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Developments of Investment Arbitration in the European Union: Achmea and Beyond

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This paper reviews the Achmea decision issued by the Court of Justice of the European Union and its effects on European Union Law. The 2018 judgment (dictated as a preliminary ruling) indicates that ISDS and European Union Law are essentially incompatible. As a consequence of this decision, the Commission and EU Member States adopted several measures seeking to adjust their standards to the new criteria of the Court of Justice. Such measures are also reviewed in this paper.

The case of the Energy Charter Treaty (ECT) is assessed with particular interest as many international investment proceedings have been grounded on this treaty, and because its reach extends beyond EU Member States. Additionally, the paper also reviews the impact of the Achmea decision on the enforcement of subsequent arbitration procedures between States and investors.

Achmea has added uncertainty to a scenario of international investments which was already distressed by the COVID-19 pandemic. These circumstances may prove detrimental for international capital flows in the mid to long term.

Achmea decision, Bilateral Investment Treaty, ISDS, Energy Charter Treaty, EU Investment Law, enforcement of arbitral decisions, EU Law autonomy, Mutual Trust Principle, ICSID

1. Introduction

The European Union's assumption of competences in the investment sector has not been a model of consistency. The Commission has acted piecemeal and not always adequate, especially in dealing with the pre-Lisbon Treaty system, which relied on the BITs signed by the Member States and, within this, with respect to the dispute settlement mechanism they include.¹ As a corollary of the absence of a common position on investment, the Union's ability to conduct the necessary international negotiations has been restricted. The inconsistencies have been projected, essentially, in the treatment

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¹ Davide Rovetta, *Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues*, Eur. Y.B. Int'l. Econ. L. 221-233 (2013).

shown towards the referred BITs which, it must not be forgotten, are instruments regulated by the public international law carrying a series of obligations to the States parties that cannot be ignored. The treatment is divided between the Agreements between Member States and the Agreements between Member States and Third States but, strictly speaking, it is based on an a priori consideration: their opposition to them, without offering alternative solutions at an initial stage. Nor did the transitional regime established by Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries² bring about a harmonious solution, with particular solutions persisting, some of which are intended to be avoided by the *Commission manu militari* through the filing of infringement proceedings.³

If a common denominator can be extracted from the EU position during this period, it has been a prejudice, also a priori, towards the investment dispute settlement system still in force, provided for both in the BIPs and in the Energy Charter Treaty, without taking into account its usefulness and contributions. Here the Commission's incoherent policy has been conditioned by three circumstances. Firstly, the rejection movement of certain groups, which has had the virtue of politicizing the issue when investment arbitration was born precisely with the aim of depoliticizing this type of disputes. Secondly, the impact of the jurisprudence of the Court of Justice was made concrete in cases C-205/06 (*Commission / Austria*), C-249/06 (*Commission / Sweden*) and C-118/07 (*Commission / Finland*), where the incompatibility of the BITs with certain provisions on capital and payments of the ECT was declared.⁴ In these proceedings, the Commission had additionally argued that the Member States had not complied with the obligation to bring their bilateral commitments into line with the original law in accordance with Article 307.2 TEC, and in all three decisions the CJ declared that Austria, Sweden and Finland had failed to comply with their obligations

² OJ L 351, 20.12.2012, 40–46

³ José Carlos Fernández Rozas, *Conjeturas en torno a la nueva política global europea en materia de inversión internacional tras el Reglamento n° 912/2014*, La Ley Unión Europea, 5-27 n. 18 (2014).

⁴ See Nikolaos Lavranos, *European Court of Justice—Infringement of Article 307—Failure of Member States to Adopt Appropriate Measures to Eliminate Incompatibilities between the Treaty Establishing the European Community and Bilateral Investment Treaties Entered into with Third Countries Prior to Accession to the European Union*, 103 Am. J. Int'l L. 716–722 n.4 (2009); Francisco José Pascual Vives, *El subsistema regional comunitario ante el régimen internacional de protección de las inversiones extranjeras*, 36 Revista de Derecho Comunitario Europeo, 467-495 (2010)

under the TEC, after pointing out that the clauses on the free transfer of capital contained in their BITs with third countries were contrary to the TEC (requiring their renegotiation or termination). Specifically, it considered that they were incompatible with articles 57.2, 59 and 60.1 TEC, on the free movement of capital and payments, that it was up to the Member States to request the amendment of the agreement in question in each case and that when they found any incompatibility with EU law, which required the amendment of an agreement, they were obliged to denounce it, provided that the incompatibility was sufficiently clear. These conclusions of the CJEU have been extended to almost all BITs concluded by EU Member States with third countries.

Finally, the negotiations that were taking place at the time between the EU and the USA towards a Transatlantic Trade and Investment Agreement. In the latter case, the Commission was obliged to adopt certain criteria on transparency, the possible creation of an appellate court, the application of arbitration awards and possible future appeal mechanisms, but it did not have well-structured starting documentation for this operation. Although the negotiations were not finalized, these approaches are reiterated as a result of the drafting of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) into force provisionally in 2017.

2. *Achmea decision*, March 6th of 2018

After more than 150 intra-European Union investment arbitrations, the Court of Justice of the European Union, in case C-284/16 *Achmea*, decided by a majority⁵ to adopt a shift in paradigm through a historic ruling,⁶ declaring an incompatibility between the arbitration clause included in the Bilateral Investment Treaty (BIT), adopted in 1991 between the Netherlands and Czechoslovakia, and the law of the European Union (EU).

In 1993, Slovakia undertook the obligations of Czechoslovakia as its legal successor, including those that originated from said treaty. Slovakia later entered the European Union in 2004. After Slovakia opened-up the health insurance market, Achmea, part of a Dutch company, invested in that market during 2004. Following a change in government in 2006, the new Slovakian authorities reversed a portion of those

⁵ EU:C: 2018:158. Bjorn Arp, *Slowakische Republik (Slovak Republic) v. Achmea B.V.*, 112 Am. J. Int'l L. 469 n. 3 (2018).

⁶ Burkhard Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice* 19 Magazine Eletrônica of Direito Processual 116 n. 3 (2018).

economic policies, adopting measures such as prohibiting health insurance companies from distributing profits. In 2008, Achmea initiated an arbitration procedure under the rules of the United Nations Commission on International Trade Law (UNCITRAL) against Slovakia, using the city of Frankfurt am Main as the seat of arbitration, subjecting the dispute to German law, and arguing that the prohibition to distribute profits was an infringement of Article 4 of the BIT between Slovakia and the Netherlands.⁷ Slovakia, with the support of the European Commission, plead lack of jurisdiction, arguing the arbitral tribunal described in Article 8.2 of the BIT was incompatible with EU law, as Slovakia was now part of the European Union.

This objection was dismissed by the arbitral tribunal in October of 2010. Slovakia's subsequent actions for annulment and appeal before the German courts against this interlocutory arbitral decision were also dismissed.

The final ruling, issued in December of 2012, concluded that Slovakia had committed a violation of the principle of Fair and Equitable Treatment (FET) as well as a violation of the clause of free transfer of profits, thus ordering Slovakia to compensate the Dutch company with a sum in excess of EUR 22 million. Slovakia filed an action for annulment before the Higher Regional Court of Frankfurt am Main, which was later dismissed. Slovakia then appealed on a point of law to the Bundesgerichtshof (German Federal Court of Justice), on the basis that the arbitration clause contained in Article 8 of the BIT was incompatible with Articles 18, 267, and 344 of the Treaty on the Functioning of the European Union (TFEU). In this appeal, Slovakia argued that complying with the arbitral tribunal's award would infringe public policy, stating that the ruling was contrary to Article 18.1 of the TFEU, which prohibits discrimination on grounds of nationality; Article 267 of the TFEU, that sets forth the preliminary rulings system within the Court of Justice of the European Union (CJEU) to settle cases relating to EU law; as well as Article 344 of the TFEU, which prohibits deciding questions relating to EU law in a court different than the CJEU.

As a result of this action, the Bundesgerichtshof stayed the proceedings and referred three questions to the CJEU. In its filing, the Bundesgerichtshof provided its own understanding of the case, and stated that the scope of Article 344 of the TFEU, in the light of the caselaw of the CJEU, does not pose any obstacle for individuals to bring a

⁷ PCA Case No. 200813

claim against a Member State, adding that an investment arbitration is compatible with Article 267 of the TFEU. The Bundesgerichtshof also mentions that although arbitral tribunals are not tribunals as per the definition of that article –and therefore cannot make direct references for preliminary matters–, State courts may ultimately review the compatibility of the ruling at the enforcement stage and, whenever in doubt, may refer prejudicial questions to the CJEU. Finally, the Bundesgerichtshof acknowledged that a BIT within the EU that allows for a more favorable treatment of nationals of a specific Member State is discriminatory. However, it did not conclude that this discriminatory effect led to the nullity of the arbitration agreement, on the contrary, the Federal Court suggested extending the scope of the *ratione personae* of the BITs, so that preferential treatment is granted to nationals of all Member States.

The Advocate General Mr. Melchior Wathelet delivered his opinion on September 19th of 2017, noting that disputes between investors and EU Member States did not fall under Article 344 of the TFEU, as such disputes did not relate to the interpretation or application of the Treaty on European Union (TEU) or TFEU, and that the ISDS system does not undermine the allocation of powers established by these Treaties, due to the continuation of powers of national courts to review arbitral awards through annulment and recognition procedures or enforcement procedures. The Advocate General later argued⁸ that arbitral tribunals meet all the criteria established by the caselaw of the CJEU to be considered courts or tribunals of the Member States, and therefore, they are "obliged" to apply EU law and should refer directly to the CJEU through preliminary rulings.⁹

The Grand Chamber of the CJEU issued a ruling on March 6th, 2018, disregarding these criteria. The ruling focused its reasoning on the principle of autonomy of the EU legal system, as per Article 344 of the TFEU, justified by the inherent characteristics of that legal body.¹⁰ Among those characteristics is the supremacy and direct effect attributes, that make it possible to build a coherent set of mutually interdependent legal principles, rules, and norms that bind the EU and its Member States reciprocally. Within this logic,

⁸ It should be noted that at that time, Germany, France, the Netherlands, Austria, and Finland had expressed their support for the ISDS mechanism. In addition, it was the European Commission itself that for a long time encouraged the signing of the BITs intra-EU.

⁹ Opinion of A.G. Wathelet, EU:C:2017:699, para. 85.

¹⁰ Case C-376/03, EU:C:2005:424, Judgment, paras 32-33.

the national courts may articulate a judicial dialogue by means of the preliminary ruling procedure, established in Article 267 of the TFEU.

The ruling adds that an ISDS provision such as the one included in the BIT between Slovakia and the Netherlands poses a threat to the nature of EU law and calls into question the principle of mutual trust.¹¹

The ruling also points out that an arbitral tribunal constituted under a BIT can interpret and apply EU legislation,¹² particularly, provisions relating to fundamental freedoms, such as freedom of establishment and the free movement of capital. This, however, does not seem feasible, as these arbitral tribunals are not part of the judicial system of the EU, under the terms of Article 267 of the TFEU.¹³

Lastly, the CJEU examined whether the *Achmea* award was indeed subject to review by a court of a Member State, which could formulate the question for preliminary ruling, thus ensuring a uniform interpretation, application, and full effectiveness of EU law. Faced with this question, the CJEU concluded that the review of an award by a court of a Member State may be limited by national law, a circumstance which cannot ensure the full effectiveness of EU law.¹⁴

3. Opinions of specialists and the first post-*Achmea* decisions

Although some experts have praised the *Achmea* award by pointing out that the ruling decided on several issues by using criteria that protects the EU legal system,¹⁵ the CJEU decision was also largely criticized because it did not go into the substance of the case: assessing whether the rights of fair and equitable treatment and the right to the remittance of profits could constitute an infringement of EU law and its fundamental freedoms.¹⁶ The ruling merely stated that the order of the EU could be put at risk, providing a broad interpretation to that possibility.¹⁷ This can be a complex matter, as

¹¹ Ibid., paras 34–37.

¹² Ibid., paras 39–42.

¹³ Ibid., paras 43–49.

¹⁴ Ibid., paras 52–53.

¹⁵ Cristina Contartese & Mads Andenas, *EU autonomy and investor-state dispute settlement under inter se agreements between EU Member States: Achmea*, 56 Common. Mkt. L. Rev. 157–192 n. 1 (2019); Simon Burger, *Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation*, 6 Y.B. Int'l. Arb. 131–133 (2019).

¹⁶ Maria Fanou, *Intra-European Union investor–State arbitration post-Achmea: RIP?*, 26 Maastricht J. E. Compar. L. 321–322 n. 2 (2019).

¹⁷ Jens Hillebrand Pohl, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded BY Mutual Trust*, 14 Eur. Const. L. R. 777–778 n. 4 (2018)

there does not seem to be a consensus as to whether all Member States of the EU¹⁸ have the same protection standards.¹⁹

On the other hand, the understanding that arbitral tribunals are not part of the judicial system of the States involved, has been put into question. Particularly considering that States themselves, in the exercise of their sovereign powers, established those arbitral tribunals.²⁰

The abovementioned appears unconvincing as such type of pronouncements are not subject to the control of State courts, given that the arbitral seat allows not only to carry out controls by means of annulment, but also when seeking to recognize or enforce what has been decided – these controls are, nonetheless, significantly reduced when enforcing an award issued through the ICSID²¹ system.²² Indeed, rulings regarding jurisdiction pertaining to processes being reviewed by that body of the World Bank have been sustained on the basis of the particularities of that mechanism.²³

It is also noted²⁴ that under *Achmea's* reasoning, no external tribunal could hear disputes in which the legal systems of the EU are involved, while the CJEU has not presented similar objections for cases resolved by the WTO dispute settlement system, even though the same objections could be formulated.

Despite criticism from scholars, on May 16th of 2018, in the first intra-EU investment arbitration decided after the *Achmea* award –the case of *Masdar Solar & Wind Cooperatief U.A.*²⁵ v. *Kingdom of Spain*²⁶–, the arbitral tribunal held the state

¹⁸ See e.g., European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland* (10 October 2021), http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

¹⁹ Nikos Lavranos, *Quo Vadis investment protection within the EU?*, Practical Law (5 October 2021), <http://arbitrationblog.practicallaw.com/quo-vadis-investment-protection-within-the-eu/>; Maria Fanou, *supra* n. 16. 330.

²⁰ Bjorn Arp, *supra* n. 5. 470.

²¹ The reader should recall that, in accordance with Article 54 of the ICSID Convention, awards issued through that system are automatically recognized, and are mandatory for the States involved.

²² Jens Hillebrand Pohl, *supra* n. 17. 784; Fernando Bedoya & Javier Tarjuelo, *La posición del Tribunal de Justicia frente al arbitraje de inversión y la reacción a la misma de los tribunales arbitrales internacionales*, 9 *La Ley Mediación y arbitraje* (2021); Maria Fanou, *supra* n. 16. 328-329.

²³ See *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain* (ICSID Case No. ARB/15/20) (<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/20>), and *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4) (<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/4>), the same idea is also present in the award for *UP and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35), issued October 9th, 2018 (<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/35>).

²⁴ Bjorn Arp, *supra* n. 5. 470.

²⁵ From the Netherlands.

²⁶ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/1>

responsible for violating the Energy Charter Treaty, ECT (both an intra-EU and extra-EU investment agreement, to which both the EU and Member States are parties, adopted on December 17th, 1994, which came into effect on April 16th, 1998). The tribunal dismissed Spain's allegation regarding the invalidity of the ECT's dispute resolution clauses by stating that the *Achmea* decision "ha[d] no bearing upon the present case."

In this case, the arbitral tribunal attempted to limit the scope of application of the jurisdictional argument developed by the CJEU in *Achmea*, considering that such court only addressed the BITs established within the EU by the Member States, not non-EU BITs and investment treaties established by the EU, such as the ECT.²⁷

For Spain, the effects of the *Achmea* case are quite relevant, as this country has been the subject of many lawsuits from foreign investors throughout the years, mostly from other Member States of the EU.

The origin of these arbitration cases lies in the regulatory changes that the Spanish Government made between 2010 and 2014 following the policy of incentives for investment in renewable energies from 2004 to 2008.²⁸ The limitation and subsequent extinction of those incentives were the cause of the numerous lawsuits filed by foreign investors, based on the ECT.²⁹

Soon after, on June 15th of 2018, the award for *Antin Infrastructure Services Luxembourg S.à.r.l.*³⁰ and *Antin Energia Termosolar B.V.*³¹ v. *Kingdom of Spain*³² was issued. This ruling considered that fair and equitable treatment had been infringed, ordering the defendant to pay a compensation in excess of EUR \$100 million.³³

²⁷ See Francisco Pascual-Vives & Laura Aragonés, *¿Cambio de tendencia en la saga de arbitrajes sobre las energías renovables? (Novenergy, Masdar and Antin c Spain)*, 36 *Revista Electrónica de Estudios Internacionales* 25-29 (2018).

²⁸ See Iñigo Iruretagoiena & Nicolás Alonso, *Los laudos derivados de las controversias relativas a las inversiones en fuentes de energía renovables y el régimen de las ayudas estatales en la Unión Europea: A propósito del asunto Antin c. España y la decisión de la Comisión Europea de iniciar una investigación en profundidad* 9 *La Ley Mediación y arbitraje* (2021).

²⁹ See Dorina C. Suciú, *Los arbitrajes de energías renovables contra España a la luz de la sentencia del Tribunal de Justicia de la Unión Europea en el asunto Achmea* 37 *Revista Electrónica de Estudios Internacionales* (2019).

³⁰ From Luxembourg.

³¹ From the Netherlands.

³² <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/31>

³³ This ruling was modified on January 29th, 2019. An appeal for annulment was filed against that award to prevent the execution that had been requested before courts in the United States and Australia. The appeal was ultimately rejected on June 30th, 2021. See Iñigo Iruretagoiena & Nicolás Alonso, *supra* n. 28.

4. Commission Guidelines of July 19th of 2018

On July 19th of 2018 the Commission issued the Communication to the European Parliament and the Council on Protection of intra-EU Investment,³⁴ in which the incompatibility of intra-EU BITs with EU law was declared.

It was said that the purpose of this document is to consolidate the business environment for EU investors, understanding that EU law protects the rights of investors, and precisely because of this, investors can assert these rights before national administrations and courts.

The free movement of capital, goods, services, and workers in the EU market are fundamental freedoms that relate to the general principles of non-discrimination, proportionality, legal certainty, and legitimate expectations. EU law also recognizes fundamental rights such as the freedom of enterprise, the right to property, and the right to an effective remedy.

In a criticized³⁵ move, the Commission referred to the ECT³⁶, indicating that the ECT cannot be used as a basis for the settlement of disputes between EU investors and EU Member States, since EU law already provides a general and effective legal framework for that purpose, including appropriate remedies.

As such, public authorities in the EU and in the Member States have a duty and a responsibility to protect investments and to regulate markets. The EU and the Member States can therefore take legitimate steps to protect those interests. However, they can only do so in certain circumstances and under certain conditions, and in accordance with EU law.

The reported purpose of the communication was to help prevent Member States from taking measures that violate EU rules and to help investors assert their rights before national administrations and courts, while stating that national courts have an obligation

³⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8>

³⁵ Enric Bartlett, *La inaplicación de la cláusula arbitral del Tratado sobre la Carta de la Energía a las inversiones intra-europeas: una pirueta jurídica de la Comisión en su comunicación sobre protección de la inversión intra-UE de 19 de julio de 2018*, 61 Cuadernos Europeos de Deusto 179-192. n.1 (2019).

³⁶ It should be noted that the EU Member States are not the only parties of the ECT. Other countries such as Japan, Russia, Australia, Belarus, Switzerland, and Iceland are also parties of that treaty. See J. Robert Basedow, *The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration*, 23 J. Int'l Econ. L. 271-292 n. 1 (2020)

to annul any arbitral award of an investor-state arbitral process and must reject its application.

In the meantime, on August 31st of 2018, an exception of jurisdiction was resolved in the case of *Vattenfall AB and others*³⁷ v. *Federal Republic of Germany*.³⁸ The court took into account the criteria established in *Achmea*, indicating that EU law derives from treaties that are part of and governed by international law, so Article 26 ECT constitutes "the primary law applicable to the jurisdiction of the Court", which must be interpreted in conjunction with Article 16 ECT, according to which arbitration can proceed. Following this logic, Article 16 ECT constitutes a *lex specialis* as a conflict-of-law rule under public international law, which must prevail over EU law, an aspect strengthened when confronted with VCLT Article 31(1).

5. Declaration of nullity of January 16th, 2019

On the 15th and 16th of January, a majority group of representatives of Member States of the EU signed a declaration of nullity of the BITs (also including the ECT),³⁹ for contravening EU law⁴⁰ (also invoking the VCLT articles 30 and 59, and rules of Common Law), committing to adopt several measures, including the termination of all BITs by December of 2019, the obligation to inform arbitral tribunals of the legal consequences of the *Achmea* case in intra-EU arbitral proceedings, as well as the annulment or non-enforcement of intra-EU arbitral awards.

This declaration, although it does not have the nature of a treaty, has been understood⁴¹ as an interpretative agreement, in the terms of the VCLT Article 31(1)(a), on the cumulative effect of two instruments that would apply to one same case, i.e., the treaties of the EU and the intra-European Union BITs.

³⁷ From Sweden.

³⁸ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/12>

³⁹ Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States.³ Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.

⁴⁰ https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en

⁴¹ Ion Galea, *Influence of Jurisdictional Matters over the Substance of Investment Agreements: The Case-Law of the European Court of Justice and the European Union Investment Policy*, 24 Rom. J. Int'l L. 122 (2020).

This option was questioned by certain specialists,⁴² as the withdrawal of existing treaties with an ISDS clause and the impediment to subscribe new agreements would play against investors from countries such as Germany. This country began subscribing agreements of this nature with Pakistan in 1959, and over the following years has subscribed many more of those agreements. Furthermore, the elimination of the investment arbitral system⁴³ could negatively impact investors both in the EU⁴⁴ and outside of the EU, who would find themselves in potentially disadvantageous scenarios as their investments could be in States with courts that are not perceived as fully impartial. The ISDS system mitigates some of those risks.⁴⁵

With regards to the awards issued through ICSID, these are not subject to annulment before State courts, but are only subject to a review process before the World Bank's own body. Given that regulation, many considered unlikely that the pronouncements issued within that system would be undermined by the criteria of the *Achmea* award. That was the logic applied on February 25th, 2019, in the case of *Landesbank Baden-Württemberg and others*⁴⁶ v. *Kingdom of Spain*,⁴⁷ where the objection of jurisdiction was rejected.

Another case involving the ECT is *Eskosol S.p.A. in liquidazione v. Italian Republic*,⁴⁸ in which the court on May 7th rejected an exception of jurisdiction, arguing that the *Achmea* case does not affect matters reviewed under the ECT, since that instrument is an international agreement subscribed by both the EU and its Member States. Therefore, the obligations and effects established in this agreement are different in nature from those originated from BITs within the EU, and consequently, Member States have an obligation to comply with the ECT, unless the CJEU explicitly indicates that such agreement violates EU law.

⁴² Christian. Riffel, *Does Investor-State Dispute Settlement Discriminate against Nationals?*, 21 German L. J. 202 n. 2 (2020).

⁴³ Bjorn Arp, *supra* n. 5. 472.

⁴⁴ Begoña Pérez Bernabeu, *Las medidas tributarias adoptadas por los Estados miembros bajo el prisma de la protección a la inversión extranjera: pasado y futuro?*, in *El mercado único en la Unión Europea.: balance y perspectivas jurídico-políticas* 936-942 (Laura García Álvarez & J. M. Martín Rodríguez eds., Dykinson 2019).

⁴⁵ Iñigo Iruretagoiena, *Mecanismos de arreglo de diferencias entre inversores y Estados (ISDS) y la autonomía del ordenamiento jurídico de la Unión Europea: ¿una ecuación (im)posible?*, 59 *Revista de Derecho Comunitario Europeo* 225 (2018).

⁴⁶ From Germany.

⁴⁷ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/45>

⁴⁸ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/50>

The award in the case of *9REN Holding SAR.L.*⁴⁹ v. *Kingdom of Spain*⁵⁰ came on May 31st of 2019 and ruled against Spain for infringing the ECT.

In a case before the Stockholm Chamber titled *Novenergia*⁵¹ v. *Kingdom of Spain*,⁵² the Svea Court of Appeals, on June 25th of 2019, rejected a request for a CJEU preliminary ruling on the applicability of the ECT in intra-EU investment disputes.

The risk of a shift in criteria by the EU motivated a request to the Court of the District of Columbia for the enforcement of the award. However, that court suspended the process, as the annulment was pending before the Swedish Court.

Another matter resolved within that same period was the case of *Belenergia S.A.*⁵³ v. *Italian Republic*,⁵⁴ initiated in 2015, in which the arbitral tribunal rejected the claims about its jurisdiction.⁵⁵ In that case, Italy, with the support of the Commission, and acting as *amicus curiae* given the intra-Community nature of the issue, sought to question the jurisdiction of the arbitral forum, arguing that the ECT is no longer applicable for intra-EU relations after the Treaty of Lisbon came in effect.

The arbitrators considered that the BITs (in this case, the ECT) and the treaties of the EU do not address the same subject, and therefore, according to VCTL Articles 59 and 30, the BIT cannot be terminated, nor can the rules of successive treaties be applied. They concluded that there is no contradiction between such BITs and Articles 344 and 267 of the TFEU and 19.1 TEU. Per the opinion of the arbitral tribunal, their authority derives from the ECT and not from EU law. That is why the ICSID system has been used as a method for the recognition and enforcement of independent awards.⁵⁶ More specifically, with regard to the perceived incompatibility of the CJEU, the award states that

“this is the perspective from the EU legal order. (...) EU law can be applied to the extent that the ECT regime permits its application. This Tribunal considers

⁴⁹ From Luxembourg.

⁵⁰ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/15>

⁵¹ From Luxembourg.

⁵² <https://www.italaw.com/cases/6613>

⁵³ Luxembourg company.

⁵⁴ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/40>

⁵⁵ See Iñigo Iruretagoiena Agirrezabalaga, *Belenergia c. Italia: el arbitraje de inversiones intra-UE en el escenario post-Achmea y la interpretación del trato justo y equitativo en el marco de los recortes en el sector de la producción eléctrica fotovoltaica en Italia*, 1 La Ley Mediación y arbitraje (2020).

⁵⁶ Regardless, the claims presented by the company were dismissed.

that different international law regimes can communicate to the extent that their own rules permit it. This Tribunal has been constituted and exercises its jurisdiction under the ECT regime to which the EU is a Contracting Party. A treaty means what it says. No text or conflict rule under ECT suggests that an ECJ's decision pertaining to the EU legal order could derogate from the offer to arbitrate under Article 26 ECT as pertaining to the ECT as an independent international law regime".⁵⁷

In this way, the Belenergia tribunal adopts a position consistent with other ICSID tribunals that also distinguish these two perspectives and underline the fact that its authority derives from the investment treaty (the ECT) and not from the legal order of the Union.

On December 2nd of 2019, the award for *Stadtwerke München GmbH, RWE Innogy GmbH, and others*⁵⁸ v. *Kingdom of Spain*⁵⁹ was rendered, where the jurisdiction of the arbitral tribunal was recognized, but the substantive portion of the claims deduced by the claimant were rejected.

6. Termination Agreement of May 5th, 2020

On May 5th, 2020, 23 Member States⁶⁰ signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union,⁶¹ affecting many treaties, all listed in its Annex. The purpose of this agreement was to prevent new processes of this nature from being initiated, and that those that were already started be negotiated through a structured dialogue, using a facilitator, within six months of its entry into effect,⁶² which took place on August 29th of 2020.

This agreement reaffirms that the BITs are incompatible with EU law, which is the reason why the initiation of arbitration proceedings is not justified after a State has become a member of the Union.⁶³

⁵⁷ *Belenergia c. Italia*, Case no. ARB/15/40, award, August 6, 2019, para. 324.

⁵⁸ From Germany.

⁵⁹ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/1>

⁶⁰ This agreement was not signed by Austria, Finland, Ireland, and Sweden.

⁶¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29>

⁶² Articles 9 and 10.

⁶³ Article 4.1. The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member

The Agreement covers all investor-state arbitration procedures, based on intra-EU BITs, under any convention or set of arbitration rules, including ICSID, the Permanent Court of Arbitration, the Stockholm Chamber of Commerce Arbitration Institute, the International Chamber of Commerce, UNCITRAL, and *ad hoc* arbitration. It excludes processes arising as a result of the ECT.

Understandably, this instrument has generated quite a bit of controversy and has been the subject of criticism and praise by specialists in the field.⁶⁴

Some have suggested⁶⁵ that because of these measures, some countries such as the United Kingdom or Switzerland may emerge as potentially attractive investment jurisdictions, given the distrust that may be generated by national courts dealing with these types of cases.

Another objective has been ensuring consistency with international commitments. The agreement termination processes should not affect rights acquired because of the execution of an agreement. States are obliged to live up to their promises and adhere to basic notions of good faith (e.g., VCLT Article 26 or *pacta sunt servanda*). The retrospective withdrawal of consent to arbitrate investment disputes vis-à-vis the premature termination of a sunset clause challenges the good faith obligations of the Agreement's Members.⁶⁶

The CJEU rulings in the *Komstroy* and *PLD Holdings* cases are other judicial milestones in line with rejecting the possibility of investment arbitration.

The *Komstroy* case (C-741/19) was decided on September 2nd of 2021. In this case, the Ukrainian company Energoalians (subrogated by Komstroy) initiated an *ad hoc* arbitration procedure as provided for in Article 26 (4)(b) of the ECT against Moldova. The arbitration was conducted in Paris, in accordance with UNCITRAL rules, and resulted in an award condemning Moldova. Moldova requested the nullity before the French Court, which raised preliminary questions. The CJEU decided to hear the case,

State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.

⁶⁴ Sanja Djajic & Maja Stanivukovic, *Changed Perspectives and Conflicting Treaty Obligations: What Is the Message of the CJEU Achmea Decision and the 2020 Plurilateral Termination Agreement for Candidate Countries Such as Serbia?*, 2 Cent. Eur. J. Compar. L. 59 n. 1 (2021).

⁶⁵ *Ibid.*, 71.

⁶⁶ Devin Bray & Surya Kapoor, *Agreement on the Termination of Intra-EU BITs: Sunset in Stone?*, Kluwer arbitration (10 October 2021), <http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/>

even though the parties in dispute were not Member States of the EU, noting that since the entry into effect of the Treaty of Lisbon, the EU has exclusive competence in matters of investments (Article 207 TFEU), and since the parties chose Paris as their seat, French law –and therefore European law–, has an impact on the case.

The CJEU stated that although the ECT obliges Member States to respect the arbitral mechanisms provided for in the ECT in their relations with investors from third States which were also Contracting Parties to that agreement with respect to investments made in those Member States, the preservation of the autonomy and nature of EU law precludes the ECT from imposing the same obligations within Member States, and therefore reaffirms the criteria that Article 26(2)(c) ECT must be considered inapplicable to disputes between a Member State and an investor from another Member State⁶⁷ concerning an investment made by such investor in the first Member State.⁶⁸

Beyond the EU level, it is difficult to admit the subjection of arbitral awards to the controls of the judicial system of the EU, as this would contravene VCLT Article 27.⁶⁹ Indeed, this type of conflicts ought to be solved according to the rules of Public International Law, as opposed to EU law.⁷⁰

Others argue that the rules regarding the law of treaties and the principle of specialty⁷¹ could prevent the EU from unilaterally imposing its criteria beyond its borders, and if one wishes to annul the agreements already in effect (Article 351 TFEU should be considered) a formal negotiation would be required.⁷²

⁶⁷ Judgment, para. 65: “It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves”.

Judgment, paragraph 66: “In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State”.

⁶⁸ See Fernando Bedoya & Javier Tarjuelo, *supra* n. 22.

⁶⁹ Article 27 Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

⁷⁰ See Rafael Gil Nievas, *Beyond the Plain Reading of the Komstroy CJEU Decision: A Potential New Analysis of the CJEU's Reasoning*, 9 *La Ley Mediación y arbitraje* (2021); Fernando Bedoya & Javier Tarjuelo, *supra* n. 22.

⁷¹ Ottavio Chirico, *Disentangling Conflicts of Laws in EU and Member States' Investment Agreements*, 2021 *J. Disp. Resol.* 297 n. 2 (2021).

⁷² Przemyslaw Domagala, *CJEU Achmea Judgment and What Comes next. Some Reflections on the Potential Implications of the CJEU Judgment of 6.3.2018 (C-284/16)*, 8 *Pol. Rev. Int'l & Eur. L.* 136 n. 1 (2019).

The *PL Holdings*⁷³ case (C-109/20), of October 26th of 2021, seems like a good way to close this sequence. In this case, the CJEU held that EU law bans certain effects of *ad hoc* arbitration agreements between Member States and investors of a different Member State. This predicament reaches beyond of the specified provisions in the termination agreement, and even affects processes developed –and whose awards were pronounced– prior to the *Achmea decision*,⁷⁴ indicating that conflicts must be resolved through the national judicial systems.⁷⁵

7. Some consequences of the *Achmea decision* and subsequent actions: the decision of the German Federal Court of 1 December 2021

In the event of a possible and probable rejection of the enforcement of conviction awards issued against Member States, the plaintiffs would have to go before non-EU State courts⁷⁶ to seek such enforcement. This tumultuous scenario⁷⁷ would be the consequence of the rejection of investment arbitration within the EU. This was the case in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*,⁷⁸ in which the plaintiffs addressed the courts of Columbia, United States, requesting enforcement against Spain for arbitral awards issued in 2017 and 2018, or

⁷³ A Luxembourg company with investments in the Polish banking industry, which, in 2013, was forced to sell its shares. This triggered proceedings before the Stockholm Chamber of Commerce. Poland was convicted and later triggered for annulment before the Court of Appeal of that Swedish city. The appeal was dismissed. A subsequent appeal on a point of law was brought before the Swedish Supreme Court, which in turn referred a question to the CJEU for a preliminary ruling.

⁷⁴ In this case, the arbitral awards were issued during 2017.

⁷⁵ Judgment, para. 46: “It is common ground that the arbitration clause in Article 9 of the BIT is, like the clause at issue in the case which gave rise to the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158), capable of leading to a situation in which an arbitration body rules in disputes which may concern the application or interpretation of EU law. Accordingly, that arbitration clause is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU. That clause is, therefore, incompatible with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU and has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU (see, to that effect, judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraphs 58 and 59). Furthermore, as is confirmed by Article 4(1) of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, from the date of accession of the Republic of Poland to the European Union on 1 May 2004, Article 9 of the BIT could no longer serve as the basis for arbitration proceedings between an investor and that Member State”. Judgment, para. 68: “(...) 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 (...)”.

⁷⁶ Bjorn Arp, *supra* n. 5. 471.

⁷⁷ Przemyslaw Domagala, *supra* n. 72. 133.

⁷⁸ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/36>

the *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain* case,⁷⁹ in which enforcement was requested to the Court of the District of Columbia, United States, as well as Australia. This was also the case in *Ioan Micula, Viorel Micula and others*⁸⁰ v. *Romania*,⁸¹ in which the ICSID tribunal ordered Romania to pay €178 million. As Romania refused to comply with the order (taking into account the pronouncements issued by the European Commission, which indicated that if Romania provided compensation to the claimants for the loss of the alleged incentives, such conduct would be regarded as granting new aid, which is incompatible with EU law),⁸² the plaintiff sought the enforcement of the award in the United Kingdom⁸³ and in the District Court of Columbia. This last court, on September 11th, 2019, made a series of distinctions and considered that Achmea did not affect the jurisdiction of the tribunal under the ICSID system, which resulted in Romania paying the owed amount.

Additionally, the Commission has requested to be informed of arbitral awards issued in investment processes to verify compliance with EU law. This process effectively suspends the execution of the award and places a new obstacle that hinders the fulfillment of conviction awards.⁸⁴

In this context, a recent German decision is of particular relevance. On December 1, 2021, the Republic of Croatia succeeded in achieving the complete dismissal of an appeal filed in Germany's Bundesgerichtshof by the Austrian bank Raiffeisen Bank and its Croatian subsidiary arising from the inadmissibility of an investment arbitration brought against Croatia under the Austria-Croatia bilateral investment treaty. The Austrian bank sought to appeal the decision of the German Higher Regional Court of Frankfurt am Main (OLG) which, on February 11, 2021, found that the arbitration

⁷⁹ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/31>

⁸⁰ From Sweden.

⁸¹ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/29>

⁸² Later, the Commission Decision (EU) on State aid 2015/1470 of March 30th, 2015, was annulled by the General Court. The ruling, dated June 18th, 2019, decided on Cases T624/15, T694/15 and T-704/15.

⁸³ Guillaume Croisant, *Micula Case: The UK Supreme Court Rules That the EU Duty of Sincere Co-operation Does Not Affect The UK's International Obligations Under The ICSID Convention*, Kluwer Arbitration (12 October 2021), <http://arbitrationblog.kluwerarbitration.com/2020/02/20/micula-case-the-uk-supreme-court-rules-that-the-eu-duty-of-sincere-co-operation-does-not-affect-the-uks-international-obligations-under-the-icsid-convention/>

⁸⁴ This is an application of the powers conferred by the Council Regulation (EU) 2015/1589 of July 13th of 2015, which lays down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

proceedings instituted by the banks against Croatia under the intra-EU BIT were inadmissible. The OLG had further ordered the banks to reimburse Croatia for the costs of the proceedings.

According to this decision, an international agreement between EU Member States must not affect the “autonomy of the Union’s legal order and its judicial system, which serves to ensure consistency and uniformity in the interpretation of Union law”. Within this court system, it is up to the national courts and the ECJ to ensure the full application of Union law. In this context, the so-called preliminary ruling procedure plays a key role in ensuring the uniform interpretation of Union law. Pursuant to Art. 267 TFEU, national courts refer questions to the ECJ in connection with the interpretation of Union law.”

The court went on to say that in the dispute at hand, it was possible that an arbitral tribunal deciding the dispute would have to apply not only Austrian or Croatian law, but also Union law. The arbitral tribunal was however precluded from seeking a preliminary ruling under Article 267 of the TFEU, as an arbitral tribunal does not qualify as a court of a Member State within the meaning of Article 267 of the TFEU. The fact that no binding interpretation of Union law can be obtained from the ECJ is sufficient to constitute an interference with the autonomy of Union law. That the applicable national law – which would be German law as the *lex arbitri* governing the review of an arbitral award – is not sufficient to render Article 9 para. 2 BIT compatible with Union law⁸⁵.

The Bundesgerichtshof’s dismissal of the appeal as inadmissible is groundbreaking as it is the first time a court in the European Union has affirmed with finality the conclusion that the principles of EU law enunciated by the CJEU in *Achmea v. Slovakia* apply beyond the *Achmea* litigation.

8. Non-EU effects

The issue of foreign investment to and from the EU has been the subject of special concern for the Member States, considering strategic aspects in certain industries that may mean large flows from capital-surplus countries that have undertaken aggressive investment policies in different parts of the world. The common treatment of foreign

⁸⁵ Decision of the Higher Regional Court of Frankfurt, February 11, 2021, <https://jusmundi.com/fr/document/decision/en-raiffeisen-bank-international-ag-and-raiffeisen-bank-austria-d-d-v-republic-of-croatia-ii-decision-of-the-higher-regional-court-of-frankfurt-thursday-11-february-2021>.

investments must be understood in that same line,⁸⁶ which seeks to address the challenges posed by capital flows from regimes such as those of China, Russia, and countries in the Middle East, and its impact on strategic industries.⁸⁷

Those elements must be taken into account when considering the reorganization proposed by the EU, as evidenced by the *Achmea* case precedent and the International Investment Court.

9. Permanent tribunal for hearing investment cases

The logic of abandoning bilateral arbitration systems has been followed by the EU by subscribing new treaties and by updating those that have already been in place for several years. This has been suggested in the negotiations of those agreements with Mexico, Chile, and other economies,⁸⁸ without sufficient clarity as to whether the EU can impose its criteria favorable to the creation of a permanent arbitration tribunal dedicated to these matters.⁸⁹ The first germ of such a tribunal received partial application in the EU–Canada Comprehensive and Economic Trade Agreement (CETA).

Opinion 1/17 of the CJEU dated April 30th of 2019,⁹⁰ states that the investment dispute settlement mechanism adopted in that agreement with Canada was compatible with EU law⁹¹. In accordance with EU law provisions, the national law of the Member States must be considered as a fact, therefore, the investment tribunal deciding the dispute could not interpret or apply EU law, thus avoiding potential interpretation issues, which are centralized in the CJEU.⁹²

⁸⁶ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

⁸⁷ Fernando Lozano, *El reglamento para el control de las inversiones extranjeras directas en la Unión: una apuesta poco ambiciosa*, 49 *Revista General de Derecho Europeo* 341-360 (2019).

⁸⁸ See Andrés Urzúa, *Sistema de solución de controversias inversionista-estado (ISDS) en crisis: Estados Unidos y la Unión Europea*, 78 *Revista de Derecho Económico* 105-109 n. 1 (2021).

⁸⁹ For additional information regarding potential consequences that these EU approaches may have on the relations with the United States, See Nicholas Wiggins, *T-Tip Negotiations Round Two: An Opportunity to Redirect the Trajectory of International Investment Law*, 169 *U. Pa. L. Rev.* 1289 (2021).

⁹⁰ ECLI:EU:C:2019:341.

⁹¹ Judgment, para. 127: “The question of the compatibility, with EU law, of the creation or preservation of an investment tribunal by means of such an agreement must be distinguished from the question of the compatibility, with EU law, of the creation of such a tribunal by means of an agreement between the Union and a non-Member State”.

⁹² For criticism regarding this ruling based on potential risks to the EU judicial system, See Simas Grigonis, *Investment Court System of CETA: Adverse Effects on the Autonomy of EU Law and Possible Solutions*, 5 *Int'l. Compar. Juris.* 127-141 n. 2 (2019).

It is worth noting that the possibility of establishing a European Investment Court would be better understood as part the judicial system of the EU, for purposes of Article 267 of the TFEU, however, it would be questionable, under that same logic, that such a court could be open to the participation of third countries.⁹³

An initiative to create a permanent multilateral investment court may be classified as a step backwards,⁹⁴ since it would eliminate the main advantages of arbitration, such as flexibility and speed in obtaining decisions, and impartial treatment, since it is the States that appoint the judges, without the intervention of investors. This can lead to a less protective regime for investors, an issue that could restrict transnational capital flows.

Others⁹⁵ have analyzed this initiative and concluded that this proposal would not entail a significant change or an improvement in the system, when compared to that of investment arbitrations, and they seem generally skeptical about its effects.⁹⁶

In the long run, the EU system's autonomy may lead⁹⁷ to isolationism, which would disincentivize relations with other economies, and would be inconsistent with the increase in international courts and cooperation.⁹⁸

10. A blunt and ambiguous decision

The judgment of the CJEU in the *Achmea* case marked a landmark in the consideration of investment arbitration within the EU, with a decisive impact on intra-EU BITs. The Court stated that the fact that an arbitral tribunal must take EU law into account in deciding on a possible breach of the BIT is sufficient to qualify such a dispute as "concerning the interpretation and application of the Treaties" for the purposes of Article 344 of the TFEU. According to this approach, allowing courts to deal with matters requiring the application of Union law threatens the uniform and effective interpretation and application of that law. And the Court adds in defense of its decision

⁹³ Jens Hillebrand Pohl, *supra* n. 17. 785.

⁹⁴ Pierre Collet, *The Current European Union Investor State Dispute Settlement Reform: A Desirable Outcome for Investment Arbitration?*, 53 *NYU J. Int'l L. & Pol.* 698-700 n. 2 (2021).

⁹⁵ Ameyavikrama Thanvi, *The Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement: Proposal and Some Unaddressed Issues*, 8 *Indian J. Arb. L.* 97-117 n. 2 (2020).

⁹⁶ Juan Pablo Charris, *The Proposed Investment Court System: Does It Really Solve the Problems?*, 42 *Revista de Derecho del Estado* 83-115 (2019).

⁹⁷ Bjorn Arp, *supra* n. 5. 471.

⁹⁸ Iñigo Iruretagoiena, *supra* n. 45. 233.

that by not being able to exercise its role as the final and authoritative interpreter of the EU legal order, it cannot ensure its uniform interpretation and full effectiveness.

By declaring that the investment arbitration provided for in these agreements is incompatible with the EU legal order, as it does not guarantee its full effectiveness, the *Achmea* judgment opened the possibility of replacing the existing intra-EU BITs. It opened up the possibility of a new instrument, applicable to all Member States and providing for investor-state dispute settlement mechanisms that exclude arbitration. The ruling of the Court of Justice is also very important for arbitrations under the Energy Charter Treaty, since it challenges the jurisdiction of arbitral tribunals created on the basis of this instrument, requests the annulment of awards rendered and opposes the recognition and enforcement of awards, at least before the courts of the Member States. Thirdly, it opposes the investment arbitration provided for in the extra-EU BITs, since, although it does not affect the establishment of arbitral tribunals provided for therein, it may have repercussions on the recognition and enforcement of arbitral awards in a Member State. Finally, it has had an impact on the distribution of competences between the European Union and the Member States for the conclusion of future EU trade and investment agreements, as shown in CJEU Opinion 1/17, when analyzing whether or not the CETA tribunals have the competence to interpret and apply EU law.

The doctrine expressed in the *Achmea* judgment, forceful as regards the defense of the guiding principles of the EU and its law, but ambiguous in others, has given rise to a plethora of doctrinal comments, many of them dissenting. But the process of revising the model is already underway. Let's look at two illustrative examples.

On October 24, 2019, EU Member States reached an agreement on a plurilateral treaty for the termination of BITs within the EU. The agreement follows the declarations of January 15 and 16, 2019 on the legal consequences of the Court of Justice judgment in *Achmea* and on the protection of investment in the European Union,⁹⁹ where Member States committed to terminate their BITs within the EU. This Termination Agreement pays attention to two issues. Firstly, how existing BITs within the EU are to be terminated, and how their sunset clauses are to operate, and secondly, what response

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https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf

should be given to new, pending and concluded arbitration proceedings. The measure has affected 190 BITs.

As far as disputes under the ECT are concerned, the Member States have committed themselves to discuss without delay, together with the Commission, whether additional measures are necessary to draw the full consequences of *Achmea* in relation to the intra-Community application of the ECT. For the time being the negotiating directives adopted by the EU Council are silent on any possibility of ruling out the application of the ECT in the inter se relations of the Member States¹⁰⁰.

¹⁰⁰ Council adopts negotiation directives for modernisation of Energy Charter Treaty, 2 July 2019, 10745/19 ADD 1.