# The Rule of Law and the Roll of the Dice. The Uncertain Future of Investor-State Arbitration in the EU

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## Contents



**Abstract** Investment treaty law and EU law began to develop in the same era and share some important philosophical and axiological foundations. The pressure on the

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CEE countries to enter into numerous bilateral investment treaties in late 80s and early 90s, in the context of the EU accession aspirations of the former communist countries, was likely to result, eventually, in a conflict between EU law and investment treaty law. The conflict could have been managed in three different ways, yet the CJEU decided in *Achmea* to declare an undefined volume of intra-EU arbitrations to be incompatible with EU law. This important judgment, which delivered an outcome desired by the European Commission and a number of Member States, is based on questionable legal reasoning that creates high uncertainty in this area of law. The doubts include the scope of application of *Achmea*, which is now a highly debatable issue. The CJEU itself saw it necessary to limit the scope of *Achmea* by declaring in Opinion 1/17 (*CETA*) that the legal reasoning of *Achmea* did not apply to investment protection treaties with third countries. The Member States of the EU remain politically divided in their views as to whether *Achmea* applies to the Energy Charter Treaty. And while the problems with the rule of law and independence of the judiciary in certain Member States continue to grow, *Achmea* has left an important gap for which there is no substitute in the current architecture of the EU legal system.

## 1 Introduction

Yogi Berra, a baseball player and coach, once famously said it was difficult for him to make predictions, especially about the future. His job should be easier in legal studies, since law is supposed to be a set of rules intended to yield reasonably high predictability of result. A frequent connotation of the rule of law is that legal matters should unfold in an orderly and foreseeable fashion, instilling the sense of certainty in legal subjects. When it comes, however, to the interactions between EU law and investor-state arbitration, predictability of outcome has been rather low lately. Politics clearly trumps technical legal reasoning in this field. This should probably be of little wonder. International investment protection law has always been a highly political issue. In the early 90s, investment protection treaties were used in Europe as a way to foster economic expansion of Western European companies to the former Soviet bloc, without much technical legal thought being given to the long-term consequences of creating this new legal order in Europe and its relation to EU law.

The potential for conflict between EU law and investment treaty law was not identified at that time, though it was eventually unavoidable. When these two worlds finally came to a clash, their confrontation could have been managed in several different ways. Advocate-General Wathelet made an ingenuous proposal in *Achmea*,[1] which could have established harmonious co-existence of both legal systems, and at the same time, surrender intra-EU investment treaty tribunals to

[1] CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2017:699.

the functional supremacy of the CJEU.[2] The CJEU, however, chose a radically different approach, declaring an undefined volume of intra-EU arbitrations to be incompatible with the EU law.[3] That decision elated certain European Governments, but not necessarily those most adherent to the rule of law. The CJEU then purported to clarify in *Opinion 1/17* that only the investor-state dispute resolution clauses in intra-EU treaties should be deemed incompatible with EU law, and not those in the treaties with third countries.[4] In the latter case, the outcome seems to depend on whether a treaty in question complies with the threshold criteria defined by the CJEU in *Opinion 1/17*. By declaring that the CETA[5] complied with such criteria, the CJEU cleared the path to the ratification and entry into force of that treaty. *Opinion 1/17* reads as if the pendulum swang in the direction opposite to *Achmea*, since the position the CJEU took in it contradicts in many important aspects the legal reasoning underlying the *Achmea* judgment.[6] Nonetheless, the CJEU confirmed in *Opinion 1/17* that *Achmea* applies broadly to intra-EU proceedings, but sought to distinguish it from the case of treaties with third countries.[7] As shall be shown below, however, the distinction between the intra-EU and extra-EU investment treaties is not sufficient to justify the contradictory conclusions reached by the CJEU in these two decisions. A more plausible explanation is that in either case the delivered outcome was conforming to the existing political expectations, which in each case were different. In *Achmea*, the expectation was to do away with investment treaty arbitration in Europe.[8] In *Opinion 1/17*, to confirm the ability of the EU to create a new system of international justice in investment matters, featuring the Investment Court System.[9]

Because of these important decisions, the EU is now facing three important challenges. *Firstly*, the elimination of intra-EU investment arbitrations has left an important gap in the legal protection of individuals in Europe. There is no substitute for it in the current architecture of the EU legal system.[10] At the time when certain illiberal governments pursue systemic actions intended to undermine the

[2]See Buczkowska et al. (2017).

[3]CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158.

[4]CJEU, Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, on the one part, and the European Union and its Member States, of the other part*, ECLI:EU:C:2019:341, see dispositive part and paras. 126–129.

[5]See http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. Last accessed on 17 July 2019.

[6]Koutrakos (2019), pp. 239–294.

[7]CJEU, Opinion 1/17, *supra* note 4, paras. 126–127.

[8]See Hartley (2019), p. 335: 'It will be clear from the cases discussed that the law in this area is almost entirely based on policy. The Treaty provisions are important, but they are regarded simply as underpinning the wider policies inherent in the EU Treaties.[...] it would be futile to search for a narrow formula which encapsulates the law.'

[9]See http://europa.eu/rapid/press-release_IP-19-2334_en.htm. Last accessed on 17 July 2019.

[10]Which is admitted even by the enthusiastic supporters of the *Achmea* judgment, see e.g. Hindelang (2019), p. 383.

independence of the judiciary in certain EU countries, it is also riskier than ever to assume that state courts in these countries can remain capable of providing effective protection of EU rights to individuals.[11] *Secondly*, *Achmea* has created significant uncertainty as to its exact meaning and scope. Its reasoning is far from clear and the judgment itself is based on seemingly mistaken assumptions.[12] Even the EU Member States differ among themselves in their official positions as to the impact of *Achmea* on the Energy Charter Treaty.[13] *Achmea* also creates a conflict between international and EU law. In particular, it puts EU Member States in a delicate situation, since they are obliged to comply with existing arbitral awards in accordance with the investment protection treaties, but *Achmea* prevents them from complying voluntarily. This may create real practical problems especially outside the EU, where local courts seized with requests for enforcement against state assets do not necessarily have to recognize the principles of primacy and autonomy of EU law.[14] Thirdly, *Achmea* creates lingering problems for the ambitious plans of the EU to reform the investor-state dispute resolution system globally, in particular through the creation of a multinational investment court.[15] *Opinion 1/17* resolves this problem only partially and superficially. Future arbitrations under the CETA shall likely lead to the situation in which the CJEU's position taken in *Opinion 1/17* may have to be revisited in light of the views expressed in *Achmea*. Predictability in this area of law has been reduced to a roll of the dice.

[11]See Sadowski (2018), pp. 1025–1060.

[12]As the Arbitral Tribunal in ICSID Case No. ARB/15/15, *9REN Holding S.À.R.L. v. Spain*, award of 31 May 2019, para. 150, put it: 'The Tribunal has attempted, with the Parties' assistance, to understand the truncated reasoning in the CJEU's decision in *Achmea*. There is much to understand.'

[13]Compare the Declarations of the Member States of 15 and 16 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en, last accessed on 20 June 2019.

[14]The U.S. courts currently seem to be the principal extra-EU destination of EU investors who were awarded damages by investment treaty tribunals against Spain. See, for example, N*extEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, Petition to Confirm International Arbitral Award Pursuant to the 1965 ICSID Convention of 3 June 2019, Case no. 1:19-cv-01618, https://www.italaw.com/sites/default/files/case-documents/italaw10570.pdf, last acceded on 17 July 2019.

[15]Lavranos and Singla (2018), p. 351 et seq.

## 2 From Friends to Foes

### *2.1 Early Co-existence*

Modern investment treaty law and European integration have contemporaneous origins. The 1959 treaty between Germany and Pakistan,[16] regarded as the first bilateral investment treaty worldwide, was adopted just 2 years after the Treaty of Rome was signed. The arbitration between a UK company *AAPL and Sri Lanka* in the late 80s was the first dispute in which an arbitration agreement conferring jurisdiction on an arbitral tribunal, was construed from a combination of a provision in an international treaty and the express or implied will of an investor.[17]

When the CEE countries began the process of their association with the EEC (later the EU) in the 90s, it was the European Commission which requested them, in the so-called Europe Agreements, to enter into bilateral investment treaties with the then Member States.[18] This is the explanation of the high number of bilateral investment treaties between Eastern and Western European countries. The European Union and its Member States also adopted the Energy Charter Treaty, which provides for the settlement of a broad range of investor-state disputes through international arbitration.[19] There does not seem to be evidence that at the time these treaties were signed, serious discussions were held as to whether international investment law and investor-state arbitration were compatible with EU law, or whether candidate Member States from Central and Eastern Europe should renounce these treaties once they are admitted to EU membership.

[16]Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962), available at http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef, last accessed on 20 June 2019.

[17]Arbitral Tribunal, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990.

[18]See, e.g., Article 72(2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, signed in Brussels on 16 December 1991, OJ 1993 L 347/2; see also: CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2017:699, footnote 41 for similar examples concerning Poland, Romania, Slovakia or Croatia.

[19]The text of the Energy Charter Treaty is available at https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf, last accessed on 20 June 2019. The (non-exhaustive) list of investment treaty arbitration initiated under the ECT is available here: https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/, last accessed on 20 June 2019.

## 2.2 Rise in Intra-EU Arbitrations

The surge in investor-state arbitrations, which began worldwide in late 90s, did not spare Central and Eastern Europe.[20] In fact, the economic and legal transformation, including massive privatization plans and the process of adaptation of the CEE legal systems to the requirements of the European Union were fruitful grounds for numerous treaty claims related to that part of the world.[21] Following the accessions of 2004 and 2007, new Member States were among the first ones to note the potential conflict between EU law and investment protection treaties. Defending themselves against treaty claims, they started to raise, in various shapes and forms, objections related to the alleged incompatibility of the two legal regimes. The European Commission also stepped in to support these contentions. Arbitral tribunals, often composed of prominent international judges and scholars in public international law, consistently rejected, however, jurisdictional objections based on EU law.[22]

The arguments in favour and against the 'EU objection' were rehearsed so many times and from so many angles that the matter can now be said to have been profoundly examined and discussed by arbitral tribunals. The case law which emerged from those decisions could be regarded as *jurisprudence constante* in investment treaty law. The unequivocal conclusion was that neither the accession of the new Member States to the EU, nor the inherent features of the EU legal system, deprived arbitral tribunals of the jurisdiction conferred upon them by investment protection treaties.

## 2.3 Game-Changing Catalysts

Three catalysts then played a major role in undermining the position of investment treaty arbitration in Europe. The first one was the emergence of cases, which, rightly or wrongly, were considered to threaten the autonomy of the EU legal order. These

[20] See e.g. UNCTAD Fact Sheet on Investor–State Dispute Settlement Cases in 2018, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf, last accessed on 20 June 2019, p. 1.

[21] See UNCTAD Fact Sheet on Investor–State Dispute Settlement Cases in 2018, p. 2. Czechia and Poland have been among the most frequently sued countries, along Ukraine and Russia.

[22] Among many decisions preceding the CJEU judgment in *Achmea*, see e.g. Arbitral Tribunal, SCC Case No. 088/2004, *Eastern Sugar B.V. v. Czech Republic*, Partial Award of 27 March 2007; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010; PCA Case No. 2008-13, *Achmea B.V. (formerly Eureko) v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010; ICSID Case no. ARB/07/19, *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012; ICSID Case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Final Award of 11 December 2013 et al.

included *Micula v. Romania*, which was often presented as a clear example that investment treaty arbitration could be used to circumvent the EU rules on state aid.[23] Such statement was inaccurate with respect to *Micula*, since the facts of that case concerned the consequences of the benefits, which were withdrawn *before* Romania joined the EU and started to be bound by the *acquis communautaire*. By implication, since the alleged internationally unlawful act occurred before the accession, the alleged liability in damages of the respondent state also arose before that date. These points were correctly identified by the General Court of the EU in its judgment of 18 June 2019, which annulled the decision of the European Commission (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania—Arbitral award *Micula v. Romania* of 11 December 2013.[24] Indeed, it should not be a controversial issue that benefits withdrawn 2 years before Romania's accession to the EU should not be regarded as state aid under EU law.[25] However, the perception impact of the *Micula* case had already taken its toll and influenced the development of international investment law.[26] Furthermore, it is not inconceivable that in another case with a different set of facts, a conflict between EU state aid law and an investment protection treaty could actually arise.

The second catalyst was the emergence of high profile disputes related to politically or socially sensitive matters. This includes, for example, the *Vattenfall* arbitration concerning the consequences of the uncompensated phasing out of nuclear power plants in Germany.[27] Along with a small number of other high profile cases, including the *Philip Morris* arbitrations concerning the plain tobacco packaging rules in Australia and Uruguay,[28] *Vattenfall* attracted considerable interest

[23] *Micula, supra* note 22.

[24] GCEU, Cases T-624/15, T-694/15 and T-704/15, *European Food SA and Others v. European Commission, ECLI:EU:T:2019:423*. See also Croisant (2019) and Bakos (2019).

[25] Interestingly, the Arbitral Tribunal in the *Micula* award calculated the amount of damages due to the investors on the basis of hypothetical assumption that the benefits would remain in force also beyond the date of the Romania's accession to the EU. The Court noted that point, but ruled that since the Commission did not draw a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession, the decision by which it classified the entirety of the compensation as aid is necessarily unlawful (GCEU, *European Food, supra* note 24, para. 108).

[26] See e.g. Art. 8.9.4 of the CETA: 'nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.' A footnote to that provision explained that with respect to EU, subsidies also embrace state aid. See also e.g. Article 2.2.4 of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part.

[27] See the official explanation of Vattenfall for the reasons of its action: https://group.vattenfall.com/press-and-media/news%2D%2Dpress-releases/newsroom/2016/why-vattenfall-is-taking-germany-to-court, last accessed on 20 June 2019.

[28] Arbitral Tribunal, ICSID Case No. ARB/10/7, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (formerly *FTR Holding SA, Philip*

within the civic societies of Western European states. These cases spurred protests against the then ongoing negotiations of the trade and investment agreements with Canada (CETA) and the US (TTIP).[29]

Thirdly, the global financial crisis required some Member States to intervene on its financial markets or to implement austerity measures, in particular with respect to certain ill-conceived public support schemes for the renewable energy sector. That led to more arbitrations where, for the first time, some of the Western European states found themselves on the receiving end and began to reconsider the risks and benefits of intra-EU investment treaty disputes.[30] These cases, too, have had an impact on the further erosion of the investors' rights in the newest generation of investment protection treaties.[31]

## *2.4 Achmea*

Such was the landscape on 6 March 2018, when the CJEU rendered its judgment in *Achmea*. The case concerned an action brought by Slovakia to German courts to set aside a jurisdiction award of an arbitral tribunal, in a relatively low profile and low-value dispute between a Dutch insurance company and Slovakia over regulatory measures in the life insurance sector. The German Supreme Court, which referred the preliminary questions to the CJEU, considered that it essentially had no major doubts that the provisions of the Netherlands-Slovakia bilateral investment agreement conferring jurisdiction on the arbitral tribunal were compatible with EU law, but asked the CJEU to confirm that view. In the proceedings before the CJEU, the intervening Member States formed two opposing camps. The polarization of views

*Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*) and PCA Case No. 2012-12.*Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL.

[29]The TTIP negotiations were launched in 2013 and ended without conclusion at the end of 2016, see: http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm, last accessed on 20 June 2019. This happened due to a wave of civil opposition in various EU countries, including massive street protests. See e.g. https://www.theguardian.com/business/2016/sep/17/ttip-protests-see-crowds-take-to-streets-of-seven-german-cities, last accessed on 20 June 2019.

[30]Spain is by far the most-frequently sued EU Member State and the second most-often sued country in the world with 49 known cases, closed or pending, by the end of 2018. Among other 'old' Member States, Italy follows with 11 cases, followed by Greece (4 cases) and Germany (3 cases), see UNCTAD Fact Sheet on Investor–State Dispute Settlement Cases in 2018, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf, last accessed on 20 June 2019, pp. 11–13.

[31]See note 23 above. The problem, from the investors' perspective, is that the ability of the states to freely withdraw subsidies incentives states to play the bait-and-switch, i.e. to first lure investors to make heavy capital expenditures in order to create the required infrastructure in exchange for a promise of long-term subsidy scheme, and then cancel the scheme shortly after the investment is completed. This is particularly problematic in sectors such as renewable energy, or water and sewage distribution and collection systems, which require very high initial capex, but then do not generate high operating costs.

in Europe was manifest, and the dividing lines were clearly marked between the capital-exporting, and capital-importing states, the latter category supported by the Member States with a high number of pending investment treaty claims.[32]

Arguably, the CJEU could have dealt with the alleged potential incompatibility between EU law and investment treaty law in three different ways. Firstly, it could have agreed with the *Bundesgerichtshof* and declare investment treaty arbitration to be compatible with EU law. This may have left unresolved the problem of potential future clashes between EU and investment treaty law in some borderline scenarios. Secondly, the CJEU could have created a framework for dialogue between arbitral tribunals and the CJEU on issues related to the application and interpretation of the EU law. To that effect, the CJEU could have recognized investment treaty tribunals as 'courts or tribunals' in the sense of Article 267 TFUE. This was exactly what Advocate General Wathelet was suggesting to the CJEU in his opinion in the *Achmea* case. The third option, and the one chosen by the CJEU, was to declare investment treaty arbitration incompatible with the EU law. In its judgment, the CJEU said it considered intra-EU investment treaty arbitration as threatening the autonomy of the EU legal order. The CJEU considered arbitral tribunals sitting under the intra-EU bilateral investment treaties to be trespassing on its own exclusive jurisdiction and refused to enter into a dialogue with them under the auspices of Article 267 TFUE. As a consequence, it ruled that the EU law 'precludes' the investor-state arbitration provisions such as the one in the treaty between the Netherlands and Slovakia.

## 2.5 *Reception of Achmea by Arbitral Tribunals*

Contrary perhaps to the CJEU's expectations, its judgment has not brought investment treaty arbitration to a halt, although the number of new claims has dropped considerably. However, arbitral tribunals have so far failed or refused to give broad effects to the *Achmea* judgment.[33] Not a single arbitral tribunal after the 6 March 2018 declined jurisdiction because of *Achmea*, although the *Bundesgerichtshof*

[32]This polarization was recorded in paras. 34 and 35 of the Opinion of Advocate General Wathelet in *Achmea*, *supra* note 1.

[33]Among others, see: Arbitral Tribunal, ICSID Case No. ARB/13/31, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, Award of 15 June 2018; PCA Case No. 2014-0, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, Award of 2 May 20181; ICSID Case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, Award of 16 May 2018; ICSID Case No. ARB/13/35, *UP and C.D. v Hungary*, Award of 9 October 2018; SCC Arbitration V 2015/150, *Greentech Energy Systems A/S et al. v Kingdom of Spain*, Award of 23 December 2018; ICSID Case No. ARB/13/30, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux SARL*, Award of 30 November 2018; SCC Case No. 2015/063, *Novenergia II—Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, Award of 15 February 2018; ICSID Case No. ARB/15/15, *9REN Holding S.À.R.L. v. Spain*, *supra* note 12.

eventually annulled the *Achmea* award as a consequence of the CJEU decision.[34] Arbitral tribunals recurred to various legal reasons in order not to give effect to *Achmea*. Most notably, the arbitral tribunal in *Vattenfall* issued a lengthy and thoroughly reasoned decision in which it declared that *Achmea* should not apply to arbitrations based on the Energy Charter Treaty.[35] Given that at least several dozen cases brought under the Energy Charter Treaty are currently pending against various EU Member States, the *Vattenfall* decision is of clear importance to the future of investment-treaty arbitrations in Europe.

In reaction to the *Vattenfall* decision and the general pushback from arbitral tribunals, on 15 and 16 January 2019, all EU Member States adopted three, partially concurring declarations on the *effects* of the *Achmea* judgment.[36] More than anything else, these declarations are strong political statements against investment-treaty arbitration in Europe. However, these declarations also include specific promises, such as an undertaking to deposit their instruments of ratification, approval or acceptance of a plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States, by 6 December 2019.[37]

In parallel to, and somehow in spite of, its quest against the intra-EU investment protection treaties, the European Commission has launched an ambitious initiative to reform the global investor-state dispute resolution system through the creation of a multilateral investment court.[38] Such court would be intended as a dispute resolution forum, including between the EU or its Member States and investors of the other contracting parties to the investment protection and trade agreements. There are many problems how to conciliate the functioning of such system with *Achmea*. More broadly, the reasons underlying *Achmea* should also be seen as the legal obstacles to investment protection treaties with third countries. This is why Belgium (on behalf of Wallonia) questioned the compatibility of the EU-Canada trade and protection

[34]Order of the *Bundesgerichtshof* of 31 October 2018, file no. I ZB 2/15, available at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=89393&pos=0&anz=1, last accessed on 20 June 2019.

[35]Arbitral Tribunal, ICSID Case No. ARB/12/12, *Vattenfall AB and others v. Federal Republic of Germany*, Decision on the Achmea Issue of 31 August 2018; *9REN Holding S.À.R.L. v. Spain*, *supra* note 12.

[36]See: https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/, last accessed on 20 June 2019. See also e.g. Power (2019).

[37]See https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf, last accessed on 20 June 2019. The Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union was signed on 5 May 2020 (OJ L 169, 29.5.2020, p. 1–41) by 23 Member States and enterd into force for the first time on 29 August 2020.

[38]The European Commission proposed a new Investment Court System for TTIP and other EU trade and investment negotiations already in September 2015, see: http://europa.eu/rapid/press-release_IP-15-5651_en.htm. This model was initially included in the series of bilateral trade and investment agreements which the EU was negotiating with Singapore, Canada and Vietnam. Subsequently, on 20 March 2018, the Council authorised negotiations for a treaty establishing a multilateral investment court (MIC).

agreement with the TFEU. Notwithstanding, the CJEU followed the opinion of Advocate-General Bot[39] and ruled on 30 April 2019 that the CETA is compatible with EU law.[40] This is a good outcome for the future of investment treaty arbitration in Europe, but it fails to provide legal certainty and bears an inherent risk of being revisited once the actual cases under the CETA (or another similar treaty) are decided one day.

## 3 Three Question Marks About *Achmea*

The root of all uncertainty is obviously *Achmea.* The judgment provoked diagonally opposite emotions and reactions worldwide. It came as a blessing to the governments of the EU Member States with large numbers of pending arbitrations or unenforced awards, and as a curse to entrepreneurs who had made substantial long-terms investment in Europe. It has already been addressed by multiple articles[41] and arbitral awards.[42] However, even the supporters of *Achmea* recognize its ambiguities, and there are many. This chapter purports to deal with only three of them.

### *3.1 Scope of Application*

*Firstly*, it is unclear to which investment protection treaties *Achmea* applies. The dispositive part of *Achmea* reads: 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.' Thus, the interpretation rendered by the CJEU does not seem to be confined to the specific treaty in question, but is likely to extend to other international treaties concluded between Member States which include provisions 'such as' the provision analysed by the CJEU in *Achmea*. Now, at the time of the judgment there were close to 300 bilateral investment treaties between Member States, which significantly differed from each other. Remarkably, the CJEU failed to notice these differences in *Achmea*, and it did

[39]CJEU, Opinion 1/17 *Accord ECG UE-Canada*, ECLI:EU:C:2019:72.

[40]Id.

[41]Among others, see Hess (2018); Lavranos and Singla (2018), pp. 348–357; Berger (2017), pp. 282–291; Hartley (2019), pp. 321–337.

[42]*Supra* note 33.

not explain which criteria should be taken into account to determine whether a dispute resolution clause in a given treaty was 'such as' Article 8 of the Netherlands-Slovakia BIT.

This omission could create significant lack of legal certainty. However, EU Member States have addressed this problem with the subtleness of Alexander the Great approaching the Gordian knot. Their declarations of 15 and 16 January 2019 start from the assumption that *Achmea* applies to *all* bilateral investment treaties between EU Member States, no matter how similar or different they could be from the Netherlands-Slovakia BIT.[43] Moreover, although the CJEU did not pronounce in *Achmea* over the conformity of substantive provisions of the bilateral investment treaties with EU law and confined its decision only to the jurisdictional aspects of the Netherlands-Slovakia treaty, the Member States went further in their declarations. They undertook to terminate all intra-EU investment protection treaties by way of a treaty, they promised to adopt still in 2019. This step was clearly not required by the *Achmea* judgment and should rather be considered a political decision, for which *Achmea* provides a convenient supportive argument. It lead to the adoption of a treaty which shall likely have the effect of immediate termination of all intra-EU bilateral investment treaties, notwithstanding the existence of sunset clauses in many of such treaties.[44] Accordingly, the uncertainty concerning the scope of the *Achmea* judgment in practice may be limited to intra-EU arbitrations, which were pending at the time of its entry into force, and to enforcement of awards rendered to date under intra-EU BITs.

## *3.2 Energy Charter Treaty*

*Secondly*, it is unclear whether *Achmea* extends onto intra-EU disputes under the Energy Charter Treaty. Here, the positions of EU Member States seem to be divided, although a large majority of them (22 out of 27) thinks that *Achmea* has such effect. Five other Member States, namely Finland, Luxembourg, Malta, Slovenia and Sweden, noted however, that *Achmea* is silent on the Energy Charter Treaty. They referred to the fact that while a number of international arbitration tribunals post the *Achmea* judgment have concluded that the Energy Charter Treaty contains an investor-State arbitration clause applicable between EU Member States, this interpretation was contested before a national court in a Member State. Against this background, those Member States considered that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with EU law of the intra EU application of the Energy Charter

[43] *Supra* note 37.

[44] *Supra* note 37.

Treaty.[45] One Member State, i.e. Hungary, went against the wind and declared that in its view, the *Achmea* judgment concerns only the intra-EU bilateral investment treaties and it 'does not concern any pending or prospective arbitration proceedings initiated under the ECT'. Hungary also stated that the ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States. Indeed, the revision process of the Energy Charter Treaty has already started[46] and it cannot be excluded that this treaty could prospectively be changed so as to limit or exclude admissibility of intra-EU claims based on its provisions. This, however, should not have an impact on the legal ramifications of the claims brought before any such future change takes place. As of the time present, arbitral tribunals accept ECT claims brought by EU investors against EU Member States and EU national courts have not taken any firm position on this point.

### *3.3 Commercial Arbitration*

The *third* area of ambiguity resulting from *Achmea* concerns commercial arbitration. Namely, although the CJEU made a very clear distinction between commercial and investment state arbitration in *Achmea*, some of the reasons and arguments underlying the approach that the CJEU took with respect to investment treaty arbitration also extend logically to commercial arbitration. Similar to investment treaty tribunals, arbitral tribunals in commercial matters also cannot refer questions to the CJEU pursuant to Article 267 TFEU. The position of the Court in this respect is well settled.[47] Similar to investment treaty arbitration, commercial arbitration also derogates from jurisdiction of national courts of EU Member States, certain matters in which EU law could be interpreted or applied. Awards of arbitral tribunals sitting in commercial matters, and awards of arbitral tribunals sitting in non-ICSID investment treaty matters are subject to the same scope and degree of review from EU national courts in the context of actions for annulment or applications for enforcement. Therefore, although it results from *Achmea* that the same standard of review is

[45]Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, available at https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf, last accessed on 24 June 2019.

[46]See Modernisation of the Energy Charter Treaty (ECT), TDM 2019(1), https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=83%20; see also https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201818_-_STR_Modernisation_of_the_Energy_Charter_Treaty.pdf and Negotiating directives for the European Commission issued by Council on 2 July 2019, https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf, last acceded on 17 July 2019.

[47]CJEU, Case C-102/81 *Nordsee*, ECLI:EU:C:1982:107 and CJEU, Case C-126/97 *Eco Swiss*, ECLI:EU:C:1999:269.

sufficient to ensure autonomy of EU law in commercial matters and insufficient in investment treaty matters, it is completely unclear why. Some could argue this is because of the reportedly sensitive nature of the matters, which are dealt with in investment treaty matters. But if these matters are sensitive, they are typically sensitive to particular national interests and national policies of EU Member States and not of the EU. On the other hand, EU law expressly approves and endorses commercial arbitration in matters involving EU competition law.[48] There could be hardly anything more sensitive in the entire body of EU law, yet the CJEU is satisfied with the limited purview of national courts in these matters.

Another attempt to justify the distinction of investment treaty arbitration and commercial arbitration under *Achmea* has been to show that in investment treaty arbitration it is a treaty between the EU Member States that is the reported source of the derogation of the jurisdiction of national courts. Accordingly, some authors purported to claim that the existence of such treaty collides with Article 344 TFEU and thus creates the problem. This argument, however, does not justify the distinction with commercial arbitration and is incorrect for a number of reasons. Firstly, in order for jurisdiction of an investment treaty tribunal to arise (and thus to derogate any existing competence of national state courts), also the investor needs to give its consent. Accordingly, an investment treaty is not *per se* the autonomous and enforceable basis for jurisdiction of investment treaty tribunals. Rather, the treaty is a set of mutual undertakings of the contracting states that each of them should respect and honour future decisions of eligible investors to refer disputes to international arbitration (and not to state courts). However, an arbitration agreement is perfected between the state and the investor.[49] Secondly, in commercial arbitration, the derogation of competence of state courts in favour of arbitral tribunals has dual basis. On the one hand, such derogation is governed by national arbitration laws. On the other, the derogation is rooted in Article 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[50] which obliges the

[48]See e.g. *Eco Swiss*, *supra* note 47, where the CJEU agreed that matters of EU competition law were arbitrable and was satisfied that proper application of EU competition law could be ensured by national courts reviewing arbitral awards as part of the action for enforcement or annulment of award. It is simply illogical and inconsistent on the part of the CJEU, to accept in *Eco Swiss* that annulment proceedings before national courts offer sufficient guarantees of proper application of EU law by commercial arbitral tribunals, and to claim at the same time in *Achmea* that they do not. Commercial arbitration is also widely used and promoted in the EU as legal remedy for parties injured by anti-competitive behaviour of parties abusing dominant position. See e.g. Commission Decision of 24.5.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement Case AT.39816—Upstream Gas Supplies in Central and Eastern Europe. See also e.g. recital (48) of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, 1–19, which expressly admits private enforcement of infringements of EU competition law through arbitration.

[49]See e.g. Wychera and Mimnagh (2019), pp. 395-419.

[50]https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

contracting parties to honour and give effect to the arbitration agreements in derogation of national courts. The question following *Achmea* therefore is whether the New York Convention, insofar as it was made between the EU Member States, also should be reviewed in the light of Article 344 TFEU.[51]

*In addition,* the logic of *Achmea* may likewise apply to the individual applications to the European Court of Human Rights, which are based on a similar mechanism that intra-EU bilateral investment treaties. Member States have agreed among themselves to authorize individuals to refer issues which may involve the application or interpretation of EU law, to an international court. Moreover, the CJEU has already precluded the possibility of the EU's accession to the European Convention of Human Rights in *Opinion 2/13*. It also held there that inter-state applications under Article 33 of the Convention would not be compatible with Article 344 TFEU.[52] It may now be an open, but still unaddressed question whether and to which extend *Achmea* takes the conclusions of *Opinion 2/13* another step further, to individual applications under Article 34.

## 4 Investor, Mind the Gap

### *4.1 How EU Law Purports to Replace Intra-EU BITs...*

Assuming for a moment that *Achmea* could indeed achieve its political objective, which is to eradicate investment treaty arbitration from within the EU, the judgment would create a gap in the system of judicial protection in Europe.[53] This would be its natural consequence. For so long, investment treaty arbitration and EU law have co-existed and provided complementary protection to the beneficiaries of the four fundamental freedoms in Europe that there were no demands for an extension of EU law onto guarantees similar to those offered under investment treaties. Then in the aftermath of *Achmea*, a sudden realization came that the judgment of the CJEU could deprive a large number of EU investors of important substantive rights they required in order to maintain and develop their cross-border investments. The pressure was such that within 4 months after *Achmea*, the European Commission prepared and submitted to the European Parliament and Council, the Communication on Protection of intra-EU investment.[54]

The document opened with a bold statement that the 'European Union's single market is a unique area of investment opportunities'. The European Commission

[51] See also further Paschalidis (2019), pp. 219–236.

[52] CJEU, Opinion 2/13 *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, see para. 213.

[53] See e.g. Balthasar (2018), pp. 227–233.

[54] European Commission, Communication on Protection of intra-EU investment, 19.7.2018 COM (2018) 547 final.

then went to declare it 'is committed to preserving and improving both a predictable, stable and clear regulatory environment and the effective enforcement of investors' rights.' It failed to mention that at the time of the communication, EU Member States were respondents in over 100 investment treaty disputes,[55] the majority of which related to allegations of unpredictability, instability or lack of clarity of the regulatory framework in the energy,[56] financial[57] or mining sectors.[58]

The European Commission was presumably mindful of those claims, but it nonetheless declared in the Communication that 'EU laws allows for markets to be regulated to pursue legitimate public interests such as public security, public health, social rights, consumer protection or the preservation of the environment, which may have consequences also for investments. Public authorities of the EU and of the Member States have a duty and a responsibility both to protect investment and to regulate markets. Therefore, the EU and Member States may legitimately take measures to protect those interests, which may have a negative impact on investments.'[59] This statement, again, did not take into account that in many cases the EU Member States were declared to be in breach of their international law obligations and obliged to pay damages.

The European Commission went on to recognize that 'In the aftermath of the Achmea judgment, the unlawfulness of intra-EU investor-State arbitration may result in the perception that EU law does not provide for adequate substantive and procedural safeguards for intra-EU investors. However, the EU legal system protects cross-border investors in the single market, while ensuring that other legitimate interests are duly taken into account. When investors exercise one of the fundamental freedoms, they benefit from the protection granted by: (1) the Treaty rules establishing those freedoms; (2) the Charter of Fundamental Rights of the European Union ("Charter"); (3) the general principles of Union law; and iv) extensive sector-specific legislation covering areas.'[60]

The Communication went on to demonstrate with examples that EU protects intra-EU investors with respect to the acts of investing in, acquiring and setting up companies; the right to acquire, use or dispose of immovable property; the repurchase of shares and bonds dealt in and quoted on a stock exchange; the receipt

[55]According to UNCTAD, there are currently 105 known pending investment treaty arbitrations against EU Member States (https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search, acceded on 16 July 2019). This does not take into account unreported arbitrations.

[56]E.g. see cases *The PV Investors v. Spain, Vattenfall v. Germany, CSP Equity Investment v. Spain, Europa Nova v. The Czech Republic, EVN v. Bulgaria, I.C.W. v. The Czech Republic, MOL v. Croatia, Natland and others v. Czech Republic, Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic, RREEF v. Spain, Voltaic Network v. The Czech Republic, InfraRed and others v. Spain* or *NextEra v. Spain*.

[57]E.g. cases *Cyprus Popular Bank v. Greece, Adamakopoulos and others v. Cyprus, UniCredit Bank and Zagrebačka Banka v. Croatia* or *Addiko Bank v. Croatia*.

[58]E.g. case *Gabriel Resources v. Romania, Lumina Copper v. Poland* or *Corcoesto v. Spain*.

[59]European Commission, *supra* note 54, p. 1.

[60]European Commission, *supra* note 54, p. 3.

of dividends and interest; the commercial grant of credits (including consumer credits); the acquisition of units of an investment fund; mortgages, legacies and loans, etc. and the acquisition of patents, trademarks and other intellectual property rights.

## *4.2 ... And Why It Fails*

The point is, however, in what the Communication did not show. Notably, it did not show that the EU protects investors against unfair or unfavourable treatment at the hands of the Member State, that it protects them against breach of legitimate expectations, instability, arbitrariness, or polititcally charged measures. That EU procedural law offered a one-stop-court in the event of a concerted action of various state organs targeting a single investor. It also failed to show that EU national courts could effectively protect the investors' rights including by way of award of damages commessurate with the loss suffered.

The point is, EU law—including the specific instances featured by the European Commission in the Communication—protects intra-EU investors from a different angle and at a different level than bilateral investment treaties. To use an example invoked in the Communication, the taxation which was found by the CJEU to be incompatible with EU law in C-493/09 *Commission v. Portugal*[61] would not need to be declared incompatible with a bilateral protection treaty.[62] On the other hand, investment treaty law could protect an investor against an oppressive and harassing tax enforcement proceedings or unjustified freezing of assets in the course of tax proceedings related to the collection of that tax, while EU law would not.

The differences in the protection of investors between EU law and bilateral investment agreements can also be shown on the example of the joined cases C-52/16 and C-113/16 S*EGRO and Horváth,*[63] which are being regarded by the European Commission as a reportedly apposite example of the ability of EU law instruments to protect investors in the EU.[64] In that matter, amendments to the relevant Hungarian law in 2013 extinguished all usufructuary rights on arable land, unless it could be proven that they were created between members of the same family. Consequently, the rights of the EU foreigners concerned were

[61]ECLI:EU:C:2011:635.

[62]In that matter, the CJEU dealt with discriminatory taxation which exempted Portuguese-based pension funds from corporate income tax which was applied on dividends, when this tax was applied to pension funds from other EU Member States. If that matter had been referred to an investment treaty tribunal under a bilateral investment treaty, the questions for the tribunal to consider would include e.g. whether the foreign-seated fund could demonstrate to have an investment in Portugal and whether the tribunal's jurisdiction was not excluded or restricted in tax-related matters.

[63]ECLI:EU:C:2018:157.

[64]European Commission, *supra* note 54, p. 14.

cancelled from the property register. The CJEU, responding to the preliminary question of Hungarian courts, declared that the legislation infringed the provisions on the free movement of capital. In a subsequent judgment of 21 May 2019, the CJEU also confirmed that by adopting the contested legislation, Hungary was in breach of its obligations under the TFEU.[65]

The outcome of *SEGRO* can be, in many respects, more favourable for investors than the outcome of a theoretical investment treaty claim in a parallel case. First of all, the claimants could eventually receive restitution, i.e. its rights should be returned to it. This would not be possible in investment treaty arbitration, where damages would be the principal remedy.[66] Proceedings before Hungarian courts, even including the reference to the CJEU, would be cheaper, and not necessarily longer than an investment treaty arbitration. On the other hand, claimants in the SEGRO-type scenario *depend* on the willingness of national courts to refer matters to the CJEU, and sometimes national courts can bend over backwards to arrive at an interpretation that would deny the claimants their relief in spite of the CJEU decision.[67] Also, because of the sectoral and limited jurisdiction of national courts, as well as the limited scope of application of EU law, the SEGRO-type scenario is not apposite for complex factual patters, where claimant is affected by various measures taken by different state organs. Thus, despite the attempts of the European Commission to prove the contrary, the EU law cannot effectively make up for the legal vacuum that shall be created when the system of intra-EU investment treaty protection is terminated.

## 5 Triumph of Hope Over Experience

### *5.1 Risk of Conflicting Decisions*

Another risk created by *Achmea* is that in the future, this judgment may undermine the attempts of the EU to create a new mechanism of resolution of investor-state disputed, involving a multilateral investment court and, more broadly, call into question the trade and investment agreements which are now being negotiated by the EU. This may be the situation e.g. when an arbitral tribunal established under one of these treaties comes to conclusion that conflicts with the interpretation of EU law

[65]CJEU, Case C-235/17 *Commission v. Hungary* (Usufruct of agricultural land), ECLI:EU:C:2019:432.

[66]But see Arbitral Tribunal, ICSID Case No. ARB/11/23, *Mr. Franck Charles Arif v. Republic of Moldova*, Award of 8 April 2013.

[67]See e.g. CJEU, Cases C-213/11, C-214/11 and C-217/11 *Forta, Fortuna and Grand*, ECLI:EU:C:2012:495 and the subsequent case law of the Polish courts, such as the judgment of the Constitutional Court of 11 March 2015, file no P 4/14 (accessible at www.trybunal.gov.pl) and resolution of the Supreme Administrative Court of 16 May 2016, II GPS 1/16 (accessible at http://orzeczenia.nsa.gov.pl/doc/98C5206CE9).

provided by the CJEU. So far, and for some unexplained reason, the European Commission and the CJEU seem to believe that the EU or its Member States would never lose a dispute under such treaties and that in any event, no friction between such treaties and the TFEU could arise.[68] In the light of *Micula*, *Achmea* and the numerous cases confirming the breach of international law standards by EU Member States, this optimism is difficult to understand.[69]

The core of the *Achmea* reasoning is that an arbitral tribunal could misinterpret or misapply EU law and therefore affect its autonomy. Accordingly, it is—according to *Achmea*—wrong to derogate investor-state disputes from national courts (who can ask questions by virtue of Article 267 TFEU) and to refer these disputes to arbitral tribunals (who cannot ask such questions). But if so, would not the same concerns arise if a matter is referred to an arbitral tribunal (or a multilateral investment court) established to resolve investment treaty dispute on the basis of a treaty between the EU and a third country?

## *5.2 Application of EU Law As Facts?*

An arbitral tribunal, or a multilateral investment court seized with a dispute under the investment treaty between the EU and a third country shall likely have to apply or interpret provisions of EU law just to the same extent as the arbitral tribunal would under the Netherlands-Slovakia bilateral investment treaty. In *Opinion 1/17*, the CJEU purported to distinguish the arbitral tribunal under the CETA from investment tribunals sitting under intra-EU bilateral investment treaties by pointing to the explicit provision of the CETA (Article 8.31.2) pursuant to which a CETA tribunal would have to evaluate EU law merely as a fact. Whereas, in the view of the CJEU expressed in *Achmea*, bilateral investment tribunals *could* apply EU law *qua* law and not *qua* facts. The distinction is not persuasive for many reasons. Firstly, not all bilateral investment treaties have had similar choice of law clauses, and in many instances domestic and EU law of the EU Member States would be regarded as facts.

[68] See in particular CJEU, Opinion 1/17, *supra* note 4, paras. 152 and 153. The CJEU has focused on the fact that according to its provisions, the CETA 'cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties'. On that basis, the CJEU declares in para. 153 of Opinion 1/17 that the CETA Tribunal 'has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures specified in paragraph 152'. This conclusion not only confuses the question of jurisdiction with the decision on merits, but more importantly it overlooks that it will be for the CETA tribunal to decide what was necessary for the Member States to pursue a public interest and whether its actions were not arbitrary, disproportionate or abusive.

[69] On Opinion 1/17 see e.g. Koutrakos (2019), p. 294 who refers to the approach of the CJEU in Opinion 1/17 as to a leap of faith.

Secondly, even if an arbitral tribunal under a BIT were to interpret EU law *qua* law, it would not differ in such operation from an arbitral tribunal resolving a commercial dispute under national law of an EU Member State. Thirdly, such interpretation would not in any event be binding on the CJEU.

The point is, regardless of whether EU law is applied as law or as facts, it does always require certain interpretation on the part of the arbitral tribunal, whether under the CETA or not. It is not possible to assume that a future CETA tribunal would not have to review the conduct of an investor, or state authorities, against the yardstick defined in an act of EU law. Nor that in view of conflicting submissions of the parties as to whether each side could reasonably rely on its own interpretation of that act, assess that conduct. Such assessment could then be contrary to an anterior or posterior interpretation given to that act by the CJEU. Alternatively, it could well happen that a CETA tribunal would find that an interpretation given by the CJEU to a particular provision of the EU law constitutes a breach (or part of a breach) of the CETA provision.

Two other arguments have been used to distinguish between intra and extra EU situations. They are the principle of mutual trust and involvement of the EU as the contracting party to the treaty. Starting with the latter argument, it goes only as far as Article 344 TFEU is concerned. However, the fact that the involvement of the EU as a party may do away with the issue of an Article 344 violation is irrelevant for the principal problem, which is the risk of incompatibility of the award with the principle of autonomy of EU law. As far as the problem concerns the autonomy of EU law, it is immaterial who the parties to the treaty are. The point is, even the EU cannot enter into an international treaty that would be incompatible with the TFEU.

## *5.3 Role of Mutual Trust*

Turning to mutual trust, this principle merely means that a court of a Member State should assume that courts of another Member State can be trusted to comply with a minimum (*nota bene*, vague and undefined) standard of due process. The argument to be built on the principle of mutual trust is that in an intra-EU context, it is not necessary to take a dispute out of the purview of the courts of a Member State because it is supposed that those courts would ensure due process of law. But in relation with third countries, the principle of mutual trust simply implies that courts of *all* Member States seen as one, are deemed to offer the same type of due process guarantees and be subject to the supervision of the CJEU. Accordingly, a provision in an investment protection treaty with a third country conferring jurisdiction onto an arbitral tribunal operating outside the judicial structures of the Member States, logically implies that the EU would agree to waive these guarantees which are presumed to exist (pursuant to the mutual trust principle) in the entire EU. Such provision also implies the waiver of the power of the CJEU to ensure that an arbitral tribunal properly applies and/or interprets EU law.

The justification given in *Opinion 1/17* for these concessions was that respect for the rule of law could not be presumed in the third countries with whom such treaties are made.[70] Accordingly, it seems following *Achmea* and *Opinion 1/17* that the CJEU is prepared to sacrifice the autonomy of EU law and limit the jurisdiction of national courts because certain third countries may have inadequate judicial systems, but is not prepared to accept investment treaty arbitration in a purely intra-EU context, where the risk of an actual conflict between a decision of an arbitral tribunal with EU law would be much lower. The reasoning here is plainly incoherent and the issue would have to be revisited by the CJEU at some point in the future.

In summary, the derogation of a dispute from Member State courts in favour of an international court or tribunal (one of the key reasons why the CJEU declared intra-EU arbitration to be incompatible with EU law in *Achmea*), could create similar legal issues in an intra-EU as in an extra-EU dispute.[71] Moreover, an international investment court could even declare that the CJEU acted in violation of the respective investment protection treaty through the adoption of a particular judgment on the interpretation or application of EU law. All these points, adopting the logic of *Achmea*, would strongly advocate against alleged conformity of extra-EU investment protection treaties with EU law. One would therefore think that following the decided stance taken in *Achmea*, the CJEU should take the next logical path and decide in *Opinion 1/17* that investment treaty arbitration is likewise prone to undermine the effectiveness of EU law in the non-intra EU context. As we have seen, this did not happen. But this does not mean that the issue will not be revisited one day.

## 6 Simply Bad Outcome for Europe

### *6.1 Imprudence of Trusting National Courts Only*

Putting aside the technical legal flaws in the reasoning of *Achmea*, it is submitted that the judgment was also imprudent from the perspective of protection of the rule of law in Europe. At the time when independence of the judiciary is under attack from illiberal governments, promoting judicial monopolism is not the best strategy. Thus, while *Achmea* strengthens the position of the CJEU and national courts, a better route to defend the rule of law precisely in those Member States where it most needs to be protected would be to allow for a multiplicity of legal remedies at the choice of

[70] Expressed clearly in para. 82 of the opinion of AG Bot, supra 40, and implied in paras. 128–129 of Opinion 1/17, *supra* note 4.

[71] Admittedly, the conferral of jurisdiction would take place pursuant to an agreement entered into not by and between EU Member States, but pursuant to a treaty entered into by the EU and the Member States with a third country. This, however, only addresses the concerns raised by the CJEU in *Achmea* in relations to Article 344 TFEU, but not these related to Article 267 TFEU nor these related to Article 19 TEU and the principle of autonomy of EU law.

the aggrieved party. A useful analogy is the engineering concept of redundancy. In a technical context, redundancy is understood as duplication of critical components or functions of a system with the intention of increasing reliability of the system in the event of a failure or break-down.[72] Thanks to redundancy, for example, passenger airplanes may safely continue a flight even in the case of the breakdown of one (or more) engines. Similarly, multiple safeguards are routinely put in place to ensure safety in air traffic. In law, redundancy is intuitively regarded as unwelcome as it entails the risk of multiplicity of proceedings and conflicting judgments. As a result, duplications in legal systems are eliminated. This, however, exposes the critical components of the legal infrastructure designed to protect the rule of law to the risk of a single successful attack from an illiberal or autocratic political power.

The existing system of investment treaty arbitration in Europe not only offered a choice but was importantly different from proceedings before state courts and more immune to current threats. International investment law enforces the rule of law principally through non-state, apolitical *quasi*-judicial bodies, notably international arbitral tribunals, which are constituted on an *ad hoc* basis for the limited purpose of determining the outcome of a single case. The decentralized, dispersed system of arbitration results more resilient to the potential attacks to which national courts may be exposed from illiberal governments. Additionally, investment treaty arbitration enables individuals to bypass national courts and assert their claims directly before supra-national *quasi*-judicial bodies, which they cannot do under EU law.

## 6.2 *Three Salient Advantages of Investment Treaty Arbitration*

Three specific features of international investment arbitration make it more attractive for investors than any remedy available under EU law. Firstly, international arbitration under investment protection treaties typically allows creating a level playing field for the individual and the government with respect to the composition of the arbitral tribunal. From the perspective of an individual claimant, this is a remarkable advantage, which is simply not available elsewhere. In national courts, judges are appointed exclusively by the competent organs of the executive power.[73] Individuals

[72] Adams (2017), p. 77.

[73] The perceived bias of domestic courts is typically indicated as one of the reasons that investors prefer international arbitration to litigation before domestic courts, see e.g. Brower and Steven (2001), p. 196. This phenomenon was also recognized by the European Commission in the 2013 Factsheet Investor-State Dispute Settlement, http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf (last visited on 18 July 2019), in which it stated at p. 2: 'Firstly, the investor may not want to bring an action against the host country in that country's courts because it might think they are biased or lack independence. Secondly, investors might not be able to access the local courts in the host country. There are examples of cases where countries have expropriated foreign investors, not paid compensation and denied them access to local courts. In such situations,

are similarly disadvantaged in proceedings before permanent international courts, to which judicial candidates are often nominated by states. In international arbitration, however, an individual and a state are on a par regardless of whether each party appoints a co-arbitrator (and the president of the tribunal is appointed by those two or by an arbitral institution) or the entire arbitral panel is chosen from among neutrals by an arbitral institution.

Secondly, investment arbitral tribunal can be harsher to respondent states with respect to damages. Domestic courts often feel constrained from ruling against states with respect to the consequences of measures taken in pursuit of their sovereign powers. Therefore, even in high value disputes, high damages are rare. In proceedings before the European Court of Human Rights, settled case law regarding a taking in breach of Article 1 of Protocol No. 1 confirms that the compensation need not be full.[74] Confronted with such benchmarks, the prevailing approach in investment treaty arbitration favoring the full compensation model[75] is attractive to investors. It allows to assume that owners of a business project frustrated by unlawful acts of a state could receive compensation calculated on the basis of expected future streams of revenue that were missed because of the contested measures.

Thirdly, enforcement of investment arbitral awards need not take place in the territory of the Member State concerned. Arbitral awards are enforced either pursuant to the Washington Convention[76] or the New York Convention,[77] which implies that the grounds for refusal of enforcement on the leading international financial markets is very limited. This poses an important risk to the states that refuse to settle the awards voluntarily. The existence of a number of unsettled awards may create problems for a state when seeking to gain access to international funding. It can also increase the perceived political risk of doing business within that state, thus affecting the inflow of foreign investments and augmenting the cost of service of sovereign debt. Furthermore, the very prospect of being engaged in costly arbitration proceedings is a nuisance to the states.[78] In the end, the disadvantages of investment treaty arbitration proved in the past to have a chilling effect on the attempts of various states to take measures inconsistent with the rule of law.

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investors have nowhere to bring a claim, unless there is an ISDS provision in the investment agreement.'

[74]ECtHR, *Lithgow and others v. United Kingdoms,* Judgment of 8 July 198, *Applications nos. no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81*.

[75]PCIJ, the *Chorzów Factory* case (*Germany v. Poland*), Judgment of 13 September 1928, P.C.I.J., Series A, No. 17, p. 47.

[76]Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington D.C., 18 March 1965, 575 UNTS 159.

[77]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS 38.

[78]Pelc (2017), p. 567 estimates the average defence cost for a state per case at approximately USD 5.5 million.

For aforementioned reasons, investment treaty arbitrations played an important role in the European Union as a tool of fostering and enforcing the rule of law. Member States of the EU, particularly in Central and Eastern Europe, felt there was real risk of facing adverse financial consequences if they would adopt measures that are incompatible with the rules laid down in the investment protection treaties. Investors could assume that if they did not trust local courts in that part of the world,[79] they had recourse before an international forum. Following *Achmea*, the accuracy of that assumption was undermined. Following *Opinion 1/17*, it has been partially restored, as it seems that the CJEU shall tolerate—at least for some time—recourse to arbitration by investors from Canada (and possibly also other jurisdictions) or their EU subsidiaries,[80] against EU Member States.

## 7 Conclusions

The decisions in *Achmea* and *Opinion 1/17* have critical importance for the future of cross-border investment protection in Europe. Their political manifesto is clear. Protection of cross-border investments within the EU should not take place pursuant to current investment protection treaties, and should not involve international arbitration as it has been known to date. With respect to investments involving third countries, the EU has green light to engage in trade and investment protection treaties, provided that investor-state dispute resolution provisions in such treaties comply with certain conditions believed to preserve the autonomy of EU law. However, the technical legal analysis used by the CJEU to justify these conclusions is wanting in many important aspects and it is internally incoherent. Therefore, it undermines legal certainty and meets with considerable pushback from international arbitral tribunals and international business community.

The source of these problems is clearly *Achmea*. The principal issue with this judgment is that it purports to deliver a simplified political message that all investor-state arbitrations based on intra-EU BITs are reportedly unlawful. By doing so, *Achmea* overlooks not only the legal and factual niceties concerning almost 300 potentially affected international treaties which were formally in force at the time when the judgment was issued, but also the potential collateral effect which the legal reasoning employed in that judgment may have e.g. for commercial arbitration or the European Convention of Human Rights.

[79]The situation in national judicial systems in many EU Member States if far from ideal, which is being admitted even by the European Commission. See e.g. the 2018 EU Justice Scoreboard, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf.

[80]See Article 8.23.1. (b) of the CETA.

The timing of *Achmea* could not be worse as it coincided with the systemic actions taken in countries such as Poland to undermine the independence and efficiency of the national judicial system and to subjugate it to the political will of the executive branch.[81] It is of course most desirable that the CJEU intervenes to protect the rule of law by supporting the independence of the judicial systems of the Member States. However, the contested legislative acts in Poland, and earlier in Hungary, were not a result of innocent errors of the national legislator. They were undertaken in wilful disregard of due process of law and they were intentional. As of today, the jury on the future of judiciary in Poland is still out. It also seems that the procedure under Article 7 TEU has encountered serious difficulties and it is uncertain whether it can be completed at all.[82] Given the continuing rise of populism and extremism in Europe is may be that also other political powers are watching the space closely. In these circumstances, cutting the intra-EU investors off from an alternative way of pursuing their legal claims and referring them before the mandatory jurisdiction of national courts was not a prudent move.

The same arguments which served to justify the decision in *Achmea* can also turn in the future against the trade and investment agreements which have been entered into, or are currently being negotiated by the EU. As long as these treaties provide for access of investors to international arbitration, they will incentivize EU investors to bypass *Achmea* by setting up subsidiaries in such third countries parties to these treaties. Clearly, there is a tendency in the current international investment and tax law to deprive post-box (or conduit) companies of the benefits of preferential tax treatment[83] and investment protection. This, however, makes it only harder—but not impossible—to engage in jurisdiction shopping and treaty planning.

Finally, *Achmea* puts EU Member States into a position of conflicting obligations. On the one hand, the intra-EU treaties remain in force and create certain obligations for these Member States under public international law, which may benefit third parties (investors). On the other, under the interpretation of *Achmea* as the Member States adopted on 15 and 16 January 2019, they are constrained from complying with these obligations voluntarily. What results is an increasing mass of

[81] See e.g. CJEU, Case C-619/18 *Commission v. Poland (retirement of Supreme Court judges)*, judgment of 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-192/18 *Commission v. Poland (retirement rules for Polish judges)*, AG Opinion of 20 June 2019, ECLI:EU:C:2019:529; CIEU, Joined Cases C-585/18, C-624/18 and C-625/18 *Krajowa Rada Sądownictwa and Others*, AG Opinion of 27 June 2019, ECLI:EU:C:2019:551.

[82] The process was brought to a stall in 2018. Moreover, senior EU officials admit the procedure has had limited impact on Poland's behaviour, see https://www.reuters.com/article/us-poland-katainen-eu/eus-katainen-says-article-7-procedure-against-poland-has-had-little-impact-idUSKCN1S73C6; last acceded on 17 July 2019.

[83] See e.g. CJEU, Joined Cases C-116/16 and C-117/16, *Skatteministeriet v. T Danmark and Y Denmark Aps*, ECLI:EU:C:2019:135.

unpaid awards rendered against EU Member States that one day shall reach the gravitas required for the problem to be resolved at a political, and not legal level. How and when can this may happen remains to be seen.

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