Tropper, *From Achmea to Komstroy: The CJEU Strikes Back Against Investment Arbitration under the Energy Charter Treaty*, Völkerrechtsblog, September 22, 2021.
12. Opinion No. 1/17 of the Full Court (*CETA*), April 20, 2019, ECLI:EU:C:2019:341.

thus preventing effective control over the correct and consistent interpretation and application of EU law. The CJEU found that the judicial review that arises in the context of EU-seated investor-State arbitration is limited, since the referring court can only perform a review insofar as its domestic law permits. Hence, according to the CJEU, the full effectiveness of EU law cannot be guaranteed.

Finally, just like *Achmea*, the decision distinguishes investor-State arbitration from commercial arbitration, insofar as commercial arbitration "originate[s] in the freely expressed wishes of the parties concerned," whereas investor-State arbitration is not based on the parties' freely expressed wishes. This conclusion seems incorrect from a legal point of view. First, investor-State arbitration does not find its direct and only source in the bilateral or multilateral investment treaties, which are just vehicles of the host State's consent to arbitrate disputes with investors. Consent is perfected only upon the investor's acceptance of the State's offer. Second, States, as parties to disputes, freely consent to refer disputes with investors to arbitration by entering into the relevant investment treaty. Therefore, given that commercial arbitration tribunals routinely interpret and apply EU law, the CJEU's approach would logically lead to the conclusion that any commercial arbitration involving the application of EU law may be incompatible with the EU legal system.

Komstroy had no direct impact on the EU's and its Members' status as Contracting Parties to the ECT. The ECT remains in force between all Contracting Parties, including all EU Member States and the EU. A modification of the ECT to remove its application between the EU Member States would require the consent not just of the EU and its Member States, but of all the Contracting Parties to the ECT.

As described in greater detail below, to date, all ECT tribunals that have considered jurisdictional objections based on the intra-EU nature of the dispute have, with only one exception, rejected the suggestion that the ECT does not apply on an intra-EU basis. The CJEU did not provide any analysis under the Vienna Convention on the Law of Treaties (VCLT) on the interpretation of the ECT. Nor did the CJEU address the substantial body of case law under the ECT on the interpretation of Article 26 of the ECT, the vast majority of which reached the opposite conclusion.

§5.03 *PL HOLDINGS* AND THE PROHIBITION OF INTRA-EU AD HOC ARBITRATION AGREEMENTS

In yet another anti-intra-EU investment arbitration ruling, on October 26, 2021, in *Republic of Poland v. PL Holdings S.à.r.l*,[13] the CJEU ruled that EU Member States are precluded from entering into ad hoc arbitration agreements with EU-based investors replicating the content of an arbitration agreement in a BIT between the EU Member States.[14]

13. Case No. C-109/20, *Republic of Poland v. PL Holdings S.à.r.l.*, October 26, 2021, ECLI: EU:C:2021:875.
14. *See* D. Zasheva, G. Lentner, *ECJ in PL Holdings: Ad Hoc Arbitration Agreement Between EU Investor and Member State Not Compatible with EU Law* (November 8, 2021) https://

PL Holdings brought arbitration proceedings against Poland under the BIT between the Belgium-Luxembourg Economic Union (BLEU) and Poland after a Polish regulator ordered the compulsory sale of its interests in a Polish bank. The seat of the arbitration was Stockholm, and the case was administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). In a 2017 award, the tribunal concluded that Poland had expropriated PL Holdings' investment and awarded damages.

In September 2017, Poland brought set-aside proceedings before the Swedish courts, arguing that, based on *Achmea* the arbitration clause in the Poland-BLEU BIT was incompatible with EU law. The setting aside proceedings before the Svea Court of Appeal led to a surprising outcome.[15] The Swedish Court came to the same conclusion as the German Supreme Court in *Achmea* with respect to the invalidity of the State's offer to arbitrate. However, the same Court found that, by participating in the arbitration without raising a timely objection to jurisdiction based on an alleged violation of EU law, the respondent State and the investor had concluded a tacit arbitration agreement. In the Court's view, Poland tacitly accepted PL Holding's offer to arbitrate by failing to raise an objection based on *Achmea* at the proper stage of the proceedings. This resulted in an ad hoc arbitration agreement between Poland and PL Holdings governed by Swedish law, i.e., the law of the seat.[16] The arbitration agreement was said to be derived from the parties' common intention to resolve the dispute in the same manner as a commercial arbitration agreement. In this respect, the Svea Court relied on the questionable distinction made by the CJEU in *Achmea* and *Komstroy* between commercial arbitration and treaty arbitration, i.e., that, unlike investor-State arbitration, commercial arbitration originates in the "freely expressed wishes of the parties."

Given that Poland had objected that the arbitration agreement violated EU law during the arbitration proceedings, even if not at the outset, and that the CJEU has on other occasions required Member States' courts to annul awards for breach of mandatory EU law regardless of an objection being raised during the course of the arbitration,[17] the Svea Court's approach is questionable and may be regarded as an extreme attempt at preserving the validity of an intra-EU award despite *Achmea*. In any event, its conclusion would not be applicable to the vast majority of intra-EU arbitrations that led to an award after *Achmea*, in which the relevant objection was timely and effectively raised.

europeanlawblog.eu/2021/11/08/ecj-in-pl-holdings-ad-hoc-arbitration-agreement-between-eu-investor-and-member-state-not-compatible-with-eu-law.

15. *See* Svea Court of Appeal, *PL Holdings v. Poland*, Case Nos. T-8538-17 and T-12033-17; for an unofficial English translation, *see* https://www.italaw.com/sites/default/files/case-documents/italaw10447.pdf.
16. Poland had initially objected to the jurisdiction of the arbitral tribunal, but on different grounds. It objected that its offer of arbitration violated EU law only at a later stage of the proceedings.
17. *See* Case C-168/05, *Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL*, October 26, 2006, ECLI:EU:C:2006:675; G. Bermann, *Navigating EU Law and the Law of International Arbitration*, 28 Arbitration International 415 (2012).

As a result of Poland's appeal, the Swedish Supreme Court referred to the CJEU the question whether Articles 267 and 344 of the TFEU as interpreted in *Achmea* mean that an intra-EU arbitration agreement is invalid even if a Member State refrains from raising jurisdictional objections after arbitration proceedings are commenced by the investor.

The CJEU held that: "[a]ny attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would run counter to the first Member State's obligation to challenge the validity of the arbitration clause."[18] In those circumstances, the CJEU held that a national court is required to uphold an application seeking to set aside an arbitration award made on the basis of an arbitration agreement infringing Articles 267 and 344 TFEU and the principles of mutual trust, sincere cooperation and autonomy of EU law.

Following in the footsteps of *Achmea* and *Komstroy*, the CJEU underscored that an agreement to remove from the jurisdiction of their own courts' disputes which may concern the application or interpretation of EU law may prevent those disputes from being resolved in a manner that guarantees the full effectiveness of EU law. In the CJEU's view, any ad hoc arbitration agreement containing the same terms as the investment treaty would have the same effect. The CJEU observed that the legal approach envisaged by the Svea Court in PL Holdings could potentially be adopted in a multitude of disputes concerning the application and interpretation of EU law, "thus allowing the autonomy of that law to be undermined repeatedly."[19]

The CJEU also relied on the Termination Agreement. It found that, based on the principles of the primacy of EU law and sincere cooperation, not only may EU Member States not undertake to remove disputes from the EU judicial system but also, in a situation like the one in PL Holdings, they are required to challenge the validity of the arbitration clause or the ad hoc arbitration agreement before the competent arbitration body or court. In the CJEU's view, this is further confirmed by Article 7(b) of the Termination Agreement, which provides that Contracting Parties involved in an intra-EU arbitration "shall ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it."[20]

§5.04 *MICULA* AND THE INTERTEMPORAL DIMENSION OF THE PROHIBITION OF INTRA-EU TREATY ARBITRATION

The CJEU's most recent broadside at intra-EU treaty arbitration is a January 25, 2022, ruling by which the CJEU overturned a decision by the EU's General Court in the fifteen-year-long Micula "saga."[21]

18. Case C-109/20, *Republic of Poland v. PL Holdings S.à.r.l.*, October 26, 2021, ECLI-:EU:C:2021:875, at para. 54.
19. *Ibid.*, at para. 49.
20. *Ibid.*, at para. 53.
21. Case C-638/19 P, *Viorel Micula and others v. Romania*, January 25, 2022, ECLI:EU:C:2022:50.

The ICSID arbitration proceedings commenced in 2005, prior to Romania's accession to the EU. The investors argued—and the ICSID tribunal agreed—that Romania had impaired their investments by repealing certain economic incentives with a view to eliminating measures that could constitute State aid shortly before its accession to the EU. In 2013, the tribunal ordered Romania to pay EUR 178 million in compensation, which the State partially paid. In 2015, however, the Commission ruled that such payment constituted unlawful State aid, precluding Romania from making further payments and requiring recovery of amounts already paid.

In June 2019 (after *Achmea*), the General Court quashed the Commission's ruling on the basis that all events relating to the incentive took place before Romania's accession to the EU in 2007, and the right to receive compensation recognized by the ICSID award arose at the time Romania repealed the incentives in 2005.[22] As EU State aid rules were not applicable in Romania prior to accession, the Commission could not exercise powers conferred to it under those rules. In the General Court's view, the fact that payment of the compensation occurred after accession is irrelevant because the payments made in 2014 represent the enforcement of a right which arose in 2005. Therefore, the General Court distinguished *Achmea* and avoided discussing the relationship between EU law and intra-EU investment arbitration: "in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgment [in Achmea]."[23]

The Commission and Spain appealed the ruling before the CJEU, claiming that the award breached the EU principle of mutual trust and autonomy of EU law as interpreted in *Achmea*. In parallel, following the General Court's decision, the claimants in the ICSID arbitration sought to enforce the award, including before the courts of England and Wales.

In July 2021, Advocate General Szpunar opined that the *Achmea* dictum could not be applied to arbitration proceedings initiated pursuant to the Sweden-Romania BIT concluded before Romania's accession to the EU or pending at the time of accession.[24] However, the Advocate General held that the alleged State aid should be deemed granted at a time when Romania was required to pay that compensation based on the arbitral award. As the time of payment post-dated Romania's accession, EU law was applicable to that measure and the Commission was competent to make the ruling it did.

The case then reached the CJEU, which took a partially different view. As far as the time at which the alleged State aid should be deemed granted, the Court agreed with Advocate General Szpunar and held that EU State aid rules were applicable to the compensation paid by Romania. Contrary to the General Court's decision, in the CJEU's view, the applicability of EU State aid rules is triggered by the payment of an

22. Cases T-624/15, T-694/15 and T-704/15, *Viorel Micula and others v. European Commission*, General Court (Second Chamber), June 18, 2019, ECLI:EU:T:2019:423.
23. *Ibid*., at para. 87.
24. Opinion of AG Szpunar in Case C-638/19 P, *European Commission v. Viorel Micula and others*, July 1, 2021, ECLI:EU:C:2021:529.

arbitral award even though all the State measures that the ICSID award compensated the investor for were taken before Romania's accession to the EU. Therefore, the CJEU upheld the competence of the Commission.

In light of its finding on the previous point, the CJEU found it unnecessary to rule on the relevance of *Achmea*. However, it stated that the General Court had erred in considering *Achmea* irrelevant. Since the compensation sought by the investors did not relate exclusively to the damage allegedly suffered before Romania's accession in 2007, but rather it extended until 2009, the arbitral proceedings could not be considered as completely confined to the pre-accession period. As such, the system of judicial remedies provided by EU law replaced arbitration upon the State's accession to the EU: "the consent [to arbitration] given to that effect by Romania, from that time onwards, lacked any force."[25]

As a result of the CJEU's ruling, the case will now be remanded to the General Court which will determine whether the Commission was right to consider that the compensation granted by the ICSID award constituted unlawful State aid and the relevance of *Achmea*.

§5.05 INTRA-EU ARBITRATION BEFORE ARBITRAL TRIBUNALS

The relationship between intra-EU investment arbitration and EU law was extremely controversial even before *Achmea*.[26] Prior to the March 6, 2018 ruling, tribunals consistently rejected objections based on the alleged incompatibility of intra-EU treaty arbitration (based on Article 26 ECT or the applicable BIT) with EU law, holding that there was "no legal rule or principle of EU law that would prevent [them] from exercising [their] functions."[27]

Unsurprisingly, the publication of the CJEU's rulings in *Achmea*, followed by those in *Komstroy*, *PL Holding* and *Micula* (jointly, "CJEU's rulings"), prompted the EU Member States to raise objections to the jurisdiction of arbitral tribunals in arbitrations which either were pending at the time the judgment was rendered or were introduced

25. Case C-638/19 P, *Viorel Micula and others v. Romania*, January 25, 2022, ECLI:EU:C:2022:50, at para. 145.
26. *See* J. Kokott, C. Sobotta, *Investment Arbitration and EU Law*, 18 Cambridge Yearbook of European Legal Studies 3 (2016); C. Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26 European Journal of International Law 639 (2015); A. Dimopoulos, *The Validity and Applicability of International Investment Agreements Between EU Member States under EU and International Law*, 48 Common Market Law Review 63 (2011).
27. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, November 25, 2015; *see also RREF Infrastructure (G.P.) Limited and RREF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016; *Novoenergia II—Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC No. 2015/063, Final Award, February 15, 2018; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, April 30, 2010; *Charanne B.V. & Construction Investments S.a.r.l. v. Kingdom of Spain*, SCC No. 2012/062, Award, January 21, 2016; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, December 27, 2016.

thereafter. So far, these objections have almost invariably been rejected.[28] It is worth noting that the Termination Agreement was not applicable to any of the decisions known to date, which either were rendered before its entry into force or involved States between which the Termination Agreement is not (yet) in force. Also, with a few recent exceptions, the States' objections and the available arbitral decisions to date refer to *Achmea*, not to *Komstroy*, *PL Holdings* or *Micula*. However, the latter decisions are likely having, *mutatis mutandis*, an impact on tribunals' jurisdiction similar to *Achmea*.

Without purporting to be exhaustive, the main arguments recurrently raised by investors and rejected by arbitral tribunals are examined below. The only award sustaining an objection based on the CJEU's rulings, the Award in *Green Power Partners v. Spain*,[29] and the other dissenting voices among arbitrators known to date are examined thereafter.

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28. *See Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08, Award on Liability and Quantum, October 7, 2020; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Respondent's Jurisdictional Objections, September 30, 2020 (with dissenting view of Arbitrator Lazar Tomov); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, June 12, 2020; *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, May 11, 2020; *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V(2014/168), Final Award, April 29, 2020; *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award, February 28, 2020; *Sunreserve Luxco Holdings S.à.r.l., Sunreserve Luxco Holdings II S.à.r.l., Sunreserve Luxco Holdings III S.à.r.l. v. The Italian Republic*, SCC V(2016/32), Final Award, March 25, 2020; *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, March 4, 2020; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, February 7, 2020, (with Statement of Dissent of Professor Marcelo Kohen), February 3, 2020; *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, November 13, 2019; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U.*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, December 30, 2019; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, June 21, 2019; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, October 9, 2018; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, July 26, 2018; *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Award, January 28, 2019; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, May 7, 2019; *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Direction on the Quantification of Damages, October 8, 2020; *Watkins Holding S.à.r.l. and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, January 21, 2020; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and Infraclass Energie 5 GmbH & Co KG*, ICSID Case No. ARB/16/5, Award, September 14, 2020; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, March 9, 2020; *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel Gmbh & Co. oHG, Kernkraftwerk Brunsbüttel GmbH & Co. oHG v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, August 31, 2018.
29. *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case 2016/135, Award, June 16, 2022.

[A] Scope and Binding Nature

A first approach taken by arbitral tribunals relies on the non-binding nature of the CJEU's rulings for an adjudicative body which does not belong to the EU legal order, such as an arbitral tribunal whose authority is based on an international treaty.

As a ruling rendered by the institution of a regional organization, *Achmea* is not binding on tribunals constituted under international treaties, such as the ICSID Convention, multilateral investment treaties, such as the ECT, and BITs, which are not part of the EU legal order.[30]

Albeit relevant to establish the status of EU law with respect to the Member States' obligations, the CJEU's rulings cannot be considered dispositive of the jurisdiction of tribunals established outside the EU legal order.[31] As a variant of this approach, tribunals held that EU law, including the TFEU and its interpretation by the CJEU in the CJEU's rulings, is not part of the law applicable to the jurisdiction of an arbitral tribunal, which is based only on the ICSID Convention (where applicable) and other international law instruments for the promotion and protection of foreign investments.[32]

[B] Intertemporal Application

A second line of reasoning pertains to the applicability of *Achmea ratione temporis*. The relevant arguments are also applicable to the decisions that followed it.

Tribunals held that, regardless of its *ex nunc* or *ex tunc* effect and of it being regarded as merely interpretative of pre-existing EU law or innovative, *Achmea* cannot retroactively invalidate the consent to arbitration effectively expressed before the ruling was rendered.[33] To corroborate this conclusion, tribunals relied on the principle that, under investment law principles, once given consent cannot be withdrawn unilaterally.[34]

30. *A.M.F. v. Czech Republic*, *supra* n. 28, paras. 376–378; *Magyar Farming v. Hungary*, *supra* n. 28, para. 209; *United Utilities v. Estonia*, *supra* n. 28, paras. 532–540; *UP v. Hungary*, *supra* n. 28, para. 253; *Sodexo v. Hungary*, *supra* n. 28, para. 185; *Eskosol v. Italy*, *supra* n. 28, paras. 178–186.
31. *Adamakopoulos v. Cyprus*, *supra* n. 28, paras. 156–162.
32. *Strabag v. Poland*, *supra* n. 28, paras. 8.112–8.118, holding that, under French law, the jurisdiction of an arbitral tribunal is subject only to international public order, of which EU law is not part; *Vattenfall v. Germany*, *supra* n. 28, paras. 113–121.
33. *See Raiffeisen v. Croatia*, *supra* n. 28, para. 227: "The Tribunal readily accepts that a CJEU interpretation of the EU Treaties forms part of the acquis once formally rendered, but that interpretation—even assuming that it has the *ex tunc* effect under EU law that Croatia ascribes to the Achmea Judgment—cannot be in force before it is rendered and comes into existence. An interpretation by the CJEU cannot be in force with binding effect on unknowing parties. Neither states nor investors can fairly be expected to guess what definitive interpretations of EU law may come from the CJEU in the future"; *UP v. Hungary*, *supra* n. 28, paras. 258, 264; *Eskosol v. Italy*, *supra* n. 28, paras. 199–206.
34. *Marfin v. Cyprus*, *supra* n. 28, para. 593.

In a similar vein, tribunals also rejected the argument that, before *Achmea*, EU Member States could possibly anticipate that concluding a BIT which provides for investor-State arbitration was incompatible with EU law, or with the EU "*acquis*."[35] This was particularly the case after Advocate General Wathelet's opinion, which reflected a state of the EU *acquis* opposite to the CJEU's eventual finding.[36]

[C] Applicable Law

Given the central role played by applicable law in *Achmea*, several tribunals excluded from the scope of the ruling, and therefore from its invalidating effects, cases in which EU law is applicable neither as such nor as part of the domestic law of the host State, and may at best be relevant as a mere fact.[37] This is typically the case of arbitrations based on BITs that refer to their own provisions and to "international law" as applicable law or of BITs that contain no express choice-of-law clause, and are thus equally governed by international law.[38]

Tribunals also held that, even assuming they would have to apply EU law as part of the law of the (EU Member) host State, they would not be interpreting and applying EU law as such, but rather domestic law, even if founded on EU law.[39]

[D] The Vienna Convention on the Law of Treaties

Almost all tribunals which heard jurisdictional objections based on *Achmea* so far examined arguments based on the VCLT, particularly Articles 30(3), 59(1), 46 and 31(3).

Article 30(3) VCLT, in case of successive treaties among the same States "relating to the same subject-matter," makes the earlier treaty applicable only to the extent its provisions are not incompatible with those of the later one. Arguments based on this provision were consistently rejected by tribunals, which found that, in the relations between the EU treaties and bilateral or multilateral investment instruments, neither the "same subject-matter" nor the "incompatibility" requirements are met.[40] Notably, both the "same subject-matter" and the "incompatibility" arguments were rejected on

35. *Raiffeisen v. Croatia*, *supra* n. 28, paras. 238–239; *Addiko v. Croatia*, *supra* n. 28, paras. 270–273.
36. *Raiffeisen v. Croatia*, *supra* n. 28, para. 243; *Addiko v. Croatia*, *supra* n. 28, paras. 274–276.
37. *A.M.F v. Czech Republic*, *supra* n. 28, paras. 368–375, especially 368: "Nothing in the Achmea judgment suggests that EU Member States were prohibited to offer arbitration under intra-EU BITs not governed even in part by EU law, but only by express treaty provisions and by general principles of international law. The CJEU did not consider that EU law could form part of either of these sources."
38. *Addiko v. Croatia*, *supra* n. 28, paras. 267, 269; *Sodexo v. Hungary*, *supra* n. 28, paras. 181–184, 188; *Eskosol v. Italy*, *supra* n. 28, paras. 172–177.
39. *Adamakopoulos v. Cyprus*, *supra* n. 28, para. 185.
40. *Addiko v. Croatia*, *supra* n. 28, para. 293; *GPF v. Poland*, *supra* n. 28, paras. 363–381; *Magyar Farming v. Hungary*, *supra* n. 28, paras. 228–248; *Marfin v. Cyprus*, *supra* n. 28, paras. 588–591.

the grounds that, unlike BITs, the TFEU governs neither the resolution of disputes[41] nor cross-border investments.[42]

Likewise, tribunals invariably held that the conditions for the application of Article 59(1) VCLT,[43] which, for a treaty to be terminated, in addition to the "same subject-matter" and incompatibility, requires that the intention of the State parties to the later treaty that the later treaty override the earlier one be established, were not satisfied.[44] Moreover, termination under Article 59 VCLT is not automatic as this provision refers to a specific procedure described in the same VCLT, which none of the EU Member State parties to the investment instruments in question ever activated.[45]

Some tribunals noted that the scope of the notion of incompatibility under Article 59(1) VCLT ("*so far incompatible* … that the two treaties are not capable of being applied at the same time") is narrower than under Article 30(3), which merely refers to the two treaties being compatible.[46] Regardless of the scope of the notion, incompatibility does not result from the fact that intra-EU BITs allegedly discriminate between EU nationals per se. If EU law recognizes a more favorable treatment, all EU investors may invoke it. If, however, an intra-EU BIT gives more rights to certain EU investors, it would be for nationals of those other countries to claim for equal rights. In any event, this circumstance does not per se make EU law and intra-EU BITs incompatible under either provision of the VCLT.[47]

Respondent States also relied on Article 46 VCLT, which prevents a State from invoking a violation of its domestic law to invalidate its consent to be bound by a treaty unless such violation is "manifest" and concerns a rule of domestic law "of fundamental importance." To reject this objection, tribunals relied on the uncertainty as to the

41. *GPF v. Poland*, *supra* n. 28, para. 370; *Strabag v. Poland*, *supra* n. 28, paras. 8.129–8.139; *Adamakopoulos v. Cyprus*, *supra* n. 28, paras. 168, 170: "BITs deal with investment and dispute settlement. The EU Treaties also deal with investment and dispute settlement. Thus, at a certain, general, level the treaties deal with the same subject matter. But at a more specific level they deal with different subject matters … Applying this test, the Tribunal has difficulty in seeing the BITs and the EU Treaties as being of the same subject-matter. The existence of a procedure allowing the nationals of one state to bring a claim against another state under a BIT does not prevent the EU Treaties from operating. The fact that both have provisions relating to obligations on states in respect of foreign investors does not mean that the functioning of one prevents the functioning of the other. They can both operate side by side." Both decisions relied on the International Law Commission's Report on Fragmentation of International Law, which provides that the "same subject matter" precondition requires the two treaties at issue to be "institutionally linked" or "part of the same regime."
42. *Magyar Farming v. Hungary*, *supra* n. 28, para. 234; *United Utilities v. Estonia*, *supra* n. 28, para. 543; *Adamakopoulos v. Cyprus*, *supra* n. 28, para. 171.
43. Article 59(1) VCLT: "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."
44. *Addiko v. Croatia*, *supra* n. 28, paras. 295–296; *Adamakopoulos v. Cyprus*, *supra* n. 28, para. 178.
45. *United Utilities v. Estonia*, *supra* n. 28, para. 551; *Marfin v. Cyprus*, *supra* n. 28, para. 594; *Eskosol v. Italy*, *supra* n. 28, paras. 194–198.
46. *United Utilities v. Estonia*, *supra* n. 28, paras. 549–550.
47. *Ibid.*, para. 553.

compatibility of dispute resolution clauses contained in intra-EU BITs with EU law at least until *Achmea*. Even if established, the violation would have been far from "manifest" and such to affect a rule of internal law "of fundamental importance."[48]

Finally, another provision of the VCLT potentially relevant to the interpretation of the investment instrument on which a tribunal's jurisdiction is based is Article 31(3)(c), which provides that "any relevant rule of international law applicable in the relations between the parties" shall be taken into account in interpreting a treaty. Respondent States have argued that this provision requires that the relevant instruments (BIT or ECT) be interpreted in light of the EU treaties, which constitute precisely "rule[s] of international law applicable in the relations between the parties." While recognizing that EU law, particularly the TFEU, is part of international law and is therefore potentially relevant to treaty interpretation under Article 31(3)(c) VCLT, tribunals held that this provision has a limited scope. It does not permit to substitute EU law, as interpreted by the CJEU, to the treaty to be interpreted, but merely constitutes a subsidiary rule of interpretation, subject to the general rule that treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose" (Article 31(1) VCLT).[49]

[E] The January 2019 Declarations and the Termination Agreement

A fifth series of arguments examined and rejected were those based on the January 2019 Declarations and/or the Termination Agreement. As mentioned above, the Termination Agreement was per se not applicable to any of the cases.

Tribunals were unable to draw from these instruments any conclusion as to the validity of intra-EU BITs' dispute resolution clauses, either because the Member States in question were not signatories of either instrument or because neither instrument was considered part of the EU *acquis*.[50] Moreover, the January 2019 Declarations were not regarded as a "subsequent agreement between the parties regarding the interpretation of a treaty" in the meaning of Article 31(3)(a) VCLT.[51]

48. *Raiffeisen v. Croatia*, *supra* n. 28, paras. 245–248; *Addiko v. Croatia*, *supra* n. 28, paras. 277–278; *A.M.F. v. Czech Republic*, *supra* n. 28, paras. 381–385; *Eskosol v. Italy*, *supra* n. 28, paras. 190–193.
49. *Vattenfall v. Germany*, *supra* n. 28, paras. 151–155; *Sunreserve v. Italy*, *supra* n. 28, paras. 386–394.
50. *Raiffeisen v. Croatia*, *supra* n. 28, paras. 249–254; *Addiko v. Croatia*, *supra* n. 28, paras. 281–290; *Magyar Farming v. Hungary*, *supra* n. 28, paras. 212–224; *Eskosol v. Italy*, *supra* n. 28, paras. 207–227.
51. *GPF v. Poland*, *supra* n. 28, paras. 350–353, arguing that the January 2019 Declarations: (a) do not constitute an understanding on the interpretation of the TFEU reached during the negotiations of the TFEU; (b) reveal no concern as to the compatibility between the BIT and the TFEU; (c) record the signatory States' intention to make best efforts to terminate intra-EU BITs and do not purport to have themselves the effect of terminating such BITs; *Strabag v. Poland*, *supra* n. 28, paras. 8.124–8.128, arguing that Art. 31(3)(a) VCLT does not trump other methods of treaty interpretation, including the ordinary meaning to be ascribed to its terms; *Adamakopoulos v. Cyprus*, *supra* n. 28, para. 179; *Magyar Farming v. Hungary*, *supra* n. 28, paras. 215, 224; *Sunreserve v. Italy*, *supra* n. 28, para. 435.

[F] Distinguishing *Achmea*: ICSID and ECT

Finally, several ICSID tribunals and tribunals constituted under the ECT avoided taking a position on one or more of the above-mentioned issues in general terms and instead rejected the objection by distinguishing *Achmea* from ICSID cases and cases based on the ECT.

In ICSID cases, tribunals dismissed objections based on *Achmea* on the grounds that: (a) unlike the *Achmea v. Slovakia* proceedings, ICSID arbitrations are not seated in any specific jurisdiction and are instead governed exclusively by the international regime of the ICSID Convention; (b) given the autonomous nature of the ICSID arbitration system, ICSID awards are not reviewed by State courts at the stage of annulment or enforcement; and (c) it was precisely in the context of the review process, which is excluded in ICSID arbitrations, that the German Supreme Court examined the award in *Achmea* and requested the CJEU's preliminary ruling.

As for cases based on Article 26 ECT, tribunals observed that *Achmea* did not address the status of intra-EU arbitration thereunder and the compatibility of EU law with the ECT, which contains an investor-State dispute settlement clause different from the one under scrutiny in *Achmea*.[52] Tribunals also observed that although, unlike BITs, the ECT is a "mixed agreement" to which, not only the Member States but also the EU itself is a party, this does not prevent investors from invoking Article 26 ECT in intra-EU disputes.[53] Article 26 ECT contains no exclusion, "carve-out" or "disconnection clause," which would make the offer of arbitration contained in this provision inapplicable in the relationships between the EU Member States.[54] Further to the CJEU's ruling in *Komstroy*, which extended the *Achmea* reasoning to ECT cases, tribunals' reasoning in these cases cannot be considered dispositive of the CJEU's concerns.

[G] An (Isolated?) Exception and Other Dissenting Voices

As stated above, no arbitral tribunal has so far upheld an objection based on *Achmea*, with one notable exception. In June 16, 2022 Award in *Green Power Partners v. Spain*, the tribunal upheld an objection based on the CJEU's rulings in an SCC arbitration based on the ECT.

The tribunal emphasized the importance of going beyond the mere juxtaposition of EU law and public international law and the determination of which legal system should prevail, favoring instead "the combined operation of certain specific norm,

52. *UP v. Hungary*, *supra* n. 28, paras. 253–258; *Sodexo v. Hungary*, *supra* n. 28, paras. 186–187, 189; *Vattenfall v. Germany*, *supra* n. 28, paras. 162, 213; *Sunreserve v. Italy*, *supra* n. 28, paras. 427–432.
53. For the observation that "even though the EU itself is a Contracting Party of the ECT, this does not eliminate the EU member States' individual standing as respondents under the ECT," *Novoenergia II v. Spain*, *supra* n. 27, para. 453.
54. *Sunreserve v. Italy*, *supra* n. 28, paras. 448–458; *Vattenfall v. Germany*, *supra* n. 28, paras. 169–206; *Hydro Energy 1 v. Spain*, *supra* n. 28, para. 502.

whether from international or domestic law."[55] After ascertaining that Article 26 ECT, interpreted "in accordance with [its] ordinary meaning" (Article 31(1) VCLT), may be applicable to disputes between Danish investors and Spain, the tribunal examined Article 26 ECT in the "context" of provisions it considered relevant, as also required by Article 31(1). In this respect the tribunal considered relevant: (i) other provisions contained in the ECT (Articles 1(3), 1(10), 25), which refer to the notion of "Regional Economic Integration Organizations" (REIO) and recognize that membership of a REIO may be subject to special requirements and the relationships between members of the ECT which are also members of a REIO may be different from relationships between other members of the ECT;[56] (ii) instruments "made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" (Article 31(2)(b) VCLT), such as "Declaration 5" included in the Final Act of the ECT Conference in relation to Article 25 ECT, the "Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 25(3)(b)(ii) of the Energy Charter Treaty," which, in the tribunal's analysis, supports the conclusion that EU Members intended to withhold consent to intra-EU investment arbitration;[57] (iii) "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31(3)(a) and (b) VCLT), such as the January 2019 Declarations, which, even if they cannot be regarded as "subsequent agreements" or "subsequent practices" in the meaning of Article 31(3)(a) and (b) VCLT, nonetheless constitute authentic interpretation of EU Members' "authentic interpretation" of the operation of the investor-State dispute settlement provisions of Article 26 ECT under both the same ECT and EU law.[58]
One can predict a similar fate for any objection based on *Komstroy*, *PL Holdings* or *Micula*. The only dissenting positions known are those of Mr. Lazar Tomov in *Raiffeisenbank v. Croatia* and Prof Marcelo Kohen in *Adamakopoulos v. Cyprus*.

Mr. Tomov's dissent is reflected in a succinct statement contained in the award.[59] He argued that, by entering into the BIT, the contracting States agreed that, insofar as the BIT is incompatible with the EU *acquis* in force at any given time, they are not bound by it. Mr. Tomov interpreted the notion of "EU *acquis*" broadly, as "shorthand for the EU legal system as a whole." He argued that incompatibility is to be determined also by reference to the CJEU's authoritative interpretation of EU law, including with respect to its scope *ratione temporis*. Furthermore, dispute resolution clauses in intra-EU BITs must have been reasonably understood by contracting States as incompatible with Articles 267 and 344 TFEU because, based on previous decisions of the CJEU, this conclusion was "predictable and likely."

55. *Green Power Partners v. Spain*, *supra* n. 29, para. 333.
56. *Ibid.*, paras. 350–355.
57. *Ibid.*, *supra* n. 29, paras. 359–363.
58. *Ibid.*, *supra* n. 29, paras. 364–387.
59. *Raiffeisenbank v. Croatia*, *supra* n. 28, paras. 255–258.

Conversely, Prof Kohen's dissent resulted in a substantial and articulated statement.[60] While accepting that *Achmea* is not directly binding on an arbitral tribunal constituted under a different BIT, Prof Kohen emphasized that the ruling is an "authoritative interpretation of EU Treaties and of their impact on other rules of international law." He also accepted that accession of the respondent State to the EU did not result in automatic termination of the relevant BIT concluded prior to it under Article 59 VCLT, as, at the time of the tribunal's award, termination negotiations were still pending.

The core of Prof Kohen's reasoning is that Article 30 VCLT, read in light of Article 351 TFEU, leads to the conclusion that the TFEU is indeed a treaty on the "same subject-matter" and the BIT and is incompatible with it. The dissent put particular emphasis on Article 351(3) TFEU,[61] which, in Prof Kohen's reading, reveals the nature of EU law, including the equality of advantages enjoyed by investors of all Member States and the role of the CJEU in interpreting EU law, "as a whole" that must be respected in the mutual relationships between EU Members.

As for the "same subject-matter" requirement under Article 30 VCLT, contrary to all tribunals that have examined objections based on the CJEU's rulings so far, and also to many others before *Achmea,*[62] the dissenting opinion finds that both the TFEU and the BIT deal with the substantive treatment of foreign (EU) investors and the settlement of disputes, even if their respective regimes differ. Hence, both treaties deal with the "same subject-matter."

According to Prof Kohen, even the second requirement under Article 30(1), i.e., incompatibility, is satisfied because intra-EU investment arbitration: (a) undermines the role of the CJEU as the sole and authentic interpreter of EU law; and (b) discriminates between EU investors who can benefit from arbitration and those who cannot, contrary to Article 18 TFEU.

A further point of dissent with numerous prior rulings lies in the role of the January 2019 Declarations, which Prof Kohen regarded as the "authentic interpretation" by EU Member States of "their own Treaties" and their relationships with the BIT. As such, regardless of their constituting an agreement amending prior treaties, the January 2019 Declarations should be "taken into account" in interpreting the BIT under Article 31(3) VCLT.

60. *Adamakopoulos v. Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Prof. Marcelo G. Kohen, February 3, 2020.
61. *See* Art. 351(1) TFEU: "the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."
62. *See European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, October 22, 2012, paras. 168–169, 178, 184; *Eastern Sugar B.V. v. Czech Republic*, SCC No. 088/2004, Partial Award, March 27, 2007, paras. 164–165; *Oostergetel v. Slovak Republic*, paras. 74–79.

§5.06 ANNULMENT AND ENFORCEMENT

Unsurprisingly, numerous arbitral awards, issued both before and after *Achmea*, have been challenged before ICSID ad hoc committees or, for cases not governed by the ICSID Convention, State courts.[63] Also unsurprisingly, investors are trying to enforce awards before the courts of the respondent States and elsewhere.

Although States chose a variety of procedural tools to challenge awards, including requests for annulment under Article 52 ICSID Convention or domestic law rules, revision under Article 51 ICSID Convention[64] and rectification under Article 49(2) ICSID Convention,[65] the following sections will examine the prospects of these challenges from the point of view of the most typical forms of award review, i.e., requests for annulment and enforcement.

For the purpose of this analysis, arbitration proceedings and awards governed by the ICSID Convention should be distinguished from non-ICSID proceedings and awards.

The analysis is carried out without considering the impact of the Termination Agreement, which has already been examined above and, albeit not applicable to any of the awards rendered so far, may become relevant to future awards.

[A] Awards Governed by the ICSID Convention

The arbitration system governed by the ICSID Convention is virtually autonomous from the legal order of its contracting States. Requests for annulment of ICSID awards are brought before other arbitral bodies (ad hoc committees), against whose decisions no recourse is available.[66] While the ICSID Convention dispenses prevailing parties with the need to obtain the *exequatur* of awards, enforcement is governed by the law of the State in whose territory it is sought.[67]

For the purpose of assessing the fate of intra-EU awards after the CJEU's rulings, annulment and enforcement should be distinguished.

63. Under the ICSID Convention and Arbitration Rules, only "awards" can be subject to annulment proceedings (Art. 52 ICSID Convention). Decisions dismissing objections to the jurisdiction of arbitral tribunals can be challenged only with the award on the merits.
64. *See Republic of Hungary v. Dan Cake (Portugal) S.A.*, ICSID Case No. ARB/12/9, Decision on Applicant's Request for the Continued Stay of Enforcement of the Award, December 25, 2018.
65. *See*, e.g., *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Decisions on the Respondent's Request for a Supplementary Decision, November 29, 2018.
66. *See* Art. 52 ICSID Convention.
67. *See* Art. 54(3) ICSID Convention: "Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territory such execution is sought." *See also* Art. 55: "Nothing in Art. 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[1] Annulment

Several ICSID ad hoc committees have already rejected challenges brought against awards on the basis of an EU law objection.[68] The analysis and conclusions may obviously differ depending on the factual and legal context of individual cases.

Except for *Micula*, all the CJEU's rulings originated from arbitration proceedings that were not subject to the ICSID Convention.[69] As for all cases not governed by the ICSID Convention, the arbitral award was therefore subject to (limited) judicial review under domestic law at annulment stage, with the possibility for the competent Member State's court to request a preliminary ruling from the CJEU pursuant to Article 267 TFEU.

Since this possibility does not even exist under the ICSID Convention, the *Achmea*, *Komstroy* and *PL Holdings* reasoning may be considered *a fortiori* relevant to ICSID cases. Given the self-contained nature of the ICSID arbitration system, the CJEU's intervention to ensure the correct application and interpretation of EU law, which constitutes the main rationale of the CJEU's rulings, is completely excluded because ICSID awards are not even subject to limited judicial review at annulment or enforcement stage. The CJEU's concerns about the alleged threat to the effectiveness and consistent interpretation of EU law would therefore be even more applicable to ICSID arbitrations. Therefore, it is not surprising that the CJEU eventually extended its reasoning to ICSID cases in *Micula*.

However, all arbitral decisions known to date refrained from engaging in a discussion of the merits of the ruling and instead concluded either for its inapplicability or irrelevance.

[2] Enforcement

Pursuant to Article 54(1) ICSID Convention, an ICSID arbitral award is not subject to judicial review by State courts and is enforceable within the territory of all Member States of the Convention "as if it were a final judgment of a court in that State."[70] Pursuant to Article 53(1) ICSID Convention, Convention awards are not subject to "any other remedy except those provided for in this Convention."

68. *Dan Cake v. Hungary*, ICSID Case No. ARB/12/9, Decision on Annulment, July 16, 2021 (unpublished; *see* https://globalarbitrationreview.com/achmea/hungary-fails-upend-another-intra-eu-bit-award); *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, May 7, 2021 (unpublished; *see* https://globalarbitrationreview.com/intra-eu-award-against-hungary-upheld); *Edendred S.A. v. Hungary*, ICSID Case No. ARB/13/21, Decision on Annulment, March 9, 2020 (unpublished); *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment, August 11, 2021 (unpublished).
69. *Achmea v. Slovak Republic* was governed by the UNCITRAL Rules and seated in Germany *Komstroy v. Moldova* was also an UNCITRAL case seated in Paris, and *PL Holdings v. Poland* was an SCC case with Stockholm as place of arbitration.
70. Article 54(1) ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

Several ICSID tribunals considered their own duty to render an enforceable award and the likely difficulties of enforcement in light of *Achmea*. However, they did not consider these difficulties sufficient to uphold objections to their jurisdiction, *inter alia,* because they found that: (a) enforcement is separate from, and does not impinge on, jurisdiction;[71] (b) difficulty of enforcement does not amount to total "unenforceability";[72] (c) enforcement and jurisdiction are governed by different rules: enforcement is governed by the law of the jurisdiction where it is sought, whereas jurisdiction depends on the ICSID Convention and the relevant investment treaty;[73] (d) whether acts of enforcement may constitute breaches of EU law, as argued by certain Member States, is outside the scope of a jurisdictional decision;[74] and (e) enforcement is not limited to the courts of the host State or of EU Member States, as the prevailing party may seek to enforce the award in the territory of a third State, where enforcement may be possible or easier.[75]

The prospects of enforcement of an ICSID award after the CJEU's rulings may depend on whether enforcement proceedings are brought within or outside the EU.

As a matter of general international law, and regardless of the CJEU's position, the enforcement regime of the ICSID Convention is also applicable to intra-EU investment treaty arbitrations in the relationships between EU Member States.

However, the hierarchy of norms within the EU legal order is nevertheless likely to hinder the enforcement of intra-EU investment arbitration awards by EU courts under Article 54 ICSID Convention. Since primary EU law prevails, not only over national law but also over other international treaties,[76] an EU Member State's court may refuse to apply Article 54 ICSID Convention.[77] Moreover, at the enforcement stage, EU courts may refer the matter to the CJEU for a preliminary ruling. In this case, after *Achmea*, *Komstroy*, *PL Holdings* and *Micula*, the CJEU's finding would be predictable.

This conclusion seems corroborated by a number of court decisions rendered in *Micula* even before the January 22, 2022 ruling, in which the claimants tried to enforce the ICSID award against the State within and outside the EU. Notwithstanding Article 54 ICSID Convention, the competent EU courts stayed in enforcement proceedings in

71. *United Utilities v. Estonia*, *supra* n. 28, para. 541; *Vattenfall v. Germany*, *supra* n. 28, para. 230.
72. *Eskosol v. Italy*, *supra* n. 28, para. 233.
73. *Marfin v. Cyprus*, *supra* n. 28, para. 596; *Eskosol v. Italy*, *supra* n. 28, para. 234; *RWE Innogy v. Spain*, *supra* n. 28, para. 374: "the Tribunal is naturally concerned that its award should be capable of enforcement, and notes the statement in the Declaration of 15 January 2019 … However, the issue of recognition and enforcement are ultimately a matter for the courts of concerned ICSID Contracting States in accordance with Art. 54 of the ICSID Convention, and the Tribunal cannot determine its jurisdiction by reference to how differing Contracting States may understand and apply their obligations under Article 54."
74. *Vattenfall v. Germany*, *supra* n. 28, para. 231.
75. *Adamakopoulos v. Cyprus*, *supra* n. 28, para. 181.
76. *See*, among others, CJEU Case 235-87, *Matteucci v. Communauté française de Belgium*, September 27, 1988, ECLI:EU:C:1988:460; Case C-3/91, *Exportur v. LOR*, November 10, 1992, ECLI:EU:C:1992:420.
77. P. Goldsmith, B. Yin, *Intra-EU BITs: Competence and Consequences*, in N. Kaplan, M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, 2018, 241: "it would be necessary to consider separately the position of EU Member States and non-EU Member States."

view of a potential conflict with EU State aid rules.[78] As a result, there seems to be no prospect of enforcing an ICSID award based on an intra-EU investment treaty within the EU.

The prospects of enforcement of an award outside the EU are quite different. Enforcement of arbitral awards in jurisdictions other than the respondent State may prove problematic due to the absence of assets not covered by State immunity. Moreover, courts outside the EU may still consider the incompatibility of the award with EU law under the doctrine of comity. This may particularly be the case after the January 2019 Declarations, whereby "member States will request the courts, *including in any third country*, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent."[79] Also, following the January 2022 CJEU's ruling in *Micula*, and subject to the upcoming decision the General Court will render in such case, the Commission may require the Member State to recover amounts paid which it concludes constitute incompatible State aid or are otherwise contrary to EU law, as interpreted by the CJEU. In this respect, it is noteworthy that the Commission recently announced its investigation into the arbitral award rendered in *Infrastructure Services v. Spain* in July 2021, which it considers, on a preliminary view, constitutes State aid.[80]

However, courts outside the EU are bound by neither EU law nor CJEU's rulings. It is unlikely that the above-mentioned considerations will take precedence over ICSID Member States' obligation under Article 54(1) ICSID Convention. Therefore, intra-EU treaty awards governed by the ICSID Convention will most likely remain enforceable outside the EU.

[B] Awards Not Governed by the ICSID Convention

Awards not governed by the ICSID Convention, but rather by the UNCITRAL, SCC, ICSID Additional Facility or other arbitration rules, are subject to the *lex arbitri* of the place or arbitration and to the jurisdiction of the relevant courts at the annulment stage.[81] Their enforcement is governed by the 1958 New York Convention on the

78. *See* Judgment of the English Court of Appeal, July 27, 2018; Judgment of the Brussels Court of Appeal, March 12, 2019.
79. *See Eskosol v. Italy*, *supra* n. 28, para. 232: "non-EU courts may face certain pressure not to enforce an intra-EU investment arbitration award, based on the undertaking by Italy and others in the January 2019 Declaration … Alternatively, if a non-EU court proceeds to enforce an award against Italy, the Commission eventually could deem any amounts collected to be unlawful State aid, and require Italy to seek recovery from Eskosol in an equivalent amount." J. Scheu, P. Nikolov, *The Setting Aside and Enforcement of Intra-EU Investment Arbitration Awards after Achmea*, 36 Arbitration International 253, 271 (2020).
80. *See 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. *See* European Commission Press Release, *State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain*, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3783.
81. K. Bondar, *Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review*, 32 Journal of International Arbitration 621 (2015).

Recognition and Enforcement of Foreign Arbitral Awards (NYC) and domestic law. Annulment and enforcement require separate analyses.

[1] Annulment

The grounds based on which an award not governed by the ICSID Convention can be set aside differ from jurisdiction to jurisdiction. However, there is substantial convergence across different jurisdictions.

The grounds for setting aside relevant objections based on the CJEU's rulings are those reflected in Article 34(2)(a)(i), 34(2)(b)(i) and 34(2)(b)(ii) of the UNCITRAL Model Law or analogous provisions of domestic law, i.e., that the arbitration agreement is "not valid under the law to which parties have subjected it, or, failing any indication thereon, under the law of th[e] State [where annulment is sought]," "the subject-matter of the dispute is not capable of settlement by arbitration" under the law of the jurisdiction where annulment is sought or "the award is in conflict with the public policy" of such jurisdiction.[82]

If the arbitration is seated within the EU, the court seized for the annulment of the award will base its decision on EU law as part of its own domestic law, which is relevant to all three above-mentioned grounds. In light of *Achmea*, *Komstroy*, *PL Holdings* and *Micula*, all three grounds are likely to provide sufficient basis for annulment.

The invalidity of the arbitration agreement is a consequence of the invalidity of the EU Member State's offer of arbitration contained in the applicable treaty. Pursuant to the most common choice-of-law approach, also reflected in Article 34(2)(a)(i) of the Model Law, in the absence of an agreement of the parties, the arbitration agreement is governed by the law of the place of arbitration.[83] Therefore, having been found incompatible with EU law by the CJEU, the arbitration agreement on which an intra-EU investment award is based is likely to be considered invalid under the law of the Member State in which the arbitration is seated. Even adopting an alternative approach, which subjects the arbitration agreement to the law applicable to the substance

82. As of December 2020, legislation based on the Model Law has been adopted in 84 countries and 117 different jurisdictions: *see* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. Even non-Model Law jurisdictions tend to provide for grounds for annulling arbitral awards identical or similar to those of the Model Law.

83. G.B. Born, *International Commercial Arbitration*, Alphen aan den Rijn, 2014, 514. For a Dutch ruling, *see Arrondissementsrechtbank* of Rotterdam, September 28, 1995, in *Yearbook Commercial Arbitration*, 1997, 762; H. Grigera-Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Récueil des Cours 71 (2001); in England, for the view that the presumption that an express choice-of-law provision contained in a contract extends to the arbitration agreement can be rebutted whenever other elements point to the existence of a closer connection with another jurisdiction, as is the case when there is an express choice of the place of arbitration, *see Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* (2012) EWCA Civ 638; in Singapore, *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* (2014) SGHCR, 12: "the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement."

of the dispute,[84] the outcome would likely be the same. Depending on the applicable treaty, such law would be the law of the host State and/or international law. Given the above-mentioned principle which, within the EU, gives priority to EU law over domestic law and other international treaties, an EU Member State's court will most likely abide by the CJEU's findings and declare the consent to arbitration invalid. The same conclusion as to the invalidity of the arbitration agreement is likely to be reached also on the basis of yet a different approach, such as the one elaborated by the French case law, according to which an international arbitration agreement is governed by a substantive rule which preserves its validity unless the agreement is contrary to the public policy of the jurisdiction where annulment is sought.[85] For the reasons stated below, even an EU Member State's court following this approach is likely to find that intra-EU investment arbitration agreements are contrary to public policy and thus invalid.

The German *Bundesgerichtshof* in *Achmea* was directly bound by the CJEU's ruling. Regardless of the binding nature of the judgment, however, it is unsurprising that the Federal Supreme Court set aside the arbitral award pursuant to section 1059(2)(1) of the German Code of Civil Procedure, which sanctions precisely the invalidity of the arbitration agreement, on the ground that Slovakia's offer to arbitrate was not validly made. As stated above, in *PL Holdings*, the Svea Court of Appeal came to the same conclusion as the German Supreme Court in *Achmea* with respect to the invalidity of the State's offer to arbitrate, even if it refused to set aside the award based on its finding that the respondent State and the investor had concluded a tacit arbitration agreement.

Alternatively, or cumulatively, the "incompatibility" of intra-EU arbitration with EU law may be framed in terms of arbitrability. From this perspective, disputes arising from the alleged breach of EU Member States' obligations under BITs or the ECT may be regarded as "not capable of settlement by arbitration."[86] The language of the CJEU's

84. For recent English case law holding that, in the absence of a specific choice-of-law agreement, the arbitration agreement is governed by the same law which governs the contract in which it is contained pursuant to the parties' agreement, *see Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)* [2020] EWCA Civ. 6 (January 20, 2020); in the same case, the Paris Court of Appeal took a different view and relied on French law as the law of the arbitration agreement: Paris Court of Appeal, June 23, 2020, *Kout Food Group v. Kabab-ji SAL*; *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38; in the U.S., *see Motorola Credit Corp. and Nokia Corp. v. Uzan et al.*, 388 F.3d (2d Cir. 2004).

85. R. Nazzini, *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*, 65 International and Comparative Law Quarterly 681 (2016); French Court of Cassation, December 20, 1993, *Municipalité de Khoms El Mergeb v. Dalico Contractors*, *Revue de l'arbitrage*, 1994, 116; "according to a substantive rule of international arbitration law, the arbitration agreement is legally independent of the main contract in which it is included or which refers to it, and its existence and effectiveness are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, without it being necessary to make reference to a national law"; *see also* French Court of Cassation of March 20, 2004, *Unikod v. Ourakali*, Revue de l'arbitrage, 2005, 961.

86. An arbitrability objection was raised by Poland in the setting aside proceedings before the Svea Court in *PL Holdings v. Poland*. The Swedish Court rejected the objection holding that the substantive issues in dispute in the arbitration, i.e., whether Poland had breached the BIT and was liable to the investor and, if so, for what amount, are per se capable of settlement by

rulings is compatible with this approach because it purports to sanction only the investor-State dispute settlement provision of the relevant BIT, not also the BITs' substantive obligations. The breach of the BITs' substantive standards of treatment may be considered enforceable in other *fora* that guarantee the consistent interpretation and application of EU law through the CJEU's role in the context of preliminary rulings under Article 267 TFEU.

Finally, an intra-EU investor-State award not governed by the ICSID Convention is likely to be set aside on the ground of a breach of the Member State's public policy. Applying the standard set by the CJEU in *Eco Swiss*, which held that a norm of EU law "which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market" must be considered as forming part of the public policy of Member States for the purpose of the annulment and enforcement of arbitral awards,[87] one easily reaches the conclusion that the *vulnus* identified in the *Achmea* ruling does indeed constitute a breach of public policy. Since *Achmea*, the CJEU made clear that it considers intra-EU treaty-based arbitration to be in violation of some of the most fundamental principles of EU law, such as the autonomy of EU law from national and international law, the EU's constitutional structure and the principle of mutual trust and sincere cooperation between the Member States, potentially affecting "the fundamental freedoms, including freedom of establishment and free movement of capitals."[88]

Given Member States' obligation to interpret the concept of public policy in light of EU law and the CJEU's position in this respect, it is difficult to escape the conclusion that giving effect to an intra-EU investor-State award constitutes a breach of EU Members' public policy and is likely to lead to the annulment of the award.[89]

Conversely, considering that all three above-mentioned potential grounds for annulment depend on the impact of the CJEU's rulings on the domestic law of EU Member States, unlike EU courts, courts outside the EU, based on their domestic law, will likely reject requests for setting aside of awards.

[2] Enforcement

To the extent the debtor has assets in several jurisdictions, the creditor may consider enforcing an award both within and outside the EU. Although the CJEU's rulings have a significant impact in both cases, the prospects of enforcement may differ greatly

arbitration. However, the Svea Court failed to address the arbitrability of the claims in light of the specific context, which might have led to the conclusion that EU law, as part of Member States' law, precludes the arbitrability of intra-EU claims based on investment treaties.

87. Case C-126/97, *Eco Swiss China Time v. Benetton International NV*, June 1, 1999, ECLI: EU:C:1999:269, para. 38.
88. *Slovak Republic v. Achmea BV*, *supra* n. 1, paras. 32, 33, 34, 42.
89. The Svea Court's ruling in *PL Holdings* reached a different conclusion. Distinguishing *Eco Swiss* and *Mostaza Claro*, the court held that the notion of public policy refers to the "substantive contents" of the award, and not to the arbitration agreement. This reasoning does not seem convincing. The notion of public policy is generally interpreted as covering both substantive and jurisdictional norms considered contrary to fundamental principles of a given (in this case, EU) legal system.

depending on the place of enforcement. As discussed below, also the place of arbitration may be relevant in this respect.

If enforcement is sought within the EU, courts are likely to deny enforcement on grounds similar to those already examined with respect to annulment, which are also reflected in the NYC, i.e., the invalidity of the arbitration agreement (Article V(1)(a) NYC), lack of arbitrability (Article V(2)(a)) and violation of the public policy of the jurisdiction where enforcement is sought (Article V(2)(b)).

Article V(1)(a) NYC allows the competent court to refuse enforcement 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." If the place of arbitration is within the EU, since EU law is part of the law of EU Member States, unless the parties agreed that the arbitration agreement be governed by the law of a non-EU Member State,[90] the award is likely to be denied enforcement on the ground that the arbitration agreement is invalid under the *lex arbitri*. Conversely, if the arbitration is seated outside the EU, Article V(1)(a) NYC is unlikely to constitute a valid basis for refusing enforcement as the applicable *lex arbitri* will not recognize the invalidity of the arbitration agreement.

Article V(2)(a) NYC provides that enforcement may be denied if "the subject-matter of the difference is not capable of settlement by arbitration under the law of th[e] country [where enforcement is sought]." If enforcement is sought within the EU, as stated above with respect to annulment, the subject matter of the dispute may indeed be considered non-arbitrable and enforcement may be denied on this basis.[91] The situation is different if enforcement is sought outside the EU as the CJEU's rulings would not be binding on the enforcement court and may not render a dispute brought under an investment treaty inarbitrable.

As far as public policy is concerned (Article V(2)(b) NYC), as discussed above with reference to setting aside, the threshold relevant for the purpose of a violation of EU's and Member States' public policy seems clearly met from the CJEU's perspective, as the CJEU stated that intra-EU investment arbitration is incompatible with the most fundamental principles of EU law and with the very institutional architecture of the EU. A violation of the public policy would result, not from the award itself,[92] but rather from its effects on the legal order of the place of enforcement. However, in *Achmea*, *Komstroy*, *PL Holdings* and *Micula*, the CJEU left no room for doubt that it regards the mere risk for the consistent application and interpretation of EU law which results from intra-EU investment arbitration as contrary to the most fundamental principles of the

90. Following the recent case law referred to above, there seems to be growing awareness among users of the potential consequences of the law applicable to the arbitration agreement and growing recourse to choice-of-law agreements. However, such agreements remain relatively rare. Moreover, an agreement subjecting the arbitration agreement to a law which preserves its validity despite its invalidity under the law otherwise applicable may circumvent mandatory rules of law and, as such, be deemed ineffective.

91. *Contra*, in the sense that "the scope of the *Achmea* judgment is limited to the ISDS clause," J. Scheu, P. Nikolov, *supra* n. 74, 270.

92. *See* D. Otto, O. Elwan, *Article V(2)*, in H. Kronke et al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 2010, 365–366.

EU legal order. Therefore, the enforcement of any intra-EU award, regardless of whether and how it applied EU law, would conflict with Members States' public policy. Conversely, if enforcement is sought outside the EU, there seems to be no reason to consider it in violation of the public policy of the place of enforcement, which would not be affected by the CJEU's rulings.

If the place of arbitration was in the EU, the potential annulment at the place of arbitration may constitute a ground for refusing enforcement also under Article V(1)(e) NYC.[93] Under this provision, annulment at the place of arbitration would significantly reduce enforceability outside the EU, but not necessarily exclude it altogether, given the well-known case law in certain jurisdictions which permits enforcement of awards annulled at the place of the arbitration.[94]

§5.07 CONCLUSION

The recent case law of the CJEU makes the enforcement of intra-EU investor-State arbitration awards much more problematic, but not impossible.

Awards rendered in proceedings governed by the ICSID Convention remain protected from annulment by the completely autonomous regime created by the Convention. Conversely, their enforcement will be virtually excluded within the EU, but *Achmea* and the rulings that followed its principle and expanded its scope are unlikely to get in the way of enforcement outside the EU.

As for non-ICSID cases, the relevance of the CJEU's case law and the fate of awards will largely depend on the place of the arbitration. All grounds potentially relevant to the setting aside of awards are likely to provide sufficient basis for the annulment of awards rendered in EU-based arbitrations, but not in proceedings seated outside the EU. Likewise, enforcement of intra-EU treaty awards not governed by the ICSID Convention is virtually precluded within the EU, whereas it seems possible outside the EU if the place of the arbitration is also outside the EU, as this would result in neutralizing, not only the grounds for refusing enforcement under Article V(2)(a) (arbitrability) and V(2)(b) (public policy) NYC but also those under Article V(1)(a) (invalidity of the arbitration agreement) and V(1)(e) (annulment at the place of arbitration) NYC.[95]

93. In *Novoenergia II v. Spain*, *supra* n. 27, the US District Court for the District of Columbia decided to stay enforcement proceedings in the US pending the setting aside proceedings against the award in Sweden. *See Novoenergia II—Energy & Environment (SCA) v. Kingdom of Spain*, US District Court for the District of Columbia, Civil Action No. 18-cv-01148 (TSC).
94. *See* G. Born, *supra* n. 78, 3621 et seq.
95. S. Lemaire, *Chronique de la jurisprudence arbitrale en droit des investissements*, *Revue de l'arbitrage*, 2018, 435. For the position in awards rendered within the EU, *see Strabag v. Poland*, *supra* n. 28, para. 8-142 (award rendered in France): "the Tribunal is not able to predict the future validity or enforceability of its award before French courts or other enforcing courts"; *Sunreserve v. Italy*, *supra* n. 28, para. 371 (award rendered in Sweden): "the Tribunal does not foresee any hindrances to the validity or enforceability of its Award before Swedish courts. In any event, at this stage, is not in a place to predict the future validity or enforceability of its Award before Swedish courts or other enforcing courts." For the position of an award rendered outside the EU (Switzerland) *see A.M.F. v. Czech Republic*, *supra* n. 28, paras. 393–395: "It is true

In the absence of a choice of seat in the relevant investment treaty and of an agreement of the parties in this respect, the arbitral tribunal's or administering institution's decision on the place of arbitration may thus have far-reaching consequences on the validity and enforceability of awards. Traditionally arbitration-friendly EU jurisdictions may not be the safest seats for intra-EU treaty arbitrations, whereas extra-EU jurisdictions, now including the UK, may prove more reliable. Institutions and tribunals would be well advised to consider these aspects when fixing the place of arbitration.

that there exist a limited number of scenarios, under which the enforcement of the Arbitral Tribunal's award might be challenging [sic] or create further disputes. However, this does not make the award unenforceable. A truly unenforceable award can only exist if it is rendered in violation of Article 190 of the PILA governing the setting aside of awards rendered by arbitral tribunals seated in Switzerland. The PILA provides for no other remedy against such awards. The only two grounds under which the award rendered by the present Arbitral Tribunal could be set aside are (i) where it would have wrongly accepted jurisdiction or (ii) its award would be incompatible with public policy due to its decision that the Achmea judgment does not preclude Article 10 of the Germany-Czech Republic BIT. The Arbitral Tribunal considers that its decision is well-founded and not contrary to Swiss international public policy."