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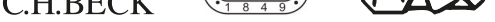

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Overview

Chapter I
The Arbitration Agreement and Arbitrability

Bernard Hanotiau
The Multiple Issues Raised by Multiparty –
Multicontract Arbitrations Relating to M&A Transactions

Friedrich Rüffler/Sarah Seper
Arbitration Agreements in Foundation Deeds –
Recent Developments under Austrian (Case) Law

Florian Kremslehner/Ann-Kathrin Reschny
Resolving Disputes in Austrian Private Foundations

Nicol Schneider
Effective Arbitration Clauses in Inheritance Proceedings

Chapter II
The Arbitrator and the Arbitration Procedure

Alexander Petsche/Brian Gabriel-Oiwoh/Abanoub Malak
The Singapore Convention
Quo Vadis of the Sleeping Beauty?

Irene Welser
Early Dispute Settlement through Arbitral Tribunals –
A Common Feature in the "DACH Region"
Austria, Germany and Switzerland?
Including Additional Thoughts and Sixteen Golden Rules
on the Way to a Successful Settlement

Markus P. Beham
Sustainability Literate Arbitrators
Essential Qualification or Nice-to-have?

Maximilian Albert Müller
Arbitration Rules and the Challenge of Effectively
Addressing Third-Party Funding

Philipp Schwarz
Third-Party Participation in Commercial Arbitration
Fifty Shades of Consent?

Nikolaus Pitkowitz/Johanna Kathan-Spath and the 20 contributors
The Vienna Propositions for the Resolution of Shareholder and Corporate Disputes

Chapter III
The Award and the Courts

Nikolaus Pitkowitz
On the Ground of Grounds –
Reasons for Sound Reasoning of Arbitral Awards

Miodrag Jovanović
Thou Shalt Avoid Perversity in Reasoning!
A Philosophical Account of (Un)reasoned Arbitral Awards

Markus Schifferl/Thomas Herbst
Decisions of the Austrian Supreme Court on Arbitration in 2021 and 2022

Chapter IV
Investment Arbitration

John Beechey
Keynote Vienna Investment Arbitration Debate

Stefan Dobrijević
The European Court of Justice on Investment Arbitrations after *Achmea*: Last Nails in the Coffin of Intra-EU Investment Arbitrations?

Ajla Serdarević
Energy Charter Treaty
In Search for Balance and Clarity

Chapter V
Developments on the Austrian Market

Alice Fremuth-Wolf/Elisabeth Vanas-Metzler
The VIAC Rules for Investment Arbitration and Mediation 2021
With Special Focus on Third Party Funding and VIAC as Appointing or Administering Authority for ad hoc Proceedings

Niamh Leinwather/Jessica Puhr
VIAC's Annual Report – 2022
The Winds of Change at VIAC

Alfred Siwy
Recent Publications

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The European Court of Justice on Investment Arbitrations after *Achmea*: Last Nails in the Coffin of Intra-EU Investment Arbitrations?

Stefan Dobrijević

I. Introduction

On March 6, 2018, the European Court of Justice (ECJ) decided the *Achmea* case.[1]) It ruled that the arbitration clauses contained in bilateral investment treaties (BIT) between Member States (intra-EU) are contrary to EU law. Although the arbitration community largely criticized the judgment,[2]) the outcome of the case was hardly surprising. Throughout the years, the European Commission has consistently argued that the intra-EU investment arbitrations are incompatible with EU law.[3]) Not even Advocate General (AG) Wathelet managed to rescue the intra-EU investment arbitrations by providing a lengthy opposite view on their compatibility with EU law.[4])

Despite the ECJ's clear verdict on the incompatibility of intra-EU BITs arbitrations with EU law, some questions remained unresolved. The *Achmea* scenario concerned only intra-EU investor-state arbitrations based on BITs. In contrast, those based either on individual agreements between investors and Member States or multilateral investment treaties were not dealt with.

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[1]) Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, ECLI:EU:C:2018:158 (Mar 6, 2018).

[2]) *See, e.g.*, Robin Dominik Miller, *Autonomie des Unionsrechts versus Schiedsgerichtsbarkeit*, EuZW 357, 362 (2018); Stephan Wernicke, *Autonomie und Häresie – Investitionsschiedsgerichte in der Rechtsunion*, NJW 1644, 1647 (2018); Claus Dieter Classen, *Autonomie des Unionsrechts als Festungsring?*, EuR 361, 369 (2018); Sven Simon & Joscha Müller, *Das Achmea-Urteil des EuGH und die Auswirkungen auf Streitbeilegungsmechanismen im Rechtsraum der EU*, NJOZ 961, 965 (2018).

[3]) *See* Eastern Sugar B.V. v. Czech Republic, SCC No. 088/2004, Partial Award, ¶¶ 199 *et seqq.* (Mar 27, 2007) (The first arbitration proceedings in which an intra-EU objection was raised by the Commission.); *see also* European Commission, Press Release IP/15/5198, Commission asks Member States to terminate their intra-EU bilateral investment treaties (June 18, 2015); Communication from the Commission to the European Parliament and the Council on the Protection of intra-EU investment, at 3 *et seqq.*, COM (2018) 547 final (July 19, 2018).

[4]) Case C-284/16, Slowakische Republik v. Achmea BV, ECLI:EU:C:2017:699, Opinion of AG Wathelet (Sept 19, 2017).

The latter had and still has enormous practical relevance, bearing in mind that the Energy Charter Treaty (ECT) is such a multilateral investment treaty. Another great unknown was whether the arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID) fall within the scope of the *Achmea* judgment. Moreover, the *Achmea* case did not address the issue of whether the implementation of intra-EU investment-state arbitral awards should be qualified as prohibited state aid. The ECJ has dealt with these questions in its recent judgments. We will closely examine whether these decisions were the last nails in the coffin of intra-EU investment arbitrations.

Before resolving this question, this article will provide a short retrospective of the *Achmea* judgment. Second, this article will analyze the investor-state arbitration agreements concluded outside intra-EU treaties. Third, it will address the investor-Member State arbitrations based on the ECT – particularly, the ones conducted under the ICSID Rules. Fourth, in a short excursus, this article will outline the frictions between intra-EU investment arbitration and EU law on state aid. Finally, the most important aspects of this article will be summarized, and the conclusions formulated.

II. *Achmea* and its Consequences – a Short Retrospective

A. Factual Background

The basis for the underlying dispute in the *Achmea* case was the BIT between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic from the early 1990s. As a standard example of an investment protection agreement, it contained an arbitration clause (*in casu* the UNCITRAL Arbitration Rules were applicable).

Following the liberalization of the Slovak health insurance market, a Dutch investor (Achmea BV) invested in the health insurance business through its subsidiary. After the Slovak Republic revoked the initial liberalization, Achmea BV commenced arbitration proceedings according to Art. 8 BIT (with the seat of arbitration in Frankfurt, Germany) and claimed damages due to violations of the BIT. The Slovak Republic challenged the arbitral award before the German courts, and the matter ended up before the German Supreme Court. It referred the question of whether the intra-EU BIT arbitration clauses are compatible with EU law, particularly with Art. 267 and Art. 344 TFEU, to the ECJ for a preliminary ruling.

B. *Achmea* Verdict and the *three-step test*

In a nutshell, the ECJ ruled that the arbitration clauses contained in the intra-EU BIT, which enable investors from a Member State to raise claims against another Member State before an arbitral tribunal, are incompatible with EU law. EU law has an autonomous and unique character that can only be maintained through uniform interpretation and application. Such uniformity is safeguarded by the ECJ via preliminary ruling procedure according to Art. 267 TFEU.[5]) Removing the disputes that might consider the interpretation of EU law from the EU's judicial system would jeopardize this principle. It would also contravene other Member State obligations as laid down in the Treaties, such as the duty of sincere cooperation (Art. 4 (3) TEU) and the duty to ensure the full and effective application of EU law through its judiciary system (Art. 19 TEU).

The ECJ assessed the question of conformity with EU law in three steps (the *three-step test*).[6]) First, it examined whether the investor-state disputes that arise out of an intra-EU BIT concern application and interpretation of EU law.[7]) Second, it assessed whether the arbitral tribunal having jurisdiction based on the aforementioned intra-EU BIT could refer a question for a preliminary ruling to the ECJ. In other words, the Court assessed whether the arbitral tribunal qualifies as "a court or tribunal" pursuant to Art. 267 TFEU. Third, the ECJ addressed the commercial arbitration exception.[8]) It accepted that the review of such awards could be limited to the fundamental provisions of EU law, as this is justified by the principle of efficiency of commercial arbitration.[9]) However, intra-EU investment arbitrations like in *Achmea* do not fall under this exception. Unlike commercial arbitrations, which "originate in the freely expressed wishes of the parties," they are rooted in treaties between the Member States, by which they remove the disputes from their courts and, thereby, from the judicial system of the EU.[10])

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[5]) Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, ¶¶ 32–36 (Mar 6, 2018).

[6]) *See* Björn P. Ebert & Friedrich Weyland, *Weitere Rechtsschutzdefizite in der EU*, RIW 20, 23 (2022) ("Den Dreischritt, den der EuGH bei Komstroy vollzogen hat […]"); Elizaveta Samoilova & Franz Koppensteiner, *Urteilsüberblick*, *in* Jahrbuch Europarecht 2022 11, 32 (Markus Klamert ed., 2022) ("Mit dem *Komstroy*-Urteil hat der EuGH klargestellt, dass auf die ECT das in *Achmea* entwickelte dreistufige Prüfungsschema anzuwenden ist.") (emphasis added).

[7]) Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, ¶ 39 *et seq*.

[8]) *Ibid*. ¶ 50 *et seq*.

[9]) *Ibid*. ¶ 54 (This goes back to Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV, 1999 E.C.R. I-03055, ¶ 35 [June 1, 1999]).

[10]) *Ibid*. ¶ 55.

C. Agreement for the Termination of BITs Between the EU Member States

In response to the *Achmea* judgment, most Member States agreed to terminate their existing intra-EU BITs.[11]) However, this outcome was unsatisfactory for two reasons. First, it deliberately did not touch upon the material scope of the *Achmea* judgment regarding Art. 26 ECT.[12]) This issue was, in the meantime, clarified by the Court in the *Komstroy* case, as we will discuss later.[13]) Second, five Member States did not participate in the Termination Agreement: Austria, Finland, Ireland, Sweden, and the UK. While Ireland simply did not have any operating intra-EU BIT to terminate,[14]) Austria, Finland, and Sweden chose to terminate their intra-EU BIT on a bilateral consensual basis.[15])

The reasons for the initial hesitation, at least in the Austrian and Swedish cases, might lie elsewhere.[16]) At the Termination Agreement's conclusion, Swedish energy giant Vattenfall brought an investor-state claim against Germany concerning its shift in the nuclear energy policy.[17]) Similarly, several Austrian banks were involved in major arbitration cases against Croatia concerning CHF loan conversions[18]) and the Croatian insolvency law amendments due to Agrokor Group's restructuring.[19])

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[11]) Agreement for the termination of Bilateral Investment Treaties between Member States of the European Union, 2020 O.J. (L 169) 1.

[12]) *Ibid.* at 2.

[13]) *See infra* IV.A.

[14]) *See* Stephan Wilske, Lars Markert & Björn P. Ebert, *Entwicklungen in der internationalen Schiedsgerichtsbarkeit im Jahr 2020 und Ausblick auf 2021*, SchiedsVZ 106, 120 [n.182] (2021) (Ireland's only intra-EU BIT was terminated already in 2011.).

[15]) *See* August Reinisch & Johannes Tropper, *The 2020 Termination Agreement of intra-EU BITs and its effect on investment arbitration in the EU: A public international law analysis of the Termination Agreement, in* Austrian Yearbook on International Arbitration 2022 301, 332 *et seq.* (Christian Klausegger *et al.* eds., 2022); *see also* Gustavo Adolfo Guarin Duque, *The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti Bowl with Fewer Ingredients and More Questions*, 37 J. Int'l Arb. 797, 820 (2020); *see* also Bundesministerium für Europäische und internationale Angelegenheiten, Bilaterale Staatsverträge, Investitionsschutz, https://www.bmeia.gv.at/themen/voelkerrecht/staatsvertraege/bilaterale-staatsvertraege/suchergebnisse/ (accessed December 28, 2022) (Austria terminated all of its intra-EU BITs.).

[16]) *See* Filip Boras, *Wieso Österreich auf Investitionsschutz beharrt*, Die Presse – Recht (Vienna), May 11, 2020, at 16.

[17]) *Id.*

[18]) *E.g.*, Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34; UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia, ICSID Case No. ARB/16/31; Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia, ICSID Case No. ARB/17/37.

[19]) Boras, *supra* note 16.

In July 2021, the Croatian government announced that the most of the arbitration cases concerning loan conversions were settled, including those concerning Austrian banks.[20]) Shortly after this, on August 20, 2021, Austria replied to the Croatian offer (from March 2021) and accepted the termination of the relevant BIT.[21]) A settlement of a pending case might have also been achieved under the Termination Agreement.[22]) However, given the complexity and uncertainty of the structured dialog procedure pursuant to Art. 9, this option seems to exist only in theory.

The UK's case is different. While it declared its commitment to terminate its intra-EU BITs, the UK did not participate in the Termination Agreement. Some commentators argue that a post-Brexit UK might be reluctant to terminate its former intra-EU BITs, as it might expect to profit from this new situation.[23]) In 2020, the EU and the UK agreed on the future commercial relationship and signed the Trade and Cooperation Agreement (entered into force on May 1, 2021). While this agreement contains a dispute settlement mechanism, it does not allow investors to raise claims against the states directly.[24]) Moreover, the EU–UK Trade Agreement makes no reference to the UK's former intra-EU BITs (now extra-EU BITs).[25]) What regime applies to them is open to debate.[26])

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[20]) *See* Vlada Republike Hrvatske, *Riješeni sporovi između države i kreditnih institucija u vezi s konverzijom kredita u* švicarskim *francima na ICSID-u* (July 5, 2021), https://vlada.gov.hr/vijesti/rijeseni-sporovi-izmedju-drzave-i-kreditnih-institucija-u-vezi-s-konverzijom-kredita-u-svicarskim-francima-na-icsid-u/32458 (accessed January 17, 2023).

[21]) Abkommen zwischen der Republik Österreich und der Republik Kroatien zur Beendigung des Abkommens zwischen der Republik Österreich und der Republik Kroatien über die Förderung und den Schutz von Investitionen [Agreement between the Republic of Croatia and the Republic of Austria on the termination of the Agreement between the Republic of Croatia and the Republic of Austria for the promotion and protection of investments] Bundesgesetzblatt III [BGBl III] No. 173/2021, https://www.ris.bka.gv.at/eli/bgbl/III/2021/173 (Austria) (accessed January 17, 2023) (The termination was publicly noted in the Austrian Federal Law Gazette on December 3, 2021 and shall enter into force on a date set in the agreement.)

[22]) Reinisch & Tropper, *supra* note 15, at 309 *et seqq.*

[23]) *Eid.* at 334.

[24]) *See* Christian W. Konrad, *Das EU-UK Handels- und Kooperationsabkommen: Auswirkungen auf den Investitionsschutz,* ecolex 916, 919 (2021); Filip Boras, *Schiedsgerichte mit Pferdefuß*, Der Standard – Wirtschaft & Recht (Vienna), January 15, 2021, at 1.

[25]) Wilske, Markert & Ebert, *supra* note 14, at 121.

[26]) *See* Noah A. Barr, *The EU-UK Investment Regime After Brexit: In Search of an Equilibrium?*, 17 Glob. Trade Cust. J. 146–157 (2022).

III. Investor-Member State Arbitration Agreements Concluded Outside Intra-EU Treaties

As previously mentioned, the *Achmea* judgment is about investor-state arbitrations based on intra-EU BITs. However, the judgment did not address arbitration agreements between Member States and investors (or private parties) concluded outside intra-EU treaties.[27]) The most frequently discussed examples in the legal literature were investment contracts and public procurement contracts (*staatliche Aufträge*).[28]) Some commentators were even concerned that the *Achmea* verdict might affect commercial arbitration.[29])

The ECJ was expected to "clarify" some of these issues in the *PL Holdings* case,[30]) one of its three *Achmea* follow-up judgments. However, despite shedding some light on the matter, some uncertainties remain about the scope of the *Achmea* ruling. We shall first examine the *PL Holdings* judgment, in which the Court ruled on the compatibility of ad hoc arbitration agreements identical to intra-EU BIT arbitration clauses (A). We will then give an overview of the scenarios not covered by the *PL Holdings* judgment and analyze whether they are likely to fall within what we call "commercial arbitration exception" (B). Lastly, we will provide a short interim conclusion (C).

A. Ad Hoc Arbitration Agreements Identical to Intra-EU BIT Arbitration Clauses (*PL Holdings case*)

1. Factual Background and Preliminary Ruling Question

The underlying arbitration proceedings were based on the Belgium and Luxemburg-Poland BIT. PL Holdings, an investor from Luxemburg, acquired two Polish banks. After the banks merged, the investor held 99% of the shares, leading to an intervention of the Polish Financial Supervision Authority. It suspended the investor's voting rights and forced it to dispose of its shares. Following this, PL Holdings initiated arbitration under Art. 9 of the respective BIT and made damage claims before an ad hoc arbitration tribunal constituted

[27]) *See* Roland Kläger, *Anmerkung: Das Achmea-Urteil des EuGH als Zäsur* für die *Investitionsschiedsgerichtsbarkeit in Europa,* SchiedsVZ 191, 192 *et seq.* (2018); Wernicke, *supra* note 2, at 1647; Classen, *supra* note 2, at 369.

[28]) Kläger, *supra* note 27, at 192; Jan Philipp Köster, Investitionsschutz in Europa 136 *et seq.* (2022); *see also* Julian Scheu & Petyo Nikolov, *The setting aside and enforcement of intra-EU investment arbitration awards after Achmea*, 36 Arb. Int'l 253, 258 *et seq.* (2020).

[29]) Ebert & Weyland, *supra* note 6, at 23 *et seq.*

[30]) Case C-109/20, Republiken Polen v. PL Holdings Sarl, ECLI:EU:C:2021:875 (Oct 26, 2021).

under the UNCITRAL Arbitration Rules. Subsequently, Poland challenged the arbitral award and brought the issue to the competent Swedish courts, as the seat of arbitration was in Sweden.

PL Holdings mainly argued that even if Art. 9 was incompatible with EU law, Poland failed to raise the intra-EU objection timely and was precluded from doing so at a later stage. Moreover, by not objecting, Poland implicitly consented to arbitrate with PL Holdings on an ad hoc basis. The Swedish courts (first and appellate instance) followed this rationale and rejected the Polish application for setting aside. The Swedish Supreme Court directed the question to the ECJ under Art. 267 TFEU. It asked whether a tacitly concluded ad hoc investor-state arbitration agreement, whose content is identical to an ineffective intra-EU BIT arbitration clause, falls within the material scope of the *Achmea* judgment.

2. Scope of the Preliminary Ruling Question

To better understand the implications of the *PL Holdings* judgment, we must clarify the scope of the ECJ's legal assessment. The preliminary reference question concerned two issues: i) the form of consent of an ad hoc investor-state arbitration agreement (tacitly or explicitly) and ii) whether the ad hoc arbitration agreement is identical to an intra-EU BIT arbitration clause and, as such, continuing the latter.

As regards the form of consent, ECJ expanded the preliminary reference question to all investor-state arbitration clauses concluded on an ad hoc basis, irrespective of how they were concluded (tacitly or explicitly).[31]) This intervention was adequate as there are no justifiable grounds why explicit and implicit consent should be treated differently. The outcome applicable to the implicit consent scenario (as in *PL Holdings*) should also apply *a fortiori* in cases of explicit consent.

Regarding the second point, the ECJ dealt exclusively with an ad hoc arbitration agreement with the same content as an inoperable intra-EU BIT arbitration clause. Therefore, the ad hoc submission to arbitration continued the intra-EU BIT clause and served as the legal basis for the tribunal's jurisdiction over the same intra-EU BIT controversy.

3. Key Legal Arguments

The ECJ made unequivocally clear that *PL Holdings* is another episode in the *Achmea* saga. After repeating its legal findings, the ECJ ruled that Art. 9 of

[31]) Case C-109/20, Republiken Polen v. PL Holdings Sarl, ¶ 37 (Oct 26, 2021); this was also noticed by Charlotte Langenfeld, *Unionsrechtwidrige Umgehung der Achmea-Rechtsprechung durch die Rückgriff auf eine ad hoc-Schiedsvereinbarung – Anmerkung zum Urteil des EuGH v. 26. 10. 2021, Rs C-109/20 (PL Holdings)*, EuR 399, 403 (2022).

the respective BIT is incompatible with EU law on the same premises. Unlike the Opinion of Advocate General Kokott,[32]) the judgment does not contain an in-depth *three-step test*. However, the ECJ did refer to the commercial arbitration exception (the last step in the *three-step test*) in the preceding judgments.[33])

The ECJ's legal analysis consists of three main arguments. First, concluding an ad hoc arbitration agreement with the same content as an ineffective intra-EU BIT clause "would in fact entail a circumvention" of *Achmea* judgment (and the obligations arising out of EU law).[34]) The Court found that an ad hoc arbitration agreement would have "the same effects" as an ineffective intra-EU BIT arbitration clause. Moreover, the ECJ ruled that the "fundamental reason" behind the ad hoc arbitration clause is "precisely to replace the [intra EU-BIT arbitration clause] […] in order to maintain its effects".[35]) The Court was not persuaded by the isolated-case argument made by PL Holdings, as the potential infringements of EU law may occur repeatedly.[36]) In other words, multiple isolated cases amount to repeated infringement and, again, have the same effects as the intra-EU BIT arbitration clause.

Second, the subsequent conduct of a Member State cannot be used to rescue an invalid intra-EU BIT arbitration agreement. According to the ECJ, any subsequent ad hoc consent of a Member State to arbitrate is part of the same intent expressed when the BIT arbitration clause was stipulated.[37])

Third, any attempt to remedy an intra-EU BIT arbitration clause is incompatible with the Member State's obligations under EU law, as expressed in the *Achmea* judgment and the Termination Agreement. The Member States are prevented from removing the investment disputes from the EU judicial system. Moreover, they are obliged to act against ongoing intra-EU BIT arbitration proceedings and intra-EU BIT arbitral awards.[38])

[32]) Case C-109/20, Republic of Poland v. PL Holdings Sarl, ECLI:EU:C:2021:321, Opinion of AG Kokott, ¶¶ 22 *et seqq.* (Apr 22, 2021).

[33]) Case C-109/20, Republiken Polen v. PL Holdings Sarl, ¶ 45 (citing Case C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:655, ¶¶ 59–60 (Sept 2, 2021) [which referred to Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, ¶ 55]).

[34]) *Ibid.* ¶ 47.

[35]) *Ibid.* ¶ 48.

[36]) *Ibid.* ¶ 49.

[37]) *Ibid.* ¶ 51.

[38]) *Ibid.* ¶¶ 52 *et seqq.*

B. Scenarios Not Covered by *PL Holdings*

1. General Considerations

Despite the extension of the preliminary reference question to both implicit and explicit ad hoc agreements, the *PL Holdings* judgment only concerned ad hoc agreements identical to intra-EU BIT arbitration clauses.[39]) Arbitration agreements concluded directly between a Member State and an investor, for example, in direct investment contracts or state contracts (*staatliche Aufträge*), were not (at least not explicitly) dealt with by the ECJ. It has to be examined whether these arbitration agreements also collide with EU law principles, as expressed in the *Achmea* judgment.[40])

The legal analysis should begin with the *three-step test*,[41]) which the Court was applying consequently in its intra-EU investment arbitration case law. The first criterion – whether the dispute may involve the application and interpretation of EU law – will presumably always be at stake when a Member State is involved in arbitration (in some form). Regarding the second criterion, the tribunals deciding on controversies arising out of direct investment contracts or state contracts may be integrated into the respective Member State's legal systems as "courts or tribunals" pursuant to Art. 267 TFEU. As this is currently not the case, the legal analysis in this article shall focus on the third step and the question of whether the commercial arbitration exception might be applicable.[42]) However, to analyze whether the commercial arbitration exception applies, its exact scope has yet to be determined.

2. Commercial Arbitration Exception

a) Nature of Consent as the Only Criterion

The ECJ's understanding of "commercial arbitration" seems open for interpretation.[43]) The Court defines commercial arbitration as proceedings that "originate in the freely expressed wishes of the parties".[44]) As such, they

[39]) *See supra* III.A.2.

[40]) *See* Christian W. Konrad, *Glosse zu EuGH 26. 10. 2021, C-109/20*, ecolex 293, 294 (2020).

[41]) *See supra* II.B.

[42]) *See* Case C-109/20, Republic of Poland v. PL Holdings Sarl, Opinion of AG Kokott, ¶¶ 43 *et seqq*.

[43]) *See* Ebert & Weyland, *supra* note 6, at 23.

[44]) Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, ¶ 55; Case C-741/19, Republic of Moldova v. Komstroy LLC, ¶ 59; Case C-638/19 P, European Commission v. European Food SA and Others, ECLI:EU:C:2022:50, ¶ 144 (Jan 25, 2022); Case C-333/19, DA and Others v. Romatsa and Others, ECLI:EU:C:2022:749, ¶ 39 (Sept 21, 2022) ("[…] d'arbitrage commercial, ne trouve pas son origine dans un accord spécifique reflétant l'autonomie de la volonté des parties […]").

are opposed to the treaties (BITs) between the Member States by which they opted for arbitration and excluded the jurisdiction of their national courts. It appears that the Court draws a distinction based (solely) on the nature of consent to arbitrate. Such a definition was also adopted by Advocate General Szpunar in his Opinion in the *Komstroy* case. He added that dispute settlement methods in investment treaties are "systemic in nature" because they exclude all disputes falling within the scope of the respective treaty.[45]) In contrast, commercial arbitration always rests upon an "arbitration agreement concerning a dispute specifically defined therein".[46]) The ECJ absorbed some of this in its two latest investment arbitration cases as it added the wording "generally and in advance" to its investment treaty definition while quoting the case law where this additional wording was not used.[47])

The *PL Holdings* judgment did not (substantially) modify the Court's understanding.[48]) While it extended the *Achmea* ruling to ad hoc or individual arbitration agreements (concluded outside of BIT), it encompassed only those agreements identical to intra-EU BIT arbitration clauses, which served as the legal basis for the same intra-BIT controversy.[49]) As previously mentioned, the Court considered that the Member State's consent to arbitrate was the same as the one expressed in the BIT.[50]) The ad hoc consent was, thus, merely an "extended arm" of the treaty clause.

b) Mapping out Additional Criteria

Unlike the ECJ's judgment in the *PL Holdings* case, which focused mostly on the circumvention argument, Advocate General Kokott analyzed the commercial arbitration exception in-depth.[51]) She brought into play the nature of the underlying dispute and the capacity in which the parties to the dispute are acting. First, she argued that both the arbitration agreement and "the disputed legal relationship itself" need to be resulting out of "the autonomous will of the parties," which is the case when the parties operate "on an equal

[45]) Case C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:164, Opinion of AG Szpunar, Komstroy ¶ 61 (Mar 3, 2021).

[46]) *Ibid.* ¶ 60.

[47]) Case C-638/19 P, European Commission v. European Food SA and Others, ¶ 144; Case C-333/19, DA and Others v. Romatsa and Others, ¶ 39.

[48]) But *see* Ebert & Weyland, *supra* note 6, at 23 *et seq.*

[49]) Case C-109/20, Republiken Polen v. PL Holdings Sarl, ¶ 67 ("Moreover, as regards the alleged serious difficulties, it should be noted that, as regards, first, the alleged impact that the present judgment might have on the arbitration agreements concluded by the Member States for various types of contract, *the interpretation of EU law provided* in *the present judgment refers only to ad hoc arbitration agreements concluded in circumstances such as those at issue in the main proceedings and summarised, in particular, in paragraph 65 above*.") (emphasis added).

[50]) *See supra* III.A.3.

[51]) Case C-109/20, Republic of Poland v. PL Holdings Sarl, Opinion of AG Kokott, ¶ 43 *et seqq.*

footing".[52]) In the *PL Holdings* case, we cannot assume such autonomous will as one party was confronted with sovereign measures of the state (banking supervision).[53])

Second, she noted that the principle of sincere cooperation (Art. 4 (3) TEU) prevents the Member States from removing disputes "relating to the sovereign application of EU law from the EU judicial system".[54]) Thus, the commercial arbitration exception may apply only if a Member State operates outside of duty of loyal cooperation (Art. 4 (3) TEU). According to AG Kokott, this appears to be the case only when sovereign measures or state authority are involved.[55])

However, some commentators argue that any involvement of Member States' public entities in arbitration, even in entirely commercial disputes, "could evade the full effectiveness of EU law" and "would arguably" conflict with the duty of loyal cooperation.[56]) These commentators rely on the ECJ's case law on the direct vertical effect of different labor law-related EU directives.[57]) In these cases, Member States failed to implement directives correctly, after which the affected individuals relied on the direct effect of these directives against the public entities of the Member States as their employers. The Court found that the capacity in which the Member State acted in those cases (as an employer) is irrelevant, as "it is necessary to prevent the State from taking advantage of its own failure to comply with Community law".[58])

In the author's opinion, this case law does not apply to the commercial arbitration exception. A Member State and its public entities submitting an entirely commercial dispute to arbitration is not the same as an incorrect implementation of a directive. Commercial arbitration, taken together with the limited review of the arbitral awards by national courts, is justified by the principle of efficiency of the arbitral proceedings and does not jeopardize the

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[52]) Case C-109/20, Republic of Poland v. PL Holdings Sarl, Opinion of AG Kokott, ¶ 52.

[53]) *Ibid.* ¶ 54.

[54]) *Ibid.* ¶¶ 55 *et seq.*

[55]) *Ibid.* ¶ 61 ("[…] it is not compatible with the effectiveness of EU law for Member States to conclude with certain investors individual arbitration agreements *in relation to sovereign measures for enforcing EU law*, where such agreements create a risk that the arbitration award will infringe EU law.") (emphasis added).

[56]) Morten Broberg & Niels Fenger, *The Law of Arbitration and EU Law – like Oil and Water?*, European Investment Law and Arbitration Review 87, 100 (Dec 21, 2022).

[57]) Case 152/84, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), 1986 E.C.R. 00723 (Feb 26, 1986); Case C-188/89, A. Foster et al. v. British Gas plc, 1990 E.C.R. I-03313 (July 12, 1990); *see also* Case C-268/06, Impact v. Minister for Agriculture and Food et al., ECLI:EU:C:2008:223 (Apr 15, 2008).

[58]) Case 152/84, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), ¶ 49; Case C-188/ 89, A. Foster et al. v. British Gas plc, ¶ 17; Case C-268/06, Impact v. Minister for Agriculture and Food et al., ¶ 85.

effectiveness of EU law, as the ECJ stated on several occasions.[59]) The commercial arbitration exception applies equally to all commercial arbitrations, irrespective of the parties involved. The Member States would otherwise be under the duty to prevent even purely private parties from using it or (at least) under the duty not to foster it.[60])

Legal commentators have similar notions about the commercial arbitration exception as AG Kokott. While some differentiate based on whether Art. 4 (3) TEU applies,[61]) others argue that the investor's claims must be rooted in civil rather than international law.[62])

As previously mentioned, the ECJ took no stance on AGs' opinions regarding the commercial arbitration exception. As it solely addressed the nature of consent to arbitrate (freely expressed will of the parties *versus* a treaty between the Member States), one might assume that the Court considers this the only distinction criterion. However, it is equally possible that the Court did not elaborate on the commercial arbitration exception because the matter was neither disputed nor (explicitly) referred to in the preliminary reference procedure. We can only speculate whether the Court has already made up its mind without communicating it or whether its silence comes from a pragmatic decision-drafting process. Both speculations can be supported by different passages of the *PL Holdings* judgment.[63]) While the Court explicitly stated that "the present judgment refers only to ad hoc arbitration agreements concluded in circumstances such as those at issue in the main proceedings",[64]) it did so not in its legal analysis of the question referred, but when dealing with the PL Holdings request to limit the temporal effects of the judgment. On the other hand, the Court also stated that "the legal approach envisaged by PL Holdings could be adopted in a multitude of disputes which may concern

[59]) Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV, 1999 E.C.R. I-03055, ¶ 35 (June 1, 1999); Case C-168/05, Elisa Maria Mostaza Claro v. Centro Movil Milenium SL, ECLI:EU:C:2006:675, ¶ 34 (Oct 26, 2006).

[60]) *See, e.g.*, Case C-265/95, Commission v. French Republic, 1997 E.C.R. I-06959, ¶ 32 *et seqq.* (Dec 9, 1997); Case 229/83, Association des Centres distributeurs Édouard Leclerc and others v. SARL "Au blé vert" and others, 1985 E.C.R. 1, ¶ 14 (Jan 10, 1985).

[61]) Scheu & Nikolov, *supra* note 28, at 258 *et seq.*; Köster, *supra* note 28, at 136 *et seq.*

[62]) Ebert & Weyland, *supra* note 6, at 23 (citing Wernicke, *supra* note 2, at 1647); but *see* Michel Schenk, Schiedsfreiheit und staatliche Schutzpflichten: Schiedsgerichtsbarkeit als Ausübung grundrechtlicher Privatautonomie – Unter Berücksichtigung einer Schiedsgerichtsbarkeit mit staatlicher Beteiligung 232 (2020).

[63]) *See* Guillaume Croisant, *CJEU Extends Achmea to Ad Hoc Arbitration Agreements Identical to Intra-EU BITs' Arbitration Clause*, Kluwer Arbitration Blog (October 28, 2021).

[64]) Case C-109/20, Republiken Polen v. PL Holdings Sarl, ¶ 67.

the application and interpretation of EU law, thus allowing the autonomy of that law to be undermined repeatedly".[65])

Upon taking a second look at the Court's sparse definition, it becomes clear that the nature of consent is likely not the only distinction criterion. First, the term "commercial arbitration" can only implicate an arbitration whose underlying legal relationship is commercial (in nature). The disputes arising out of the sovereign acts of a state, such as in investment protection, would not fall within this definition. A similar distinction between commercial and sovereign acts of states is made in the EU law instruments concerning the recognition and enforcement of judgments and the applicable law. Both the Brussel Ia Regulation[66]) and the Rome Regulations[67]) apply only "in civil and commercial matters", while the exercise of the state authority (*acta iure imperii*) is excluded.[68])

Second, from a systematical and teleological perspective, if one of the parties to arbitration is subjected to the duty of loyal cooperation regarding the underlying legal relationship, it may not remove this dispute from the EU judicial system. This would otherwise jeopardize the duty of loyal cooperation. In other words, the duty of loyal cooperation and the commercial arbitration exception mutually exclude each other. Finally, we may presume that AG Kokott's additional aspects to a commercial arbitration definition are (at least) implied by the ECJ.

The commercial arbitration analysis should, therefore, include all three aforementioned criteria: i) nature of consent (individual arbitration agreement *versus* treaty-based consent to arbitrate), ii) nature of dispute (commercial *versus* investment protection claims), and iii) capacity in which the parties to the disputes are acting and, in particular, the question of whether the participating Member State conduct's falls within the scope of application of Art. 4 (3) TEU.

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[65]) Case C-109/20, Republiken Polen v. PL Holdings Sarl, ¶ 49; *see also* Croisant, *supra* note 63.

[66]) Regulation 1215/2012, of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) 1.

[67]) Regulation 593/2008, of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6; Regulation 864/2007, of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40.

[68]) *See* Case 29/79, LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, 1976 E.C.R. 01541, ¶ 4 *et seq.* (Oct 14, 1976); *see also* Reinhold Geimer, *Art 1 EuGVVO*, *in* Zivilprozessordnung ¶ 19 (Richard Zöller ed., 32th ed. 2018); Ulrich Magnus, *ROM I Art 1, in* Staudinger BGB ¶ 21 (Ulrich Magnus ed., 2021).

3. Does the Commercial Arbitration Exception Apply to the Scenarios not Covered by *PL Holdings*?

Before analyzing whether the commercial arbitration exception applies to the scenarios not covered by *PL Holdings* judgment, we shall briefly tackle (direct) investment contacts, which enabled investment protection through direct contractual commitments. These contracts were the central mechanisms of investment protection in the 20th century until international treaties replaced them.[69]) They were widely used in oil (*e.g.,* as concession agreements) and infrastructure projects (most often as so-called BOOT [Build-Own-Operate-Transfer] contractual arrangements).[70])

The central parts of direct investment contracts were the so-called "stabilization clauses", by which the host state committed to refrain from changing the legal framework necessary for the execution of the contract during a certain period.[71]) In the newer contractual practice, the parties would temper the investment risk by including the renegotiation obligations if specific criteria are met.[72]) Equally important was the choice of law and the questions of if and when the international law (standards) should apply next to

[69]) *See* Ursula Kriebaum & August Reinisch, *36. Kapitel. Investitionsschiedsgerichtsbarkeit*, *in* Handbuch Schiedsrecht ¶ 36.38 (Dietmar Czernich, Astrid Deixler-Hübner & Martin Schauer eds., 2018); *see also* Rudolf Dolzer, *I History, Sources, and Nature of International Investment Law, in* Principles of International Investment Law 7 *et seqq.* (Ursula Kriebaum, Christoph Schreuer & Rudolf Dolzer, 3rd ed. 2022); Josefa Sicard-Mirabal & Yves Derains, Introduction to Investor-State Arbitration 47 (2018) ("In practice, the vast majority of investor-State arbitrations are now commenced based on the advance offer to arbitrate contained in BITs"); *see also* August Reinisch, § 21 Die *Beilegung von Investitionsstreitigkeiten, in* Internationales Wirtschaftsrecht ¶ 15 (Christian Tietje & Karsten Nowrot eds., 3rd ed. 2022).

[70]) *See* Karsten Nowrot, § 2 Steuerungssubjekte und *-mechanismen im Internationalen Wirtschaftsrecht, in* Internationales Wirtschaftsrecht ¶ 78 (Christian Tietje & Karsten Nowrot eds., 3rd ed. 2022); Mark Bungenberg & Friedl Weiss, § 7 Internationale Rohstoffmärkte*, in* Internationales Wirtschaftsrecht ¶¶ 67 *et seqq.* (Christian Tietje & Karsten Nowrot eds., 3rd ed. 2022).

[71]) Andre von Walter, *Chapter 3, Part I. Investor-State Contracts in the Context of International Investment Law, in* International Investment Law ¶ 19 (Mark Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch eds., 2015); Noah Rubins, Thomas-Nektarios Papanastasiou & N. Stephan Kinsella, International Investment, Political Risk, and Dispute Resolution ¶¶ 2.29 *et seqq.* (2nd ed. 2020); Rudolf Dolzer, *V Investment Contracts, in* Principles of International Investment Law 126–128 (Ursula Kriebaum, Christoph Schreuer & Rudolf Dolzer, 3rd ed. 2022); *see also* Bernhard Wychera, *Stabilisation Clauses in Investment Contracts, in* Austrian Yearbook on International Arbitration 2021 361 (Christian Klausegger *et al*. eds., 2021).

[72]) *See* Morris Besch, *Chapter 3, Part II. Typical Questions Arising with Negotiations, in* International Investment Law ¶¶ 35 *et seqq*. (Mark Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch eds., 2015).

the law of the host state, which was usually anyhow applicable. Moreover, investment contracts contain different dispute resolution clauses, usually with the possibility of arbitration.[73])

Let us now imagine that a Member State concluded an investment agreement with an investor from another Member State containing arbitration and full-stabilization clauses. Would these investor-state contracts fall within the commercial arbitration exception? The nature of consent appears unproblematic, as no international treaties would be involved. The respective arbitration agreement would rest on "the free wishes of the parties" expressed through a contractual provision. As previously discussed, the second point of the analysis is whether the underlying dispute is – in its nature – a commercial or investment one. Despite its contractual mantle, controversies over rights and obligations arising out of a stabilization clause involve the sovereign rights of the host state (particularly its right to regulate). Any controversies over this would most likely not be considered commercial in nature.

The involvement of sovereign measures would also bring Art. 4 (3) TEU into play and preclude the commercial arbitration exception in any case. Moreover, direct investment contracts might be used to circumvent the *Achmea* principles by outsourcing investment disputes from treaties into contracts. *PL Holdings* ruling would prohibit such a circumvention of the *Achmea* principles.

On the other hand, if a Member State or its agencies (or public companies) are involved in arbitration proceedings, there should be nothing to fear if the underlying contractual relationship is commercial in nature.[74]) For example, in the *Gazprom* case, arbitration over the shareholders' dispute between Lithuania and Gazprom, both shareholders in the Lithuanian gas company (*Lietuvos dujos*), was not problematized by the ECJ.[75]) Other notable examples are construction, service, or supply contracts by which the state covers its demands. The awarding of these contracts might – depending on value – be

[73]) Besch, *supra* note 72, ¶¶ 158 *et seqq*.

[74]) *See* also GIBSON DUNN, *The Latest Chapter of the Intra-EU Investment Arbitration Saga: What It Entails for the Protection of Intra-EU Investments and Enforcement of Intra-EU Arbitral Awards*, https://www.gibsondunn.com/wp-content/uploads/2022/02/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards.pdf (February 4, 2022) (accessed January 17, 2023) ("If, say, a *PL Holdings*-based challenge were to arise in the context of a private commercial agreement between an EU Member State and an EU investor, and a preliminary reference was made to CJEU, it is likely that the Court would be inclined *not* to extend the reach of *Achmea* to commercial arbitration agreements, following the artificial distinction it drew between commercial and investment arbitration agreements in *Achmea* and *Komstroy*.").

[75]) Case C-536/13, "Gazprom" OAO v. Lietuvos Respublika, ECLI:EU:C:2015:316 (May 13, 2015).

preceded by a detailed public procurement procedure.[76]) The awarded contract, however, is a commercial instrument of private law,[77]) and the claims arising out of or in connection with it can be submitted to arbitration.[78]) These disputes might concern contractual performance itself or claims for additional costs (*Mehrkostenforderungen*).[79])

C. Interim Conclusion

If we leave aside the discussion of whether the investment arbitration saga should have been solved differently by the ECJ, the ECJ's ruling in *PL Holdings* appears to be stringent and consequent. The ECJ will not tolerate any circumvention of the *Achmea* principles. The invalid intra-EU BIT arbitration clauses cannot be rescued by a subsequent ad hoc consent to arbitrate. However, the judgment did not clarify the commercial arbitration exception or whether the direct investment contracts and other forms of contracts between Member States and investors or private entities are also precluded under the *Achmea* principles. As long as the dispute is commercial in nature and the arbitration agreement is concluded outside the international treaty context, there should be nothing to fear. However, this might not be the case if the dispute concerns the Member State's sovereign rights, such as the right to regulate.

IV. Investor-Member State Arbitrations Based on the Energy Charter Treaty

The BITs are only part of the investment arbitration story, as states can also contract with each other multilaterally. Among the most notable multilateral treaties is the ECT, signed in 1994 and came into force in 1998.[80]) Strongly backed by the EU, it aimed to support the investments in the energy

[76]) Michael Holoubek, Claudia Fuchs, Kerstin Holzinger & Thomas Ziniel, Vergaberecht 116 *et seqq.* (6th ed. 2022).

[77]) *Eid.* at 19 *et seq.*

[78]) *See* Bundesvergabegesetz 2018 [BVergG 2018] [Federal Statute on Public Procurement 2018] Bundesgesetzblatt I [BGBl I] No. 65/2018, as amended, § 374, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010295 (Austria).

[79]) *See* Hans Gölles, *§ 374 BVerG 2018*, in BVergG 2018 ¶ 1 (Hans Gölles ed., October 1, 2020); Nationalrat [NR] [National Coucil] Gesetzgebungsperiode [GP] 26 Beilage [Blg] No. 69 227, https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00069/fname_686570.pdf (Austria) (accessed January 17, 2023).

[80]) *See* Crina Baltag, The Energy Charter Treaty – The Notion of Investor 7 *et seq.* (2012).

sector.[81]) It also introduced investor–state arbitration proceedings as a method of dispute resolution (Art. 26 ECT). The contracting parties to the ECT are the EU and its Member States, non-EU states (mainly in Eastern Europe), and some Asian countries.[82])

The ECT has enormous practical relevance. For example, the EU Member States found themselves as respondents in the intra-EU arbitrations 150 times until November 2022.[83]) Since the *Achmea* judgment, the Member States regularly raised the so-called intra-EU defense and objected to the tribunals' jurisdiction. However, this did not impress the arbitral tribunals, which continuously dismissed the intra-EU objections and confirmed their jurisdiction.[84]) While the details of their legal argumentations vary, the tribunals considered the rules of international law to be decisive in determining their jurisdiction.[85]) In June 2022, a tribunal constituted under the Rules of Stockholm Chamber of Commerce (SCC Rules) upheld the intra-EU objection for the first time and suggested that the tribunals' approach might change.[86])

Considering its enormous practical relevance, the ECJ addressed the question of the compatibility of the ECT dispute resolution mechanism with EU law in the *Komstroy* judgment in September 2021. It did so despite the case not having any connecting factors to EU law. We shall look closely at the respective *Komstoy* judgment (A). After that, we shall examine whether the other ECT-dispute resolution mechanisms – particularly ICSID arbitrations – share the same destiny under EU law (B). Finally, we shall briefly discuss the recent development of the ECT (C) and provide an interim conclusion (D).

A. *Komstroy* case (ad hoc arbitration)

1. Factual Background

A Ukrainian company (Komstroy, former Energoalians) initiated ad hoc arbitration proceedings against the Republic of Moldova (acc. Art. 26 (4) lit b

[81]) Baltag, *supra* note 80, at 11–13.

[82]) Energy Charter Treaty, Contracting Parties and Signatories, https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/ (accessed December 29, 2022).

[83]) Carsten Wendler, Laura Lozano & Julian Rotenberg, *Spain and other EU member states announce their withdrawal from the ECT: what are the implications for investors and arbitrations?* (November 1, 2022), https://riskandcompliance.freshfields.com/post/102i0he/spain-and-other-eu-member-states-announce-their-withdrawal-from-the-ect-what-are (accessed January 17, 2023).

[84]) *See* infra IV.B.3.

[85]) *Ibid.*

[86]) *See* Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V 2016/135, Award (June 16, 2022).

ECT) based on alleged violations of the ECT. After confirming its jurisdiction, which was disputed, the arbitral tribunal seated in Paris ordered the Republic of Moldova to compensate Komstroy.[87])

The Republic of Moldova challenged the arbitral award before competent French courts on public policy grounds, namely, lack of jurisdiction. It asserted that the claims assigned to Komstoy from the sale of electricity do not constitute an "investment" under ECT. After the French Supreme Court (*Cour de cassation*) annulled the setting aside judgment, the Regional Court of Appeal Paris (*Cour d'appel de Paris)* referred questions regarding the interpretation of the term "investment" under ECT and the territorial scope of application of the ECT to the ECJ.

2. Legal Reasoning

a) Jurisdiction

Unsurprisingly, the ECJ elaborated extensively on its jurisdiction, as the case was in no way connected to the Union, nor was EU law (directly) applicable to it.[88]) The Court's ruling on this matter was twofold. First, it emphasized that the ECT constitutes an act of the EU, as it was also concluded by the Council of the EU according to Art. 217 and 218 TFEU.[89]) Despite the underlying dispute not falling within the scope of the application of EU law, the Court upheld its jurisdiction. The Union has a "clear interest" in the uniform interpretation of the ECT, as the interpretation of the term "investment" might also arise in disputes falling *within* the direct scope of the application of EU law.[90]) Second, EU law is relevant as part of French law, which is – according to the parties' agreement – the law at the arbitral seat (*lex arbitri*).[91])

b) Substance

Before dealing with the referred questions, the ECJ provided a lengthy *obiter dictum* on whether the ECT's investor–state dispute settlement (ISDS) is compatible with EU law. In other words, it tackled the long-awaited question of whether the *Achmea* ruling also applies to investor-state arbitrations based on ECT. Unsurprisingly, after applying the *three-step test*, the Court ruled that an arbitration clause like Art. 26 (2)(c) ECT is contrary to EU law on the same grounds as in the *Achmea* judgment.[92]) Despite the ECT being a multilateral

[87]) Case C-741/19, Republic of Moldova v. Komstroy LLC, ¶ 13.

[88]) *See ibid.* ¶ 21 (This was argued by the Council of the EU and the Hungarian, Finnish, and Swedish governments, which participated in the proceedings.).

[89]) *Ibid.* ¶ 22.

[90]) *Ibid.* ¶¶ 29–31.

[91]) *Ibid.* ¶¶ 32 *et seqq.*

[92]) *See supra* II.B.

treaty, the Court found that the arbitration clause is *bilateral in nature* and that *Achmea* judgment applies.[93]) Thus, EU law precludes the ECT-arbitration clauses in the intra-EU context. However, EU law does not interfere when investors from third (non-EU) states invoke the ECT-based arbitration against Member States.[94])

Regarding the reference question, the ECJ ruled that the acquisition of claims arising from the sale of electricity does not constitute an investment under ECT. Providing an overview of the Court's rulings in this context is not crucial for the subsequent discussion.

B. Intra-EU ICSID Arbitrations

The underlying dispute in the *Komstroy* case was decided by an ad hoc arbitral tribunal established under the UNCITRAL Arbitration Rules (pursuant to Art. 26 (4)(b) ECT). However, Art. 26 (4) ECT offers two additional alternatives.[95]) The investors can also choose to arbitrate their ECT disputes under the SCC or ICSID Rules.[96]) As there are no significant differences between the UNCITRAL and SCC arbitrations, the *Komstroy* judgment applies to the latter in the same manner.[97])

However, it was debated whether this is the case with the ECT arbitrations conducted under the ICSID Rules.[98]) The ICSID Convention is a multilateral international treaty drafted in the 1960s by the World Bank. It introduced a system of "delocalized" arbitrations.[99]) The ICSID awards have the same legal

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[93]) Case C-741/19, Republic of Moldova v. Komstroy LLC, ¶ 64.

[94]) *Ibid.* ¶ 65.

[95]) *See* also Art. 26 (1) and (2) ECT (The first step is an amicable solution. If this is not possible within three months, the parties may choose between court proceedings, any other applicable dispute settlement mechanism previously agreed upon, and arbitration.).

[96]) *See* also Art. 26 (4)(a) ECT (If one ECT-contracting party is not a member of the ICSID Convention, the dispute can be arbitrated under the ICSID Additional Facility Rules.).

[97]) *See, e.g.,* Svea Hovrätt [SHovR] [Svea Court of Appeals] 2022-12-13 T 4658-18 (Swed.), https://jusmundi.com/en/document/pdf/decision/sv-novenergia-ii-energy-environment-sca-grand-duchy-of-luxembourg-sicar-v-the-kingdom-of-spain-svea-hovratt-dom-tuesday-13th-december-2022 (accessed January 17, 2023).

[98]) *See, e.g.,* Petyo Nikolov, *Investor-Staat-Schiedsverfahren gemäß Art. 26 ECT – Anmerkung zum Urteil des EuGH v. 2. 9. 2021, Rs. C-741/19 (Republik Moldau/Société Komstroy)*, EuR 496, 502 (2022); Stephan v. Marschall, *Vollstreckbarerklärung und Vollstreckung von ICSID-Schiedssprüchen in Deutschland,* RIW 785, 793 (2022); but *see* Stephan v. Marschall, *RIW-Kommentar zu EuGH, Urteil vom 25.01.2022, C-638/19*, RIW 228, 230 (2022).

[99]) Roderich C. Thümmel, § 25 Das *Investitionsschiedsverfahren, in* Schiedsgericht und Schiedsverfahren ¶ 6 (Rolf A. Schütze & Roderich C. Thümmel, 7th ed. 2021); v. Marschall, *supra* note 98, at 786; Nikolov, *supra* note 98, at 501.

effect as "if it were a final judgment of a court in that State" and shall not be subject to any subsequent review by the states, except the ones provided for in the Convention itself (Art. 50–52).[100]) A collision of an international treaty with these features and the principles of EU law, as expressed in *Achmea* and the subsequent judgments, is no surprise.

1. ECJ's Position

In the author's opinion, the ECJ (at least) implied what its position on intra-EU ICSID arbitration might be in the *Komstroy* judgment. On most occasions in the *Komstroy* judgment, the Court does not clearly distinguish between different types of arbitrations under Art. 26 ECT. Even though it analyzes only the arbitral proceedings under Art. 26 (4)(b) ECT, it regularly treats all three types of ECT arbitrations uniformly. When dealing with the ECT dispute resolution clause, the ECJ refers in most cases to Art. 26 (2)(c),[101]) or to Art. 26 (3)(a),[102]) or simply to Art. 26 ECT.[103])

Art. 26 (2)(c) ECT is simply a reference to all three types of arbitrations under the ECT, while Art. 26 (3)(a) is a provision by which the contracting parties unconditionally consent to arbitrate under all three types of arbitrations. Finally, the Court even concluded "[…] that Article Art. 26 (2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State".[104]) Thus, from the EU law perspective, the Court (at least) implied its position on all three types of arbitrations under the ECT, including the ICSID arbitrations.

The ECJ's two latest decisions regarding investment arbitration only confirmed this (*European Food* and *Romatsa*).[105]) Both decisions pertain to the *Micula* saga, an ICSID arbitration based on the Romania-Sweden BIT, followed by multiple enforcement attempts in different jurisdictions and the EU state

[100]) *See* Art. 54 (1) and Art. 53 (1) ICSID-Convention ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. […]").

[101]) Art. 26 (2)(c) ECT ("(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: […] (c) in accordance with the following paragraphs of this Article.").

[102]) Art. 26 (3)(a) ECT ("Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.").

[103]) Case C-741/19, Republic of Moldova v. Komstroy LLC, ¶¶ 40, 41, 47, 52, 59, 60, 65.

[104]) *Ibid*. ¶ 66.

[105]) *See* also v. Marschall, *supra* note 98, at 230.

aid proceedings.[106]) Taken together with the *Komstroy* judgment,[107]) rulings in *European Food* and *Romatsa* should also apply to ICSID arbitrations based on the ECT.

In the *European Food* case, the Court ruled that ICSID arbitration clauses contained in an intra-EU BIT are incompatible with EU law on the same grounds as in the *Achmea* judgment.[108]) One of the key issues was the temporal application of EU law. The EU law was applicable, as the *Micula* tribunal ruled not only over damages (allegedly) suffered before Romanian accession to the EU but also over the ones allegedly suffered *after* its accession. After applying the *three-step test*,[109]) the Court found that the state's consent to arbitrate expressed in an intra-EU BIT had been ineffective since the moment this state joined the EU, as the judicial system of the EU replaced it. The Court's words were the following: "In those circumstances, since, with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, *the consent given to that effect by Romania, from that time onwards, lacked any force*" (emphasis added).[110])

The ECJ confirmed this in its reasoned order in the *Romatsa* case, in which the Belgian Court asked whether the enforcement of the *Micula* ICSID award would be compatible with EU law. Using the same line of reasoning, the Court repeated that the arbitration clause is contained in an intra-EU BIT, so the arbitral award (as far as it is) based on this clause is also incompatible with EU law. Such an award cannot have any effect and cannot be enforced by a Member State in any event.[111])

With these judgments, the ECJ made its position unequivocally clear: EU law precludes all intra-EU investor–Member State arbitration agreements, irrespective of their type. Provided that the *three-step test* is satisfied, the *Achmea* case law also applies to the intra-EU ICSID arbitrations.

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[106]) *See infra* V.

[107]) *See* Case C-741/19, Republic of Moldova v. Komstroy LLC, ¶ 64 (The ECT is bilateral in nature.).

[108]) Case C-638/19 P, European Commission v. European Food SA and Others, ¶¶ 141–145.

[109]) *Ibid*. ¶¶ 141–144.

[110]) *Ibid*. ¶ 145; *see also* Case C-333/19, DA and Others v. Romatsa and Others, ¶ 40.

[111]) Case C-333/19, DA and Others v. Romatsa and Others, ¶¶ 43–44 ("Une telle sentence ne saurait donc produire aucun effet et ne peut ainsi être exécutée en vue de procéder au versement de l'indemnisation accordée par celle-ci.") ("Il convient, dès lors, de répondre aux deuxième et troisième questions posées que le droit de l'Union, en particulier ses articles 267 et 344 TFUE, doit être interprété en ce sens qu'une juridiction d'un État membre saisie de l'exécution forcée de la sentence arbitrale ayant fait l'objet de la décision 2015/1470 est tenue d'écarter cette sentence et, partant, ne peut en aucun cas procéder à l'exécution de celle-ci afin de permettre à ses bénéficiaires d'obtenir le versement des dommages et intérêts qu'elle leur accorde.").

2. National Courts

a) EU Member States (Present and Former)

With two exceptions (the United Kingdom Supreme Court and the Higher Regional Court of Berlin), the courts of the Member States followed the ECJ's investment arbitration case law. In February 2020, the United Kingdom Supreme Court lifted the stay on enforcement of the *Micula* arbitral award.[112]) Its key argument was that the duties under the ICSID Convention (Art. 54 and Art. 69) are owed to all ICSID-contracting states despite the intra-EU character of the underlying dispute.[113]) As the UK joined the ICSID Convention before its EU accession, the duties arising out of it shall not be affected by the EU-Treaties (Art. 351 TFEU).[114]) In February 2022, the European Commission reacted by initiating proceedings against the UK before the ECJ according to Art. 87 of the Withdrawal Agreement.[115])

In other EU Member States, the attempts to enforce the *Micula* award were unsuccessful. The Nacka District Court (Sweden)[116]) and, most recently, the Supreme Court of Luxemburg[117]) refused to enforce it. The Supreme Court of Luxemburg essentially relied on the *European Food* ruling and repeated that the arbitral clause in question became invalid when Romania joined the EU. Consequently, Romania did not waive its jurisdictional immunity.[118]) The Nacka District Court refused to enforce an award contrary to EU law.

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[112]) Micula and others v. Romania [2020] UKSC 5 [¶ 118] (appeals taken from [2018] EWCA (Civ) 1801 and [2019] EWHC (Comm) 2401), https://www.supremecourt.uk/cases/docs/uksc-2018-0177-judgment.pdf (accessed January 17, 2023).

[113]) Micula and others v. Romania [2020] UKSC 5 [¶¶ 104–108] (appeals taken from [2018] EWCA (Civ) 1801 and [2019] EWHC (Comm) 2401); *see also* Christian Tietje, Darius Ruff & Mathea Schmitt, *Final Countdown im EU-Investitionsschutzrecht: Gilt das Komstroy-Urteil des EuGH auch in intra-EU-ICSID-Verfahren?*, *in* Beiträge zum Transnationalen Wirtschaftsrecht Vol. 177, at 24 (Christian Tietje, Gerhard Kraft & Anne-Christina Mittwoch eds., Jan 2022).

[114]) Micula and others v. Romania [2020] UKSC 5 [¶ 116] (appeals taken from [2018] EWCA (Civ) 1801 and [2019] EWHC (Comm) 2401).

[115]) European Commission, Press Release IP/22/802, *Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid* (February 9, 2022).

[116]) Nacka Tingsrätt [NTR] [Nacka District Court] 2019-01-23 Ä 2550-17 (Swed.), https://www.italaw.com/sites/default/files/case-documents/italaw10319.pdf (accessed January 17, 2023).

[117]) Cour de cassation du Grand-Duché de Luxembourg [Supreme Court of the Grand Duchy of Luxembourg] July 14, 2022, No. 116/2022, https://justice.public.lu/content/dam/justice/fr/jurisprudence/cour-cassation/exequatur/2022/07/20220714-cas-2021-00061-116a.pdf (accessed January 17, 2023); *see also* Johannes Hendrik Fahner, *Anxieties about Achmea: Dutch Interim Relief Judge Refuses to Torpedo London seated-intra-EU Arbitration,* Kluwer Arbitration Blog (December 15, 2022).

[118]) Cour de cassation du Grand-Duché de Luxembourg [Supreme Court of the Grand Duchy of Luxembourg] July 14, 2022, No. 116/2022, at 29 *et seqq*.

Interestingly, the Nacka District Court dealt with Art. 54 ICSID Convention, under which Sweden is obliged to enforce an ICSID award as though it were a final Swedish judgment. The District Court found that an ICSID award is not treated differently, as any final judgment of the Swedish courts, which violates EU law, could not have been enforced either.[119])

Since *Achmea*, Germany has also been a dynamic investment arbitration jurisdiction, which is mainly owed to Sec. 1032 (2) of the German Code of Civil Procedure (GCCP). Under this provision, the parties may request the court to declare whether the arbitral proceedings are admissible before the tribunal's constitution. Three known requests concerning ICSID arbitrations followed the German Federal Court of Justice decision on the inadmissibility of the arbitral proceedings under the Austria-Croatia BIT.[120]) In the oldest one (dated April 2022), the Higher Regional Court of Berlin (HRC Berlin) rejected Germany's request to declare as inadmissible an intra-EU ICSID arbitration based on the ECT.[121]) An appeal before the German Federal Court is currently pending.[122])

Essentially, the HRC Berlin found that the rules of the ICSID Convention constitute a closed system that precludes any other remedies and, among them, the procedure under Sec. 1032 (2) GCCP.[123]) Surprisingly, the HRC Berlin found that the ECJ's investment arbitration case law (including the *European Food* judgment) does not apply to the admissibility procedure under Sec. 1032 (2) GCCP, which is exclusive to German procedural law.[124]) However, the HRC Berlin explicitly left open an outcome of setting aside proceedings if an ICSID arbitral tribunal does not take due account of the settled case law of the ECJ regarding the intra-EU investment disputes.[125]) Lastly, it took a stance on the

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[119]) Nacka Tingsrätt [NTR] [Nacka District Court] 2019-01-23 Ä 2550-17, at 13 (Swed.).

[120]) Bundesgerichtshof [BGH] [Federal Court of Justice] Nov 17, 2021, I ZB 16/21, BeckRS 2021, 39182 (Ger.).

[121]) Kammergericht Berlin [Higher Regional Court Berlin] Apr 28, 2022, 12 SchH 6/21, KluwerArbitration (Ger.), https://www.kluwerarbitration.com/document/getpdf/KLI-KA-ONS-22-49-001.pdf; *see* Laura Halonen & Sophie Eichhorn, *Berlin Court Finds that ICSID Arbitrations Are Immune from Achmea and Komstroy – At Least While They Are Ongoing*, Kluwer Arbitration Blog (July 21, 2022).

[122]) Bundesgerichtshof [BGH] [Federal Court of Justice] I ZB 43/22 (Ger.) (pending case).

[123]) Kammergericht Berlin [Higher Regional Court Berlin] Apr 28, 2022, 12 SchH 6/21, ¶¶ 3.a, 3.b; *see also* Halonen & Eichhorn, *supra* note 121.

[124]) Kammergericht Berlin [Higher Regional Court Berlin] Apr 28, 2022, 12 SchH 6/21, ¶ 3.b.

[125]) *Ibid.* ¶ 3.c ("Der Senat kann offen lassen, ob der Rechtsprechung des EuGH in einem Aufhebungsverfahren Rechnung getragen werden könnte, wenn ein nach der ICSID-Konvention gebildetes Schiedsgericht die europäische Rechtsprechung trotz der notwendigen Bindung an zwischen den Schiedsparteien geltendes Recht nicht hinreichend berücksichtigen würde.").

national courts' case law and set out the differences between those judgments and the case at hand.[126])

In the author's opinion, the HRC Berlin attempted to solve the conflict between international and EU law by "playing the ball back" to the arbitral tribunal, which should rule on its own jurisdiction, taking into account the *Achmea* case law. It might even appear that HRC Berlin tried to avoid the actual problem by relying on procedural aspects. While it is true that Sec. 1032 (2) GCCP is a procedural mechanism and that Member States have procedural autonomy, this autonomy cannot jeopardize the effectiveness of EU law. Whether the respective application of Sec. 1032 (2) GCCP by the HRC Berlin does this can be a subject of debate.

Later this year, in September 2022, the Higher Regional Court of Cologne (HRC Cologne) declared the ICSID arbitrations pursued against the Netherlands by *RWE*[127]) and *Uniper*[128]) inadmissible.[129]) Unlike the HRC Berlin, it interpreted Sec. 1032 (2) GCCP in light of the principle of effectiveness of EU law.[130]) While the HRC Cologne acknowledged the unique character of the ICSID Convention, characterized by the exclusion of national remedies, it found that the questions of admissibility and merits of the claims under the ICSID Convention were not subjects of its analysis. Instead, its task was to determine whether the arbitration agreement based on a provision of EU law (Art. 26 ECT) is valid.[131]) Lastly, the HRC Cologne added that in case of a collision, EU law prevails over the Member States' obligations to each other under international law.[132])

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[126]) Kammergericht Berlin [Higher Regional Court Berlin] Apr 28, 2022, 12 SchH 6/21, ¶ 3.c.

[127]) RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4.

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

[129]) Oberlandesgericht Köln [Higher Regional Court Cologne] Sept 1, 2022, 19 SchH 14/21, BeckRS 2022, 22871 (Ger.), https://www.justiz.nrw.de/static/pdfdownload/downloadEntscheidung.php?entscheidung=/nrwe/olgs/koeln/j2022/19_SchH_14_21_Beschluss_20220901.html; Oberlandesgericht Köln [Higher Regional Court Cologne] Sept 1, 2022, 19 SchH 15/21, BeckRS 2022, 22872 (Ger.), https://www.justiz.nrw.de/static/pdfdownload/downloadEntscheidung.php?entscheidung=/nrwe/olgs/koeln/j2022/19_SchH_15_21_Beschluss_20220901.html; *see also* Lars Markert & Anne-Marie Doernenburg, *RWE and Uniper: (German) Courts Rule on the Admissibility of ECT-based ICSID Arbitrations in Intra-EU Investor-State Disputes,* Kluwer Arbitration Blog (November 3, 2022).

[130]) Markert & Doernenburg, *supra* note 129.

[131]) Oberlandesgericht Köln [Higher Regional Court Cologne] Sept 1, 2022, 19 SchH 14/21, ¶ 36.

[132]) *Ibid*. ¶¶ 32, 38–39.

On the merits (*Begründetheit*), the HRC Cologne repeated the ECJ's case law on investment arbitration. After applying the *three-step test*, it found that the ECT arbitration clause referring to ICSID arbitration is contrary to EU law on *Achmea* grounds and arbitration based on such a clause is inadmissible. As the question has already been sufficiently clarified (*acte claire*), the HRC Cologne did not find it necessary to refer the question to the ECJ.

Earlier this year, in January 2022, the Lithuanian Supreme Court provided similar answers. It upheld the annulment of a decision issued by the first instance court, which refused to register Lithuanian claims against the French investors. Lithuania initially brought these as counter-claims against an investor group in an ICSID arbitration based on Lithuania-France BIT and withdrew them after the *Achmea* judgment.[133]) The Lithuanian Supreme Court emphasized that the *Achmea* case law "has consistently been developed in the sense that investment arbitration between EU Member States is not possible".[134]) It also found that offers to arbitrate with investors from other Member States expressed in the BITs made by Lithuania became "ineffective (by law)" on the day Lithuania accessed the EU.[135]) As previously mentioned, the ECJ confirmed such a legal assessment in *European Food* and *Romatsa* cases.[136])

Thus, the Supreme Court judgments from Lithuania and Luxemburg, the decision of the Nacka District Court in Sweden, and the latest judgments of the Higher Regional Court in Cologne follow the same rationale, which was applied for intra-EU non-ICSID awards by different instances of Swedish[137]) and French courts.[138]) As the ECJ's restrictive approach has been adopted and

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[133]) Clemens Wackernagel, *Investitionsschutz: Litauisches Gericht* für Klage *trotz parallelem ICSID-Schiedsverfahren zuständig, Anmerkung zu LAT, Urteil vom 18. 1. 2022 – e3K-3-121-916/22*, EuZW 567, 574 (2022); Inga Martinkutė, *Never-ending Achmea Saga: A New Episode from Lithuanian Courts Confirms That Intra-EU BITs Are Really Over*, Kluwer Arbitration Blog (June 24, 2022).

[134]) Lietuvos Aukščiausiasis Teismas [LAT] [Lithuanian Supreme Court] Jan 18, 2022, Civil case No. e3K-3-121-916/22, EuZW 567, 573 [¶ 71] (2022).

[135]) *Ibid*. ¶ 81.

[136]) *See supra* IV.B.1.

[137]) Högsta Domstolen [HD] [Supreme Court] 2022-12-14 T 1569-19 (Swed.), https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/2022/t-1569-19.pdf/ (accessed January 17, 2023); Svea Hovrätt [SHovR] [Svea Court of Appeals] 2022-12-13 T 4658-18 (Swed.), https://jusmundi.com/en/document/pdf/decision/sv-novenergia-ii-energy-environment-sca-grand-duchy-of-luxembourg-sicar-v-the-kingdom-of-spain-svea-hovratt-dom-tuesday-13th-december-2022 (accessed January 17, 2023).

[138]) Cour d'appel [CA] [regional court of appeal] Paris, com. int., Apr 19, 2022, No. RG 20/13085 (Fr.), https://jusmundi.com/en/document/pdf/decision/fr-strabag-se-raiffeisen-centrobank-ag-syrena-immobilien-holding-ag-v-the-republic-of-poland-arret-de-la-cour-dappel-de-paris-tuesday-19th-april-2022 (accessed January 17, 2023); Cour d'appel [CA] [regional court of appeal] Paris, com. int., Apr 19, 2022, No. RG 20/14581 (Fr.), https://www.cours-appel.justice.fr/sites/default/files/2022-04/19.04.2022%20RG%2020-14581.pdf (accessed January 17, 2023).

confirmed throughout the Union, it would be surprising if the German Federal Court of Justice does not do the same in the appeal judgment on the HRC Berlin's decision.

b) Courts Outside the EU

The courts outside the EU, in the USA, Australia, and New Zealand, were willing to recognize intra-EU ICSID awards. In June 2021, the Federal Court of Australia recognized an ICSID award against Spain.[139]) However, the High Court of Australia granted Spain's application for special leave to appeal, and the case is still pending.[140]) The question to be decided is whether and to what extent the Kingdom of Spain waived its state immunity under the ICSID Convention, as the Convention (English version) distinguishes between recognition, enforcement, and execution.[141]) Similarly, the New Zealand High Court rejected the state immunity objection and allowed the recognition proceedings to proceed.[142])

The precedent case in the USA is the enforcement of the *Micula* award.[143]) Essentially, the US District Court for the District of Columbia found the

[139]) *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3 (Feb 1, 2021) (Austl.), http://www.austlii.edu.au/cgi-bin/sign.cgi/au/cases/cth/FCAFC/2021/3 (accessed January 17, 2023); *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl (No 3*) [2021] FCAFC 112 (June 25, 2021) (Austl.), http://www.austlii.edu.au/cgi-bin/sign.cgi/au/cases/cth/FCAFC/2021/112 (accessed January 17, 2023).

[140]) *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor* [pending case] HCA S43/2022, https://www.hcourt.gov.au/cases/case_s43-2022 (accessed January 17, 2023).

[141]) *See* Nicholas Lingard & Ann Matthias, *Enforcement of foreign arbitral awards in Australia: where does 'recognition' end and where do 'enforcement' and 'execution' begin?*, (October 21, 2022), https://www.ibanet.org/enforcement-of-foreign-arbitral-awards-in-Australia (accessed January 17, 2023); *see also* Kelly Buchanan, *Australia: Court Recognizes ICSID Arbitration Award Against a Sovereign State* (September 16, 2021), https://www.loc.gov/item/global-legal-monitor/2021-09-16/australia-court-recognizes-icsid-arbitration-award-against-a-sovereign-state/ (accessed January 17, 2023).

[142]) *Sodexo Pass International SAS v Hungary* [2021] NZHC 371 (Dec 10, 2021), http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2021/371.html (accessed January 17, 2023); *see* Anna Kirk & Melding Green, *All dressed up but nowhere to go: Recognition but no enforcement of ICSID awards* (June 28, 2022), https://www.nziac.com/all-dressed-up-but-nowhere-to-go-recognition-but-no-enforcement-of-icsid-awards/ (accessed January 17, 2023).

[143]) The Judgments are contained in the following prior opinions: (1) Micula v. Government of Romania, 404 F. Supp. 3d 265 (D.D.C. Sept 11, 2019) (Micula I), *aff'd*, 805 F. App'x 1 (D.C. Cir. May 19, 2020); (2) Micula v. Government of Romania, No. 17-cv-2332-APM, 2020 WL 6822695 (D.D.C. Nov 20, 2020), *aff'd*, No. 20-7116, 2022 WL 2281645 (D.C. Cir. June 24, 2022); and (3) Micula v. Government of Romania, No. 17-cv-2332-APM, 2021 WL 5178852 (D.D.C. Nov 8, 2021), *appeal filed* Dec 7, 2021, ECF No. 178; *see also* Lawrence Northmore-Ball, Jennifer Harvey & Amber Courtier, *Micula v Romania – A Saga of Lasting Significance*, European Investment Law and Arbitration Review Online 74, 102 (Dec 20, 2021).

Achmea judgment inapplicable, because – unlike in the *Achmea* case – "all key events to the parties' dispute" occurred before the Member State (*in casu* Romania) joined the EU.[144]) Whether the enforcement courts will follow this rationale with intra-EU arbitrations commenced *after* the EU accession remains open.[145])

All eyes are now directed to the ongoing recognition proceedings, which are expected to clarify this. Concerning the ECT awards, the US District Court for the District of Columbia was willing to stay the enforcement pending the setting aside decision of the court at the arbitral seat (*in casu* Sweden).[146]) The Svea Court of Appeals court recently annulled one of these awards, subject to a further appeal before the Swedish Supreme Court.[147]) Moreover, different judges of the US District Court for the District of Columbia were also willing to stay the enforcement pending the results of ICSID annulment proceedings.[148]) After the ICSID ad hoc committee rejected the annulment of the awards on March 18, 2022, the US District Court lifted the stay in the *NextEra Energy v. Kingdom of Spain* case. As both parties filed subsequent motions, the proceedings are still ongoing.[149]) The same is happening in other enforcement proceedings of ICSID awards in the USA.[150])

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[144]) *See* Micula v. Government of Romania, 404 F. Supp. 3d 265 (D.D.C. Sept 11, 2019), *aff'd*, 805 F. App'x 1 (D.C. Cir. May 19, 2020).

[145]) Northmore-Ball, Harvey & Courtier, *supra* note 143, at 102; Alexander A. Yanos, *Intra-EU investment treaty disputes in US courts*, The Arbitration Review of the Americas 2023 (July 29, 2022), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2023/article/intra-eu-investment-treaty-disputes-in-us-courts (accessed January 17, 2023); *see also* v. Marschall, *supra* note 98, at 790 [n.56].

[146]) Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain 2020 U.S. Dist. LEXIS 12794; *see also* Cef Energia, BV v. Italian Republic, No. 19-cv-3443 (KBJ), 2020 U.S. Dist. LEXIS 120291 (D.D.C July 23, 2020); *see also* Yanos, *supra* note 145.

[147]) *See supra* note 137.

[148]) NextEra Energy Global Holdings v. Kingdom of Spain, No. 1:19-cv-01618-TSC (D.D.C. Sept 30, 2020); RREEF Infrastructure (G.P.) Limited, et al. v. Kingdom of Spain, No. 1:19-cv-03783 (CJN) (D.D.C. Mar 31, 2021); Hydro Energy 1, S.A.R.L., et al., v. Kingdom of Spain, No. 21-2463 (RJL) (D.D.C. June 25, 2022).

[149]) *See* https://jusmundi.com/fr/document/decision/en-nextera-energy-global-holdings-b-v-and-nextera-energy-spain-holdings-b-v-v-kingdom-of-spain-minute-order-of-the-united-states-district-court-for-the-district-of-columbia-granting-consent-motion-for-order-friday-29th-april-2022 (accessed January 17, 2023).

[150]) *E.g.*, RREEF Infrastructure (G.P.) Limited, et al. v. Kingdom of Spain, ICSID Case No. ARB/13/30; Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20; Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31; *see also* Yanos, *supra* note 145.

3. Arbitral Tribunals

As previously stated, the arbitral tribunals found the *Achmea* judgment inapplicable and rejected the intra-EU jurisdictional objection. After interpreting the ECT (and the ICSID Convention) pursuant to the Vienna Convention on the Law of Treaties (VCLT), the ECT tribunals upheld their jurisdiction.[151]) This did not change even after the *Komstroy* judgment in September 2021, as the tribunals consistently ruled that international – and not EU law – governs the question of their jurisdiction.[152])

However, in June 2022, the first-ever investor-state arbitral tribunal upheld the intra-EU jurisdictional objection in an ECT-based arbitration conducted under the SCC Rules.[153]) The starting point of the tribunal's lengthy analysis (¶¶ 331–478) was the interpretation of the arbitration clause (Art. 26 ECT) under the rules of treaty interpretation (Art. 31 and 32 VCLT). Despite the wording of Art. 26 ECT ("unconditional consent to the submission of a dispute to international arbitration"), which might be considered clear "on paper", the tribunal acknowledged "the complexities of this case" by applying the principle of good faith.[154]) Therefore, the tribunal continued its interpretation of Art. 26 ECT. Essentially, it found that the context and object and purpose of Art. 26 ECT require the tribunal to apply EU law and the ECJ's judgments regarding investment arbitration.[155])

As some commentators noticed,[156]) the tribunal qualified the interplay between EU law and ECT as a matter of *lex superior rather* than one of *lex specialis* or *lex posterior.*[157]) Whether ICSID tribunals will adopt a similar rationale remains open. Even the tribunal in *Green Power v. Spain* appears to

[151]) *E.g.*, Vattenfall AB e.a. v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶¶ 169–232 (Aug 31, 2018); Mathias Kruck et al. v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, ¶¶ 280–295 (Apr 19, 2021); Masdar v. Kingdom of Spain, ICSID Case No. ARB 14/1, Award, ¶¶ 679–683 (May 16, 2018).

[152]) *See* Mathias Kruck et al. v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision of the Respondent's Request for Reconsideration of the Tribunal's Decision dated April 19, 2021, ¶¶ 32–48 (Dec 6, 2021); Infracapital F1 S.a.r.l. et al. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration regarding the Intra-EU Objection and the Merits, ¶ 107 (Feb 1, 2022); Sevilla Beheer B.V. et al. v. Kingdom of Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, ¶ 620 (Feb 11, 2022).

[153]) Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V 2016/135, Award (June 16, 2022).

[154]) *Ibid*. ¶¶ 343 *et seqq*.

[155]) *Ibid*. ¶¶ 398, 405.

[156]) Federica I. Paddeu & Christian J. Tams, *Interpreting Away Treaty Conflicts? Green Power, ISDS and the Primacy of EU Law*, Kluwer Arbitration Blog (August 23, 2022).

[157]) Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V 2016/135, Award, ¶ 469 (June 16, 2022).

imply that EU law might interact differently with the ICSID arbitrations as it does with arbitrations seated in the EU.[158])

Judged based on the development following *Green Power v. Spain* case, the ICSID tribunals will continue rejecting the intra-EU objection. For example, the arbitral tribunal in *Infracapital v. Spain* rejected the Respondent's Second Request for Reconsideration, which was filled following the *Green Power v. Spain* award.[159]) Unsurprisingly, the tribunal relied on the differences in seat of arbitration and arbitration rules.[160])

Most recently, in October 2022, the arbitral tribunal in *Portigon v. Spain* issued a majority decision and dismissed Spain's request to reconsider the intra-EU jurisdictional objection.[161]) It has been reported that Mr. Sacerdoti, the arbitrator appointed by Respondent, partially dissented and opined that the tribunal is incompetent to hear the dispute as the ECT arbitration clause does not apply in the intra-EU context.[162])

C. ECT: Recent Developments

In June 2022, the ECT Conference reached an agreement in principle on the modernization of the ECT.[163]) The Conference took the ECJ's case law seriously, as the newly proposed dispute settlement clause should not apply between two contracting parties, which are members of the same "Regional Economic Integration Organization" (such as the EU). Moreover, the proposal takes into account the shift of paradigm toward renewable energy.[164]) For example, under the so-called "flexibility mechanism", new fossil fuel-related

[158]) Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain, SCC Case No. V 2016/135, Award, ¶¶ 439–441 (June 16, 2022).

[159]) Infracapital F1 S.a.r.l. et al. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Second Request for Reconsideration (Aug 19, 2022); *see also* Sevilla Beheer B.V. and others v. Kingdom of Spain, ICSID Case No. ARB/16/27, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction, Liability and Principles of Quantum (Aug 11, 2022).

[160]) Infracapital F1 S.a.r.l. et al. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Second Request for Reconsideration, ¶¶ 39–49 (Aug 19, 2022).

[161]) Portigon AG v. Kingdom of Spain, ICSID Case No. ARB/17/15; Wendler, Lozano & Rotenberg, *supra* note 83.

[162]) Wendler, Lozano & Rotenberg, *supra* note 83.

[163]) Agreement in principle on the modernization of the Energy Charter Treaty (June 24, 2022), https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (accessed January 17, 2023); *see also* Simon Maynard & Mikhail Kalinin, *ECT Modernisation Perspectives: Unpacking the Impact of the Revised ECT Text on Dispute Resolution*, Kluwer Arbitration Blog (November 6, 2022).

[164]) *See* Maynard & Kalinin, *supra* note 163.

investments will not enjoy further protection under the ECT and the existing ones only for the next ten years.[165])

Due to a lack of political consensus, the Charter Conference scheduled for the end of November 2022 was postponed until April 2023.[166]) However, numerous contracting states like Belgium, the Netherlands, Spain, Germany, Poland, Slovenia, Luxembourg, and France are either considering their withdrawal from the ECT or have already announced it.[167]) It remains open whether these states will change their positions. A unilateral withdrawal would not be beneficial, as the sunset clause protects the existing investments for another twenty years after withdrawal (Art. 47 (3) ECT). For example, after its withdrawal in 2016, Italy has faced seven known ECT claims.[168])

D. Interim Conclusion

The ECJ does not distinguish between different types of investor-Member State arbitration clauses, as the Member States' consent to arbitrate with an investor from another Member State became ineffective from the moment it joined the EU.[169]) Whether the arbitration clause directs the parties to institutional or ICSID arbitration does not make a difference from an EU law perspective. With few exceptions, the courts in the Member States have been following the ECJ's case law – also regarding ICSID arbitrations. All eyes are now set on the German Federal Court of Justice, which is expected to decide on the appeal against the decision of the HRC Berlin until the summer of 2023.

Regarding the courts outside the EU, the following year(s) should clarify how these courts will proceed with the recognition and enforcement of the intra-EU ICSID awards after the ICSID ad hoc committee rejected requests for annulment. If the enforcement outside the EU should fail, this could affect the ICSID tribunals, as they might not be able to produce enforceable awards any longer.

The risk of having its SCC award set aside might have also been among the reasons the SCC tribunal in *Green Power v. Spain* decided to "break the ice" and, for the first time, uphold the intra-EU objection. As we saw later this year, the tribunal's reflex was correct, as the Swedish courts annulled intra-EU

[165]) Agreement in principle on the modernization of the Energy Charter Treaty, *supra* note 163, at 141 *et seqq.* (applies to EU and UK and minimally to Switzerland).

[166]) *See* GIBSON DUNN, *Energy Charter Treaty – Recent Developments* (Dec 5, 2022), https://www.gibsondunn.com/wp-content/uploads/2022/12/energy-charter-treaty-recent-developments.pdf (accessed January 17, 2023).

[167]) *Ibid.*; *see also* Johannes Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) near)*, Kluwer Arbitration Blog (November 4, 2022).

[168]) Wendler, Lozano & Rotenberg, *supra* note 83.

[169]) *See supra* IV.B.1.

awards based on the *Achmea* grounds. The award in *Green Power v. Spain* would undoubtedly have the same fate.

V. Excursus: Arbitral Awards as Illegal State Aid?

Whether the implementation of intra-EU investment-state arbitral awards may be qualified as illegal state aid was another great unknown after the *Achmea* judgment. The ECJ shed some light on the matter in the *European Food* case.[170]) Advocate General Szpunar accurately described this case as "situated at the junction between investment arbitration and the law on State aid".[171]) The EU apparently decided to use this effective weapon in its confrontation with investment arbitration,[172]) as the Member States can be ordered to recover the payments concerning intra-EU arbitral awards from the investors if these would constitute illegal state aid.[173])

The *European Food* case itself is part of the so-called *Micula* saga, which comprises numerous enforcement proceedings of an ICSID award against Romania in different jurisdictions and subsequent EU state aid proceedings (in all instances). The long history of the *Micula* saga dates back to the Romanian pre-EU era.[174]) After Romania repealed the tax incentives for investments in disadvantaged regions, two Swedish investors (Micula brothers) commenced an ICSID arbitration based on the Romania-Sweden BIT in 2005. The case was decided in the investors' favor in 2013, and the compensation awarded was partially set off with taxes owed to the Romanian state and partially paid. The European Commission found that these payments constituted state aid incompatible with the internal market according to Art. 107 (1) TFEU.

The General Court of the EU (GCEU) overturned the Commission's decision. It found that the Commission did not have jurisdiction *ratione temporis* to decide over events pre-dating Romanian accession to the EU. The *Micula* case landed before the ECJ upon the Commission's appeal. The ECJ set the judgment aside and referred the case back to the GCEU. The key issue was the date at which the right to receive aid was conferred. While the GCEU found that this was the date at which the respective claims due to the withdrawal of the Romanian tax incentives arose, the ECJ ruled that the right

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[170]) Case C-638/19 P, European Commission v. European Food SA and Others.

[171]) Case C-638/19 P, European Commission v. European Food SA and Others, ECLI:EU:C:2021:529, Opinion of AG Szpunar, ¶ 2 (July 1, 2021).

[172]) *See* v. Marschall, *supra* note 98, at 230.

[173]) *See* Burkhard Hess, Europäisches Zivilprozessrecht ¶ 12.62 (2nd ed. 2021); *see also* Rainer Lukits, *Beihilfenrecht und Investitionsschutz, in* Jahrbuch Beihilfenrecht 2022 447, 466 (Thomas Jäger & Birgit Haslinger eds., 2022).

[174]) Romania joined the EU on January 1, 2007.

to receive state aid became definite only after the arbitral award was issued.[175]) As this post-dated Romanian accession to the EU, the Commission did not exceed its jurisdiction. The question of whether the payments done by the Romanian state constitute illegal state aid under Art. 107 (1) TFEU was referred back to the GCEU, which should examine the substantial standards and, in particular, make the necessary assessments of the facts. Considering the recent case law regarding state aid, it would be a surprise if the courts ruled that the substantial standards were not met.[176])

In the *European Food* case, the ECJ also dealt with GCEU's finding that the *Achmea* judgment did not apply to the case at hand.[177]) The *three-step test* led to the conclusion that the respective ICSID arbitration clause contained in Romania-Sweden BIT is incompatible with EU law on the same grounds as in the *Achmea* judgment.[178]) The Court emphasized that the Member State's consent to arbitrate contained in an intra-EU BIT became ineffective with its accession to the EU.[179]) Despite the tribunal deciding on the events that pre- and post-dated the EU accession, it appears that EU law precluded the arbitration agreement also regarding the events pre-dating the EU accession.[180]) This kind of retroactive application is not in the best interest of legal certainty.

VI. Summary and Outlook

It is most likely that the *Achmea* case law and its follow-ups apply to direct investment contracts if the underlying dispute affects the sovereign rights of a Member State. The *three-step test* and the circumvention argument (*PL Holdings*) point in this direction. On the other hand, arbitrations between Member States and private entities based on contractual arbitration clauses and affecting *merely commercial disputes* should be unproblematic under EU law (commercial arbitration exception).

In its recent intra-EU investment protection judgments, the ECJ was unequivocally clear: there will be no compromises about the autonomy of EU law. The ECJ rests at the top of the Union's system of judicial protection and has an exclusive right to interpret EU law. The intra-EU ISDS (as it is) does not

[175]) Case C-638/19 P, European Commission v. European Food SA and Others, ¶¶ 123 *et seq*.

[176]) v. Marschall, *supra* note 98, at 230; *see also* Jan Asmus Bischoff, *Du sollt keine anderen Götter haben neben mir: Der EuGH auf Konfrontationskurs mit dem Völkerrecht*, ZEuP 952, 962 (2022).

[177]) Case C-638/19 P, European Commission v. European Food SA and Others, ¶ 136.

[178]) *Ibid*. ¶¶ 137–145.

[179]) *See supra* IV.B.1.

[180]) *See* v. Marschall, *supra* note 98, at 230.

fit into this system (the *three-step test*) and is precluded by EU law once the state joins the EU.

Through the ECJ's lens, EU law derogates international law in the intra-EU context. However, arbitral tribunals and the courts outside the EU, which might be enforcing intra-EU awards, look at the matter through the lens of international law. They resort to the VCLT and interpret EU law as another international treaty and not automatically as *lex superior* in the intra-EU context. In the author's opinion, the ability to enforce the intra-EU ISDS awards could decide the outcome of this "clash of the titans". As demonstrated above, this will not be possible within the Member States of the Union, which must ensure the full effect of EU law. The reactions of courts outside the Union to the ECJ's newest decisions – particularly in the UK, the USA, and Australia – might be crucial. It remains to be seen whether they will maintain their pro-enforcement attitude. Another critical role might be played by the EU state aid proceedings, as the Member States can be ordered to recover the payments concerning intra-EU ICSID awards, which constitute illegal state aid.

In the author's opinion, the critics of the ECJ's case law are justified in some points. While the Court precluded the intra-EU investment treaty protection system, the investors were not offered an equivalent alternative. The intra-EU investments are rather left at the mercy of the Member States' courts, some of them not delivering a satisfactory level of judicial protection. That the level of protection ought to be as agreed in the Treaties, and any existing gap filled within the system will not remedy the present deficits.[181]) Paradoxically, non-EU investors, if protected by an investment treaty, may enjoy a better level of protection for the investments made in a Member State than their EU counterparts.

Finally, from an EU law perspective, the ECJ's post-*Achmea* decisions can be considered the last nails in the coffin of intra-EU *treaty-based* investment arbitrations. However, considering the diversity of actors and the complexity of the legal questions involved, the intra-EU investment arbitration saga appears to be far from over.

[181]) *See* Case C-109/20, Republiken Polen v. PL Holdings Sarl, ¶ 68 ("Secondly, the individual rights which PL Holdings derives from EU law must be protected within the framework of the judicial system of the Member States, namely, in the present case, the Polish judicial system. Consequently, even if it were established that there is a lacuna in the protection of those rights, as is alleged by PL Holdings, that lacuna would have to be filled within that system, if necessary with the cooperation of the Court in the context of its powers; however, such a lacuna cannot justify allowing a failure to comply with the provisions and fundamental principles referred to in paragraph 65 above.").