PROTECTING FOREIGN INVESTMENT IN POST-ACHMEA EUROPE: WHAT ARE THE ADJUDICATORY OPTIONS?

By Madina Dumanova

LLM Capstone Thesis

SUPERVISOR: Professor Tommaso Soave

Central European University – Private University

Central European University

June 17, 2022

TABLE OF CONTENTS

ABSTRACT 3

INTRODUCTION 5

CHAPTER ONE. FALL OF INTRA-EU INVESTMENT ARBITRATION: RATIONALES 9

1.1. Grand Attack of Achmea over Intra-EU Investment Arbitration: Autonomy over Intra-EU BITs 9

1.2. The Post-Achmea Landscape: Further Blow to Investment Arbitration Within EU 13

1.3. 'Achmea's Systemic Effects: Is Intra-EU Investment Arbitration Dead'? 15

CHAPTER TWO. AVAILABLE INSTITUTIONAL CHOICES FOR EUROPEAN INVESTORS AND THEIR TRADEOFFS 21

2.1. Domestic Courts and Their Tradeoffs 21

2.2. European Court of Human Rights and Its Tradeoffs 25

2.3. Diplomatic Protection Through Independent Courts and Its Tradeoffs 27

CONCLUSION 31

BIBLIOGRAPHY 33

ABSTRACT

The consistently rising number of investor-state arbitration proceedings has triggered an extensive backlash and increased questioning of the investment law regime within the EU. This turned into a real conflict when CJEU adopted Achmea ruling that declared the intra-EU BITs to be incompatible with the EU law in 2018. While intra-EU investors were barely getting used to the post-Achmea landscape without protections afforded under intra-EU BITs, the EU's fight against the existence of arbitration tribunals has continued ever since with its rulings in Moldova v. Komstroy and Poland v. PL Holdings declaring ECT arbitration and ad hoc arbitration agreement to be incompatible with the EU law respectively. The consequences of these rulings are momentous to intra-EU ISDS which arbitration tribunals do not yet want to recognize. While it is understandable that two systems are asserting control over the investment protection regime within the EU, the conflict between them is depriving EU-based investors of the predictability they need the most to protect their investments.

In light of the above, the thesis aims to analyze the current anti-arbitration attitude within the EU in light of Achmea and post-Achmea developments and their significant and irreparable effect on intra-EU investment arbitration. Moreover, considering the heightened need of investors for other means of dispute settlement in light of these developments, the thesis also intends to provide a comparative analysis of tradeoffs of potential adjudicatory mechanisms for settlement of investment disputes (domestic courts, ECHR, WTO, and ICJ).

Taking into account the current anti-arbitration stance in Europe, the thesis makes three recommendations: First, EU investors should abstain from resorting to arbitration due to the high risk of the challenge of an award. Second, bringing a dispute first before a domestic mechanism

and then before the ECHR offers a favorable institutional choice to investors. Third, the choice of investors should take into account the different contexts.

INTRODUCTION

International Investment Law (IIL) is one of the profound fields of international law created through a considerable number of International Investment Treaties (IITs): Bilateral Investment Treaties (BITs) and Investment Chapters in International Economic Treaties. Most IITs provide for Investor-State Dispute Settlement (ISDS) clauses which allow an investor to bring a claim against a host state before an arbitral tribunal for violations of IITs and claim significant amounts for compensation. With the issuance of binding awards, such claims are considered powerful tools in the hands of investors.

In recent years, the ISDS system has become the object of increasing public scrutiny and was accused of enabling private arbitrators to decide on the appropriateness of the wide range of public policy measures of states, thus leading to the creation of a "parallel justice system"[1]. With a growing number of awards involving compensation of hundreds of billion dollars or more[2] and other concerns over transparency[3], legitimacy, and coherence in the administration and outcome of investment arbitration disputes,[4] the ISDS system has garnered severe hatred and contempt by states.

[1] Sharon Shmidt, 'Thoughts on The Legitimacy, Sustainability and Future of ISDS in Times of Crisis' (*Arbitration & Litigation Law Firm Austria | OBLIN*, 2022) https://oblin.at/newsletter/thoughts-on-the-legitimacy-sustainability-and-future-of-isds-in-times-of-crisis/https://oblin.at/newsletter/thoughts-on-the-legitimacy-sustainability-and-future-of-isds-in-times-of-crisis/ accessed 1 February 2022.

[2] See e.g., in Yukos case, tribunal ordered Russia to pay 50 billion. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Award, 18 July 2014; In Tethyan Copper Company Pty Limited Pakistan, the Government of Pakistan was ordered to pay $6 billion as a compensation. *Tethyan Copper Company Pty Limited Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019.

[3] In 2001, New York Times Article has sparked public unease over absence of transparency in proceedings under Chapter 11 of the NAFTA. Anthony Depalma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say (Published 2001)' (*Nytimes.com*, 2022) https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html accessed 16 June 2022.

[4] American Society of International Law, 'Debate: Designing the Investor State Dispute Resolution System from Scratch' (Youtube, 8 January 2018) https://www.youtube.com/watch?v=b7vD6Buu6PY accessed 16 June 2022.

As a result of their experiences with the ISDS tribunals, Latin American states – Argentina, Ecuador, and Uruguay denounced ICSID Convention.[5] On the other side of the Atlantic - in the European Union (EU, Union), the backlash against ISDS was guided by the assertion that investment arbitration is not compatible with the EU law.

The EU made a successful move against investment arbitration with the ruling of the Court of Justice of the European Union (CJEU) in Slovak Republic v. Achmea ruling (Achmea) where it declared the ISDS clause in Netherlands-Slovakia BIT to be incompatible with the EU law. [6] Labeled as "a loud clap of thunder on the intra-EU BIT sky"[7], the ruling resulted in far-reaching consequences depriving intra-EU investors of the main means of protection of foreign direct investment - intra-EU BITs and creating a serious conflict between the EU law and IIL.

Later on, to achieve a coherent approach with respect to all intra-EU IITs, (1) 23 Member States signed an Agreement for the Termination of all intra-EU BITs (Termination Agreement) which aims to terminate 130 intra-EU BITs,[8] (2) CJEU rendered a ruling in Republic of Moldova v. Komstroy (Komstroy) that declared ISDS clause in Energy Charter Treaty (ECT) to be incompatible with the EU law,[9] (3) CJEU rendered a ruling in Republic of Poland v. PL Holdings (PL Holdings) that declared that the EU Member States are prevented from entering

[5] Georgetown Law, 'Workshop: ISDS Reform in Latin America' (2019) ISDS Reform in Latin America (georgetown.edu) accessed 16 June 2022.
[6] CJEU, *Slovak Republic v. Achmea*, ECLI:EU:C:2018:158, Judgment, 6 March 2018.
[7] Clement Fouchard and Marc Krestin, 'The Judgment of The CJEU In Slovak Republic V. Achmea – A Loud Clap of Thunder on The Intra-EU BIT Sky! - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ accessed 16 June 2022.
[8] Agreement for the Termination of all Intra-EU BITs.
[9] CJEU, *Republic of Moldova v Komstroy*, ECLI:EU:C:2021:655, 2 September 2021.

into ad hoc arbitration agreements with EU-based investors, where such agreements would replicate the content of arbitration agreement in a BIT between the EU Member States.[10]

The subsequent CJEU rulings after Achmea led to further alarm bells for the EU investors and put them in an uncertain position whether to pursue arbitration or not. Such uncertainty is aggravated by the anonymous stance of over 50 arbitrations so far which consider Achmea not to be an obstacle to their jurisdiction under international law to consider investment treaty claims and grant compensation for investors' damages. [11] However, the enforceability of such awards is a contested issue due to the high challenge risk by the Member States on the basis of invalidity of an arbitration agreement or public policy grounds.

This new legal landscape, which arises from the clash between EU and ISDS law, risks depriving EU investors and the Member States alike of the certainty and predictability required for adequate protection of foreign investment across the continent. This thesis aims to address such insecurity by analyzing the current situation of backlash against investment arbitration in the EU. Furthermore, in light of the unfeasibility of arbitration as an institutional choice for intra-EU investment claims, the thesis also intends to analyze alternative adjudicatory forums for investment disputes other than arbitration in light of their relevant tradeoffs: domestic courts, European Court of Human Rights (ECHR), World Trade Organization (WTO), International Court of Justice (ICJ).

The structure of the thesis is as follows: First, we provide a detailed analysis of the Achmea ruling from the perspective of legitimacy. Then, a brief overview of post-Achmea developments

[10] CJEU, *Republic of Poland v PL Holdings*, ECLI:EU:C:2021:875, 26 October 2021.
[11] 'The Latest Chapter of the Intra-EU Investment Arbitration Saga: What It Entails for the Protection of Intra-EU Investments and Enforcement of Intra-EU Arbitral Awards' (*Gibson Dunn*, 2022) https://www.gibsondunn.com/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards/#_ftn3 accessed 17 June 2022.

is given. Third, the systemic effects of the Achmea ruling on intra-EU arbitration with a particular focus on potential enforcement hurdles is analyzed. Finally, the thesis provides a comparative framework of the advantages and disadvantages of institutional alternatives for investment disputes other than arbitration.

While the consequences of the Achmea ruling on the intra-EU investment landscape have been the focus of many private and public law professionals, literature on comparative analysis of adjudicatory options for investment disputes in light of their tradeoffs seems to be scarce. Existing literature on different mechanisms within the context of investment disputes only separately highlights the role of such mechanisms in investment disputes: Rodrigo Polanco (diplomatic protection), Brooks E. Allen and Tommaso Soave (WTO) and Szilárd Gáspár Szilágyi (domestic courts), Tomuschat (ECHR).[12] In this regard, this thesis not only contributes to the current debates regarding Achmea, its consequences, and post-Achmea developments but also seeks to provide a holistic comparative overview of the benefits and drawbacks of possible institutional options for investment disputes.

To achieve the purposes of the thesis, the thesis applies the doctrinal analytical method. In line with the doctrinal analytical method, a comparative institutional analysis method is applied, illuminating the pros and cons of the analyzed forums.

[12] Rodrigo Polanco, *Return of the Home State to Investor-State Disputes* (Cambridge University Press 2018); Brooks E. Allen and Tommaso Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' (2014) 30 JLCIA; Szilárd Gáspár-Szilágyi, 'Foreign Investors, Domestic Courts and Investment Treaty Arbitration' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives.* (Cambridge University Press 2022); Christian Tomuschat, 'The European Court of Human Rights And Investment Protection' in *International Investment Law for the 21st Century* (2009) 636.

CHAPTER ONE. FALL OF INTRA-EU INVESTMENT ARBITRATION: RATIONALES

1.1. Grand Attack of Achmea over Intra-EU Investment Arbitration: Autonomy over Intra-EU BITs

The CJEU's ruling in Achmea on 6 March 2018 that declared intra-EU BITs incompatible with the EU law marks the culmination of the EU's, as Lavranos puts it, "crusade" against international investment arbitration.[13]

Even before Achmea, the EU had continuously been voicing its misgivings with respect to the existence of intra-EU BITs in different contexts and settings.[14] In particular, European Commission (EC) has strongly advocated against the maintenance of intra-EU BITs when it realized incompatibility of such treaties with the functioning of the internal market.[15] While Member States were fully aware of the EC's warnings, most of them either ignored or didn't agree with the views of the EC.[16]

Achmea case was an opportunity for the Union to decide the fate and future of intra-EU BITs within the EU by declaring their incompatibility with the constitutional principle of autonomy enshrined in EU Founding Treaties (Treaty of European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)).[17] A more detailed analysis of the reasoning of the

[13] Dmitriy Kochenov, Nikos Lavranos 'Rule of Law and the Fatal Mistake of Achmea: Could the Intra-EU BITs Have Been the Last Hope for Justice in Captured Illiberal Member States?' (Reconnect, 2020) 6.
[14] *UP (formerly Le Chèque Déjeuner) and CD Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Award, 9 October 2018. para 264.
[15] See, e.g., EC observations of 13 October 2011 in *European American Investment Bank AG v. Slovakia*, PCA Case No. 2010-17, First and Second Award on Jurisdiction, 22 October 2012, 4 June 2014.
[16] Ivana Damjanovic and Nicolas de Sadeleer, 'I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal' (2019) 4 EU Papers. 30.
[17] Steffen Hindelang 'Conceptualisation and Application of the Principle of Autonomy of EU Law – CJEU's judgment in Achmea Put in Perspective' (2019) 44 E.L.Rev. 4.

Achmea ruling is important for the pursuits of this thesis since it made intra-EU investment arbitration practically dysfunctional.

The concern underlying the Achmea decision is the autonomy of the EU legal order. EU as an international organization has certain autonomy enshrined in its lex specialis character.[18] The essential characteristic of such autonomy is authoritative interpretation of the EU law enshrined in 344 of TFEU.[19] The CJEU found incompatibility in this respect. In particular, according to the CJEU, since investment tribunals are not courts or tribunals within the judicial system of the EU legal order, the mere possibility of application of EU law, as forming part of the applicable law, or equally as forming part of international law, is contrary to the autonomy of the EU legal order enshrined in Article 344. Also, arbitral tribunals cannot even refer to the CJEU for a preliminary ruling based on Article 267 of the TFEU which would have granted interpretative supervision of the CJEU over the application or interpretation of EU law. Thus, Achmea has established arbitral tribunals to have adverse effects on the autonomy of the EU legal order. [20]

However, CJEU's concentration on the principle of autonomy to decide the validity of intra-EU BITs and their relationship with EU treaties raises the following concerns:

Firstly, the question arises as to what extent a normative axiom[21] and a basic constitutional law principle[22] can be determinative for derogation from an international treaty - BIT. According to the CJEU in Achmea, the autonomous legal order of the EU based on the Founding Treaties

[18] 'Certain autonomy' of (all) international organizations inherent in their lex specialis character has been recognized by the International Court of Justice (ICJ). *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) ICJ Rep 1996, para. 19

[19] Violeta Moreno-Lax and Katja Zeigler, 'Autonomy of the EU Legal Order - A General Principle?: On the Risks of Normative Functionalism and Selective Constitutionalisation' (EUI 2021) Working paper No. 15, 21

[20] *Achmea* (n 6) paras 33-55.

[21] Armin von Bogdandy, Jürgen Bast, *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2010) 39.

[22] Esa Paasivirta, 'European Union and Dispute Settlement: Managing Proliferation and Fragmentation' in Marise Cremona, Anne Thies, Ramses A. Wessel (eds), *The European Union and International Dispute Settlement,* (Hart Publishing 2017) 32.

cannot be trumped by an international agreement[23] which means that EU law can prevail over international law. Accordingly, over the course of time, CJEU has developed a strong jurisprudence on the priority of EU law over international norms on the basis of the autonomy argument in different contexts.[24] Achmea became a chance to concretize the autonomy principle in the field of investment arbitration.

However, EU law in itself is a part of international law[25] , and the concept of autonomy cannot determine the relationship between the EU law and international investment law and has no effect on the architecture of the international law. As a rule, the invalidity of international treaties is resolved on the basis of the Vienna Convention on the Law of Treaties (VCLT). In this respect, the relationship between the EU treaties and BITs is expected to be resolved on the basis of Article 30 (3) of the Vienna Convention on the Law of Treaties.[26]

Under Article 30 (3) of the VCLT, incompatible provision of the earlier treaty becomes inapplicable if earlier and later treaty has the same subject matter. Under this requirement, the EU treaties do not overlap with the subject matter of the BITs. While protection of physical security[27], free transfer of funds[28], and non-discrimination[29] may be said to reconcile with EU law, it is hard to find an equivalent of the indirect expropriation and fair and equitable treatment

[23] *Achmea* (n 6) para 33.
[24] Initially, in Van Gend en Loos, the ECJ affirmed the principle of autonomy of the EU law and stated that EU law is a 'new legal order', beholden to, but distinct from the existing legal order of public international law. ECJ, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1, Judgment, 5 February 1963. In Kadi case, the ECJ went further as to declare the UN Security Council resolution to be incompatible with the EU law for its incompatibility with the EU Founding treaties. ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union* ECLI:EU:C:2008:46, Judgment, 3 September 2008.
[25] *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on jurisdiction, 30 November 2012. para. 4.120.
[26] Julien Berger, *International Investment Protection in Europe: The EU's Assertion of Control* (Routledge 2020) 94.
[27] Arts. 2,3,16,17 of the Charter of the Fundamental Rights of the EU (EU Charter).
[28] Art. 63 of the TFEU.
[29] The Preamble, Arts. 2, 3 (3), 9, 21 (1) of the TEU, Arts. 8, 10, 18, 19 of the TFEU as well as Art. 21 (2) of the EU Charter.

(FET) standard within the EU law which are mostly litigated principles in ISDS claims.[30] Besides, EU law provides more weight to public interests which is not the case with most of the IITs. [31] CJEU did not even analyze this in the Achmea decision and simply ruled on the fate of intra-EU BITs on the basis of its long-lived autonomy principle.

Secondly, no matter how important the concept of autonomy is within the EU law, CJEU's approach in Achmea towards IIL is in some way hypocritic since Art. 3 (5) TEU specifically provides that "the Union shall contribute…to the strict observance and the development of international law." Achmea ruling clearly derogates from this provision by marking the prevalence of EU law over investment law and gives rise to a conflict between the two systems.

Lastly, as a result of Achmea, Member States faced the dilemma of choosing between obligations that contradict each other. On the one hand, they have to comply with the CJEU ruling. Admittedly, Member States have transferred part of their sovereignty to the EU upon entering the Union[32] and thus are obliged to follow the Union law. This requires them to relinquish the consent they gave under their BITs at the time of their conclusion. However, at the same time, they have a pacta sunt servanda obligation[33] before investors to keep the legal rights accorded to investors under intra-EU BITs.

It seems that the CJEU ruling in Achmea led to an uneasy tension between the IIL and EU law. The application of the autonomy principle by the CJEU against investment arbitration that only has an effect within the Union legal order was erroneous from the lens of international law. In any case, no matter how unjustifiable CJEU's approach in Achmea is, taking into account that EU Member

[30] *Berger* (n 26) 55-57.
[31] *Ibid.* 60.
[32] *Ibid.* 88.
[33] Art. 26 of the VCLT.

States are obliged to follow the EU law, Achmea was a determining factor for the future of the intra-EU investment arbitration within the EU. However, this victory came about through the deprivation of EU-based investors of their rights in intra-EU BITs.

1.2.The Post-Achmea Landscape: Further Blow to Investment Arbitration Within EU

Achmea decision didn't remain with the limited reach of intra-EU BITs for a long time. Shortly after, further events took place that either extended or reaffirmed the Achmea ruling thus strengthening the position of the EU against investment arbitration. We shall discuss these below.

***Termination Agreement*:** As described in the first section, the Achmea ruling put Member States in the dilemma of choosing between compliance with the EU law or their obligations before investors under BITs.

In this situation, with an intention to "give teeth" to the Achmea ruling[34], the EU made a superior step[35] against investment arbitration by having 23 Member States (not including Austria, Finland, Sweden, and Ireland[36]) sign the Termination Agreement aiming to terminate 130 intra-EU BITs between them. The Termination Agreement also declared sunset clauses and intra-EU BIT disputes initiated after Achmea null and void.[37]

---

[34] Gregorio Pettazzi Desiree Prantl, 'The Agreement Terminating Intra-EU Bits' (*Freshfields Bruckhaus Deringer*, 2022) https://riskandcompliance.freshfields.com/post/102g7ke/the-agreement-terminating-intra-eu-bits accessed 17 June 2022.

[35] We are calling the Terminational Agreement as a superior step against ISDS backlash since the record shows that the states were not at all enthusiastic to terminate their BITs at all times after ISDS backlash became central issue which may be attributed to reputational consequences in the relations of two countries. For example, despite its notorious losses under ISDs claims, Argentina never terminated its US -Argentina BIT. See. José E. Alvarez, 'ISDS reform: The Long View' (NYU 2021) Public Law Research Paper No. 22-02, 22.

[36] The reason why these countries, including Austria have not signed the present agreement might be due to reasons of promoting large domestic investors who are still in pending investment arbitrations. See Christoph Greil, 'The New Agreement Terminating Intra-EU BITs - A Short Overview' (*Lexology*, 2022) https://www.lexology.com/library/detail.aspx?g=c0a0b155-fadc-4f0a-8c48-c7fef0a050d9 accessed 17 June 2022.

[37] Naina Gupta and Yarik Kryvoi, 'Termination of Intra-EU Bits: Legal And Practical Consequences For Pending And Future Disputes' (*Prof Yarik Kryvoi | Blog on Law, Policy and Reforms*, 2022)

While mass termination of the intra-EU BITs along with their sunset clauses aligned the intra-EU BIT practice of the majority of states with the Achmea ruling, it also resulted in a significant lowering of substantive and procedural standards for EU investors.[38]

Intra-EU ECT arbitration: When the Achmea ruling has been rendered, the question of its applicability to the ECT came to the spotlight of attention of scholars.[39] ECT also provides arbitration as a dispute settlement forum and in terms of importance and the scope of signatories, it is much more important than the BITs since it has been signed by some 50 countries as well as by the EU itself.[40] After the upheaval of intra-EU claims under ECT that led to awards giving no regard to the sovereignty of states, investor-state arbitration under the ECT came under severe criticism. As a result, ECT became subject to the modernization process.[41] In this context, by providing certainty in the relationship of the ECT with the EU law, CJEU would be able to come very close to the annihilation of the practice of investment arbitration in Europe.

Understanding this need, in Komstroy ruling in 2021, the CJEU stretched the line of reasoning in Achmea to the ECT and ruled the ISDS clause in the ECT to be incompatible with the EU law.[42]

Intra-EU arbitration under ad hoc arbitration agreement: Released right after Komstroy, the CJEU's ruling in PL Holdings[43] shed light on the disputes arising from intra-EU BITs after Achmea where the Member State might have tacitly accepted the jurisdiction of the tribunals by not raising

---

http://kryvoi.net/blog/termination-of-intra-eu-bits-legal-and-practical-consequences-for-pending-and-future-disputes/ accessed 17 June 2022.

[38] *Kochenov and Lavranos* (n 13) 1.

[39] See. e.g., Matthew Happold and Michael De Boeck, 'The European Union And The Energy Charter Treaty: What Next After Achmea?' in Mads Andenas, Matthew Happold and Luca Pantaleo (eds), *The European Union as an Actor in International Economic Law* (T.M.C. Asser Press: 2019).

[40] Alan Uzelac, Why Europe Should Reconsider Its Anti-Arbitration Policy in Investment Disputes (AJEE Journal 2019) 14.

[41] Ylli Esmé, 'ECT Modernisation Perspectives: An Update - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2022) http://arbitrationblog.kluwerarbitration.com/2021/08/05/ect-modernisation-perspectives-an-update/ accessed 17 June 2022.

[42] *Komstroy* (n 9).

[43] *PL Holdings* (n 10).

the jurisdictional objection at an appropriate time. In such a case, it is deemed that a Member State has concluded an ad hoc arbitration agreement identical to an ISDS clause which was rendered invalid under the Achmea ruling. The question of the compatibility of such an ad hoc agreement has been referred to the CJEU for a preliminary ruling by the Swedish Supreme Court. CJEU held such an ad hoc arbitration agreement to be incompatible with the EU law since the conclusion of such an agreement "would in fact entail a circumvention of the obligations arising for that Member State under the EU Treaties."[44]

Therefore, with PL Holdings, CJEU provided the EU law protection for states who didn't raise the jurisdictional objection in intra-EU investment disputes after Achmea and declared potential ad hoc agreement argument that may emerge in such a scenario to be incompatible with the EU law.

In sum, the Termination Agreement and CJEU rulings in Komstroy and PL Holdings helped to solidify the wall created against investment arbitration by the Achmea ruling.

1.3.'Achmea's Systemic Effects: Is Intra-EU Investment Arbitration Dead'?

CJEU set a high threshold against investment arbitration in Achmea. Respondent states expected Achmea to become a groundbreaking bar for the jurisdiction of arbitral tribunals. Unfortunately, this is the point where Achmea decision has fallen short. In none of the arbitrations where Achmea objection has been invoked, investment tribunals have rejected their jurisdiction on that basis. Since tribunals are not bound by the EU law (1) and they are outside of the system of the

[44] Guillaume Croisant, 'CJEU Extends Achmea To Ad Hoc Arbitration Agreements Identical To Intra-EU Bits' Arbitration Clause - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2022) http://arbitrationblog.kluwerarbitration.com/2021/10/28/cjeu-extends-achmea-to-ad-hoc-arbitration-agreements-identical-to-intra-eu-bits-arbitration-clause/ accessed 17 June 2022.

EU legal order (2) and decide their jurisdiction on the basis of the principle Kompetenz-Kompetenz[45](3), they generally rejected EU law objections raised by Respondents.

The grounds for the objection of tribunals can be categorized as follows:

- Achmea ruling does not apply to ECT since it is a multilateral treaty (before the release of the Komstroy)- Masdar v Spain[46]; Vattenfall v Germany (II);[47] Foresight v Spain;[48] RREEF v Spain;[49]
- Achmea ruling does not apply to the ICSID arbitration since consent for the jurisdiction of ICSID is irrevocable- Marfin v Cyprus;[50] UP and CD v Hungary;[51]
- EU law objection was submitted too late-Antin v Spain;[52]

However, although tribunals are demonstrating such opposition against Achmea, one has to take into account whether these awards are enforceable. CJEU rulings rendered the very existence of arbitral tribunals to be prevented by the EU law. In this regard, since EU law forms a part of domestic laws of Member States, the risk of the challenge of awards is high.

[45] The doctrine of Kompetenz-Kompetenz implies that the arbitrators are empowered to make a final ruling as to their jurisdiction, with no subsequent review of the decision by any court. See Saadia Bhatty and Kabir Duggal, 'Wiki Note: Competence-Competence' (*Jusmundi.com*, 2022) https://jusmundi.com/en/document/wiki/en-competence-competence accessed 17 June 2022.
[46] *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018. para 679.
[47] *Vattenfall v Germany*, ICSID Case No ARB/12/12, Decision on Achmea Issue, 31 August 2018. Paras 161-165.
[48] *Foresight Luxembourg Solar 1 Sàrl, et al v Kingdom of Spain*, SCC Case No 2015/150, Final Award, 14 November 2018. paras 218–219.
[49] *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà r.l v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para 211.
[50] *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, para 592
[51] *UP and CD Holding Internationale v Hungary*, (n 14) para 264.
[52] *Antin Infrastructure Services Luxembourg Sà.r.l and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID Case No ARB/13/31, Award, 15 June 2018, para 55.

It is known that most investment arbitrations are conducted under ICSID or UNCITRAL rules. In this respect, we shall examine the enforceability of the intra-EU awards in light of these instruments.

In case of UNCITRAL arbitration, the enforcement of awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Under Article III of the New York Convention, national courts have an obligation to recognize and enforce arbitral awards except where one or more of the seven grounds under Article V apply. Potentially, intra-EU awards may be refused in enforcement based on the following grounds:

- Public policy- the recognition and enforcement of an award 'may' be refused where such action would be "contrary to the public policy of that country" i.e. public policy of the state where recognition and enforcement is sought. CJEU rulings constitute the EU law and the national courts in the Member States will automatically apply EU law as a matter of public policy on the basis of the principle of equivalence.[53]
- The invalidity of an arbitration agreement – the CJEU found ISDS provision in intra-EU BIT (Achmea) and subsequently, ISDS provision in ECT (Komstroy) and ad hoc arbitration agreement (PL Holdings) to be incompatible with EU law, thereby rendering them invalid under the legal system of the EU. This necessarily implies that the unilateral offer made by the state under such an arbitration agreement is also invalid. However, one must note that the applicable law for determining the invalidity of the arbitration agreement is the seat of arbitration. In other words, the success of this argument will be

[53] Tania Singla, 'Achmea: The Fate And Future Of Intra-EU Investment Treaty Awards Under The New York Convention' (EJIL: Talk!, 2022) https://www.ejiltalk.org/achmea-the-fate-and-future-of-intra-eu-investment-treaty-awards-under-the-new-york-convention/ accessed 17 June 2022.

determined by whether the arbitral seat is located within the territory of an EU Member State.[54]

In case of an ICSID arbitration, enforcement is governed by the ICSID Convention. Under Article 54 of the ICSID Convention, ICSID awards are binding and will not be subject to any review. At the same time, under para 3 of this Article, execution of the award shall be governed by the domestic laws concerning the execution of judgments in force in the state in which execution is sought. In this regard, since domestic courts are bound by the EU legal order, any domestic court of the Member state is obliged to refuse the execution of the ICSID award.

Overall, CJEU judgments have become a serious obstacle to the enforcement of intra-EU investment awards. However, in this context, one has to question why tribunals are still rendering awards even though they know that awards are basically unenforceable. According to Szilárd Gáspár-Szilágyi and Maxym Usynin, rationales behind tribunals' refusal to recognize EU law are various: the risk of non-enforcement is generally not taken into account by tribunals while upholding their jurisdiction;[55] motivation to legitimize the system in which they operate; formalistic interpretation and application of only legal rules that are relevant to the dispute; lack of security with respect to remuneration of arbitrators which in most cases depends on the length of proceedings.[56] However, ignorance of tribunals to the issue of enforceability in the jurisdictional phase is furthering the unpredictability of the investment protection landscape formed after the EU's backlash against investment arbitration. This is affecting nobody but investors who are in need of an adequate forum that is able to render compensation for injuries

[54] *Singla* (n 53).
[55] *Marfin Investment Group v The Republic of Cyprus* (n 48) para 596.
[56] Szilárd Gáspár-Szilágyi and Maxim Usynin, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment' (Brill – Martinus Nijhoff Publishers 2019) European Investment Law and Arbitration Review, 19-22.

resulting from potential future disregard of foreign investment protection and investor rights by the EU Member States.

It can be argued that there is a possibility of enforcement of intra-EU awards outside the EU which was the case with the Micula brothers v. Romania. After finding Romania in breach of the fair and equitable treatment or the prohibition of expropriation clauses of the BIT, on December 11, 2013, arbitral tribunals awarded Micula brothers €178 million. Following partial payment of the award by Romania, on 30 March 2015, the EC ruled that such payment constituted illegal state aid. It precluded any further payment by Romania and ordered it to recover the partial payment that had been made.[57] However, Micula brothers were able to obtain a decision to enforce an ICSID award in the US despite the EU law objection.[58]

However, in the context of enforcing an award outside the EU, one has to take into account the following obstacles investors might face:

- Relative high costs (to obtain an enforcement decision, the Micula brothers had to lodge applications in the UK and the US in parallel);
- Enforcement is subject to the condition of whether the Member State has assets in that state;
- There is a possibility that EC can escalate EU law objection by filing amicus curiae in enforcement proceedings at a foreign court.[59]

[57] Guillaume Croisant, 'Micula Case: The General Court Quashes The Commission'S Decision And Rules That The Award Is Not State Aid - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2022)http://arbitrationblog.kluwerarbitration.com/2019/06/19/micula-case-the-general-court-quashes-the-commissions-decision-and-rules-that-the-award-is-not-state-aid/ accessed 17 June 2022.
[58] US District Court for the District of Columbia, Viorel Micula v The Government of Romania, Civil No 1:14-cv 00600, Decision on the Claimant's Motion to confirm the ICSID Award.
[59] Carlos Lozano, 'More Than a Friend Of The Court: The Evolving Role Of The European Commission In Investor-State Arbitration - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2022).

In sum, despite the fact that many tribunals upheld their jurisdiction and ruled on the dispute after Achmea, awards rendered by such tribunals are potentially unenforceable. Investors that are awarded compensation, are not able to enforce it in 28 Member States, so they have to spend additional time, effort, and funds to enforce an award in a foreign judicious, without the guarantee of success. Such status quo is creating uncertainties for investors.

http://arbitrationblog.kluwerarbitration.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/ accessed 17 June 2022.

CHAPTER TWO. AVAILABLE INSTITUTIONAL CHOICES FOR EUROPEAN INVESTORS AND THEIR TRADEOFFS

Having outlined the backlash against investment arbitration in the EU, with particular emphasis on the Achmea ruling, it now bears asking: what remedies are European investors left with in this new landscape? Can they find alternative means to access adequate legal protection in a post-Achmea scenario? To answer these questions, this chapter explores investors' remaining adjudicatory options and assesses their promises and pitfalls.

It should be noted that this chapter focuses only on adjudicatory options available for the settlement of investment disputes rather than political (i.e. negotiations) or market options (i.e. insurance) which can also be effective depending on the context of the dispute and relations of investor and the host state.

2.1. Domestic Courts and Their Tradeoffs

Paradoxically, while the ISDS system has been introduced as a means for investors to circumvent the limitations of domestic courts of host states, EU investors now seem to be expected to return to the "old school" of domestic courts in light of opposition against ISDS. In general, domestic courts are the default forum in the light of the inapplicability of arbitration clauses with the EU law.

Domestic dispute settlement mechanisms can apply international law as a part of their domestic legal system. Depending on the constitution of the state, a domestic court can apply international law directly as a part of domestic law or indirectly through domestic implementing legislation.

Therefore, a national court can rule on the international investment dispute by referring to a relevant treaty or customary international law.[60]

However, using domestic courts might have the following deficiencies in the context of resolution of investment disputes:

Firstly, the capacity of domestic courts to deal with disputes in the sphere of IIL is a very debated issue. In many countries, national economic courts deal with claims related to investment and the judges might lack specific knowledge to apply international law principles to investment disputes. According to Bronckers, because of a lack of comfort to apply international law, national judges try to deal with this issue by referring questions of international law to their national administrations.[61] However, Gáspár Szilágyi maintains that none of the allegations regarding the incapacity of national judges in backed by evidence, and the issue of the lack of expertise of national judges in international law is already a history. He supposes that since many domestic judges are gaining international law degrees, the capacity of domestic judges to apply international principles might not be an obstacle anymore.[62] However, there is a difference between the knowledge and expertise gained through years of practice which national judges usually might not have been able to obtain. This issue seems to have been dealt with in

[60] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241, 242.
[61] Marco Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18 Journal of International Economic Law 655, 655–7.
[62] Szilárd Gáspár-Szilágyi, 'Foreign Investors, Domestic Courts and Investment Treaty Arbitration' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives.* (Cambridge University Press 2022) 176.

Kazakhstan by forming specialized investment courts. [63] However, this is not the case in any of the EU Members States.

The second worrying downside of domestic courts in the context of claims involving international aspects is the lack of independence. Domestic courts may indeed be biased towards domestic authorities. The independence issue seems to be especially problematic within certain states in the EU. According to the 2021 EU Justice Scoreboard - the key data tool used to monitor the quality of EU justice systems, slightly more than a third of companies had a negative perception of a local court in Slovakia and Hungary. The three main motives raised were interference and pressure from the government/politicians, economic interests, and the status and position of judges not sufficiently guaranteeing their independence.[64]

As regards Hungary, the 2018 Sarghentini Report of the European Parliament has been highly critical of the Hungarian Government's tactics to undermine the rule of law and the independence of the judiciary.[65] A clear example of such bias is illustrated in the ***Magyar Farming v. Hungary*** dispute where the Hungarian legislation precluding the pre-lease rights clause led to the expropriation of leasehold rights of the Magyar farming. After local court proceedings, the Magyar farming was served with an eviction notice and Hungary threatened to transfer possession of the land to the winners of a tender process it had held. Magyar refused to leave which led Hungarian authorities to arrest the founder of Magyar- Hunter without

[63] Talgat Sariev and Perizat Nurlankyzy, 'Investment Court In Kazakhstan - Trials & Appeals & Compensation - Kazakhstan' (*Mondaq.com*, 2022) https://www.mondaq.com/trials-appeals-compensation/528810/investment-court-in-kazakhstan accessed 16 June 2022.
[64] European Commission, *The 2021 EU Justice Scoreboard* (European Commission COM No 389, 2021) para 3.3.1.
[65] European Parliament, *Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (Sarghentini Report), 2017/2131(INL).

explanation and deny access to a lawyer before releasing him without charge the following morning.

Afterwards, the investor filed an ICSID arbitration claim. The arbitral tribunal ruled that Hungarian legislation led to the expropriation of investor's rights under the lease and granted €7.1 million in compensation plus interest rate and legal fees.[66]

Absent the arbitration proceedings under the existing BIT, the investor would not have achieved justice and received compensation for the measures taken by the Hungarian government. The pressure exerted by Hungarian authorities and biased local court proceedings clearly shows that rule of law within the country is subordinated to the government.

At the same time, domestic courts offer the following comparative advantages:

Firstly, domestic courts, at least as a first instance, play a big role in the resolution of investment disputes. Generally, national courts are in the best position to interpret and apply their own laws and may also be better suited than an international tribunal to make findings of fact if they have greater access to evidence according to Foster.[67] Moreover, domestic institutions are relatively more available to hear smaller claims.[68] This enables access of smaller investors to justice.

Secondly, there are supervisory mechanisms that can assist national courts in preserving the rule of law. Within the EU, national courts may request the CJEU for a preliminary ruling whenever a question of EU law is raised unless the CJEU has already pronounced on an identical matter or there is no reasonable doubt about the appropriate interpretation.[69] Besides, if an investor is not

[66] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary,* (ICSID Case No. ARB/17/27), Award 13 November 2019.
[67] George Foster, 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 Columbia Journal of Transnational Law 201, 262.
[68] *Gáspár-Szilágyi* (n 62) 199.
[69] Art. 267 of the TFEU.

satisfied with the ruling of the domestic court, it can bring a private action before the ECHR.[70] These bodies act as supervisory authorities that can strengthen the fairness of domestic rulings.

Overall, when it comes to domestic courts, they have serious obstacles regarding a lack of necessary expertise, and independence which might present substantial drawbacks to the trust of investors in domestic courts. However, domestic courts are better suited to deal with investment claims as an initial forum. Besides, there are bodies such as CJEU and ECHR that can provide a supervision for malfunctioning domestic mechanisms.

2.2. European Court of Human Rights and Its Tradeoffs

Given the current arbitration stance in Europe, ECHR has recently come under the focus of scholars and practitioners as an appropriate forum for investors' claims.[71] Investor claims before the ECHR are brought through private action on the basis of the breach of the European Convention on Human Rights and its Protocols. Access of corporate entities to the ECHR is provided by Article 34 of the Convention. Article 35 of the ECHR requires exhaustion of local remedies before a party may initiate a claim before the court.[72]

In general, the ECHR mechanism is favorable for investors in the following respects:

Firstly, it grants extensive protections of proprietary rights. ECHR grants the peaceful enjoyment of "possessions" under Article 1 of Protocol 1.[73] The jurisprudence of the court demonstrates that the term "possessions" encompasses a wide concept of possessions suited to protect a wide variety of assets involved in an investment project. In particular, the Article has been found to

[70] Art. 34 of the European Convention of Human Rights.
[71] See *Berger* (n 26) 214; Xavier Taton and Guillaume Croisant, 'Intra-EU Investment Arbitration Post-Achmea: A Look At The Additional Remedies Offered By The ECHR And EU Law - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2022) http://arbitrationblog.kluwerarbitration.com/2018/05/19/intra-eu-investment-arbitration-post-achmea-a-look-at-the-additional-remedies-offered-by-the-echr-and-eu-law/ accessed 16 June 2022.
[72] *Tomuschat* (n 12) 640.
[73] Art. 1 of the First Protocol of the ECHR (P-1).

grant protection from commercial activities involving operating a restaurant, running a warehouse under a special customs regime, to trademarks, and claims to recover taxes illegally collected by the state as well. [74]

Secondly, ECHR does not fall behind investment tribunals in measuring compensation. The process of granting of compensation by the ECHR is based on the "fair balance" test between the demands of the general interest of the community and the requirements of the protection of the individual fundamental rights. [75] ECHR has already proved its capacity to provide an adequate compensation of 1.8. billion in the Yukos case[76] that is in no way less appealing than those awarded by ISDS tribunals. Moreover, ECHR may also award non-pecuniary damages[77] which is clearly not the case for investment tribunals.

Thirdly, judgments of the court are enforceable in the Respondent states and are supervised by the Committee of Ministers.[78]

However, the main obstacle of the ECHR is the heavy workload. At the end of 2020, there were 62,000 pending applications[79] which in principle would require any new application to go through two or three years of waiting period before reaching the court. If we add the time period spent for the exhaustion of local remedies to the waiting period before the ECHR, this might mean that investors will have to spend several years litigating against the breaching states. If so, this is a substantial prejudice to investors to choose to bring a claim before ECHR.

[74] Christina Binder and Christoph Schreuer, *International Investment Law For The 21st Century: Essays In Honour of Christoph Schreuer* (2009) 647.
[75] Beyeler v Italy [2000] ECHR 33202/96.
[76] *Yukos v Russia* [2014] ECHR 14902/04.
[77] See e.g., *Tor di Valle v Italy* [2000] 45862/99. In this case, the ECHR granted compensation caused by inconvenience and prolonged uncertainty caused to the applicants where proceedings before national courts lasted for unjustifiably long periods.
[78] *Tomuschat* (n 12) 642.
[79] ECHR, *Annual Report 2020* (provisional edn) 149.

In sum, ECHR might be a favorable forum for investors due to its broad protection of proprietary rights, compensation, and enforcement system. Nevertheless, long waiting periods are the main obstacle of ECHR that can deter investors from pursuing their claims.

2.3. Diplomatic Protection Through Independent Courts and Its Tradeoffs

Diplomatic protection is an institution of customary international law where a state spouses the claim of its national against another state and pursues it in its name.[80] Initially, in times when investment protection was covered by Friendship, Commerce and Navigation (FCN) treaties, ICJ was an appropriate forum for claims arising out of breach of obligations of states.[81] As was the case with the ECHR, bringing an investment claim before ICJ also requires exhaustion of local remedies.[82] However, very few investment cases have been settled by ICJ and gradually it became replaced by the other more specialized bodies for investment dispute settlement.[83]

One of the bodies that practically replaced ICJ is WTO, a multilateral organization created in 1995 which provides for compulsory jurisdiction. WTO is also based on state-to-state dispute settlement. Since WTO covers many states and removed the exhaustion of local remedies rule, state-to-state resolution of investment disputes became more prolific within the system.[84]

The WTO regulates some investment-related disciplines in its covered agreements through the following protections: national treatment and most-favored-nation principles, prohibitions

[80] Rodrigo Polanco, *Return of the Home State to Investor-State Disputes* (Cambridge University Press 2018) 11.
[81] Won-Mog Choi, 'The Present and Future of The Investor-State Dispute Settlement Paradigm' (2007) JIEL 725, 726.
[82] *Interhandel (Switzerland v United States*) [1959] ICJ Rep 5.
[83] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and The Reform of Investment Law' (2018) AJIL 361, 392.
[84] *Choi* (n 81) 727.

against the imposition of local content requirements or other requirements contingent upon exports or foreign exchange inflows, and intellectual property rights protections.[85]

A few of the investment-related disputes have been adjudicated by the WTO.[86] One of the remarkable investment cases brought under the WTO regime is Australia-Tobacco Plain Packaging which was also brought before the ISDS tribunals in parallel. The dispute was based on the alleged indirect expropriation of Phillip Morris Brand (ISDS claim) and encumberment of trademark (WTO claim). [87]

Even though state-to-state dispute settlement mechanisms present a possibility for investors to adjudicate their disputes before ICJ or WTO, they might have the following disadvantages:

Firstly, the biggest drawback of state-to-state dispute settlement is that it tends to politicize the dispute. Since diplomatic protection is seen as a right of the home state and not of an investor, the chances of the home state espousing the claims of the investor may be slim. It is possible for the home state to sacrifice an investor's interest and not bring a claim whatsoever to avoid any degradation of diplomatic relations or any other conflict with the host state.[88] This gives a state an enhanced control over the investment dispute. As a result of this, participation may be

[85] *Allen and Soave* (n 12) 18.
[86] See, e.g., Panel Report, *Canada–Certain Measures Affecting the Automotive Industry*,WT/DS139/R,WT/DS142/R (adopted June 19, 2000), as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000: VII, at 10.58–.150 (involving investment related measures under TRIMS and GATT*); Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434 (Ukraine), WT/DS435 (Honduras), WT/DS441 (DR), WT/DS458 (Cuba), WT/DS467 (Indonesia) (involving IP related measures under TRIPS); *United States – Measures Concerning Non-immigrant Visas, Request for Consultations by India*, WT/DS503/1/Add.1 (Mar. 18, 2016) (involving measures under GATS).
[87] For WTO claim: *Australia –Certain Measures* (n 84). For ISDS claim: *Philip Morris Asia v. the Commonwealth of Australia, Philip Morris Asia.* UNCITRAL. Notice of Arbitration, Nov. 21, 2012. paras. 7.15–.17.
[88] *Choi* (n 81) 730.

compromised in favor of the large corporations that are politically influential or well-connected to the government.[89]

Secondly, if a state decides to bring a claim on behalf of an investor before the WTO, the remedy provided might not align with the interests of an investor. The WTO system does not focus on providing compensation.[90] WTO Member will secure a panel's recommendation that the responding Member bring its measures into compliance with the WTO Agreement.[91] In case the losing party does not comply in a reasonable time, the state that brought the claim against the investor may retaliate.[92] However, the personal benefit to an investor from retaliatory measures is very low.

However, bringing claims through diplomatic protection might be preferable in the following ways:

We have mentioned enhanced control of the state over investment disputes through diplomatic protection as a drawback for investors. However, such control may be beneficial in various ways. Having home states as their supporters, investors are in a better position to convince the host states to cease the breach of obligations if they have an adequate legal standing to sue the host state. The mere possibility of being involved in a dispute with another state which logically leads to degradation of diplomatic relations may become a warning signal for the host state to reconsider its policies against investors. Moreover, when home states act as a filter for investor

[89] *Puig and Sheffer* (n 83) 394.
[90] Art. 22 of the DSU requires parties to *agree* on compensation. Compensation has been awarded only once in in US–Copyrights dispute. US–Copyright, WT/DS160/R.
[91] Art. 21 para 3 of the DSU.
[92] Art. 22 of the DSU.

claims, they can screen out possible frivolous, aggressive, controversial claims of investors, and bring the claims of investors that are worthy of calling the international adjudicative attention. [93]

Lastly, resorting to diplomatic protection presents an opportunity for investors to bring their disputes before the most powerful courts- ICJ and WTO which are renowned for the preservation of rule of law and assurance of investor rights in their jurisprudence.[94] It provides investors with greater certainty in terms of fair treatment.

Overall, diplomatic protection may be an unfavorable forum for investors due to its potential to politicize the dispute and the lack of appropriate remedy in the WTO system. However, it gives investors the opportunity to have states as their supporters in bringing their international claims before multilateral dispute settlement mechanisms which are guardians of the rule of law among nations.

[93] *Puig and Shaffer* (n 83) 727.
[94] *Ibid.,* 735

CONCLUSION

The release of the Achmea judgment made a fundamental change in international investment law within the EU by declaring the arbitration clause of intra-EU BITs within the Member States to be incompatible with the EU law. Subsequent Termination Agreement and CJEU rulings extending Achmea to ISDS clause in the ECT (Komstroy) and an ad hoc arbitration agreement (PL Holdings) helped to strengthen the anti-arbitration stance of the EU. Due to Achmea and subsequent judgments, awards rendered by investment tribunals are no longer enforceable within the EU Member States. However, regardless of the risk of refusal of enforcement, investment tribunals in intra-EU disputes do not seem to put much importance on this factor while rendering awards. This situation requires investors to attempt seeking enforcement outside of the EU without any guarantee for success. Such a conundrum between the two regimes attesting their authority is creating much unpredictability for investors to pursue arbitration.

In this situation, we believe that investors should seek other means for the resolution of their investment disputes. Our second chapter provided a comparative analytical framework of the pros and cons of available adjudicative options for investors to pursue their claims through domestic courts, ECHR, ICJ, and WTO. Having analyzed the mentioned forums, it is difficult to decide which institutional option is more preferred because all institutions have deficiencies. In fact, arbitration has become the main form of dispute settlement for foreign investor disputes due to the deficiencies of existing forums. In particular, domestic mechanisms may not be independent or impartial. ECHR mechanism may be too lengthy combined with the domestic proceeding's timeline. Diplomatic protection through ICJ and WTO grants full control over the dispute to the state.

However, considering the degrading role of arbitration in Europe, we recommend investors opt for ECHR as a complementary mechanism to domestic courts. Through this approach, domestic courts are the first actors in the resolution of investment disputes and ECHR is the forum that tackles the deficiencies of domestic mechanisms regarding lack of impartiality and independence and absence of expertise in applying international law.

However, the level of rule of law is different among states and choices should also depend on this factor. In states where rule of law is well-protected, pursuing a claim in the ECHR after domestic proceedings may not necessary. Instead, pursuing only a domestic claim may be sufficient. On the contrary, where a state does not provide for basic rule of law protections as is the case with Hungary, an international body that provides for investor standing to bring claims is of greater significance.

We do not claim that we have found the adjudicatory option for European investors that suits them in all contexts. The primary goal of this thesis was to prove the unfeasibility of pursuing arbitration given the current state of backlash against investment arbitration in Europe and comparatively discuss the pros and cons of available institutional options that an investor can resort to. In my view, different contexts should be taken into account by investors when choosing adjudicative forums in light of their tradeoffs.

BIBLIOGRAPHY

Primary sources

Treaty on the Functioning of the European Union.

Treaty on European Union.

European Charter of Human Rights.

European Convention of Human Rights.

Dispute Settlement Understanding.

Agreement for the Termination of all Intra-EU BITs.

Vienna Convention on the Law of Treaties.

New York Convention on Recognition and Enforcement of Foreign Awards.

CJEU, Slovak Republic v. Achmea, ECLI:EU:C:2018:158, Judgment, 6 March 2018.

CJEU, Republic of Moldova v Komstroy, ECLI:EU:C:2021:655, Judgment, 2 September 2021.

CJEU, Republic of Poland v PL Holdings, ECLI:EU:C:2021:875, Judgment, 26 October 2021.

Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award 13 November 2019.

Yukos v Russia, [2014] ECHR 14902/04.

Tor di Valle v Italy, [2000] 45862/99.

Zlínsat v Bulgaria, [2006] ECHR 57785/00.

Interhandel (Switzerland v United States) [1959] ICJ Rep 5.

Australia–Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434 (Ukraine), WT/DS435 (Honduras), WT/DS441 (DR), WT/DS458 (Cuba), WT/DS467 (Indonesia).

US–Copyright, WT/DS160/R.

Tethyan Copper Company Pty Limited Pakistan, ICSID Case No. ARB/12/1, Award, 12 July 2019.

Yukos Universal Limited v. The Russian Federation, PCA Case No. AA 227, Award, 18 July 2014.

UP (formerly Le Chèque Déjeuner) and CD Holding Internationale v Hungary, ICSID Case No ARB/13/35, Award, 9 October 2018.

European American Investment Bank AG v. Slovakia, PCA Case No. 2010-17, First and Second Award on Jurisdiction, 22 October 2012, 4 June 2014.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) ICJ Rep 1996.

ECJ, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration ECLI:EU:C:1963:1. Judgment, 5 February 1963.

ECJ, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union ECLI:EU:C:2008:46, Judgment, 3 September 2008.

Electrabel S.A. v. Republic of Hungary ICSID Case No. ARB/07/19. Decision on jurisdiction, 30 November 2012.

Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, ICSID Case No ARB/14/1, Award, 16 May 2018.

Vattenfall v Germany, ICSID Case No ARB/12/12, Decision on Achmea Issue, 31 August 2018.

Foresight Luxembourg Solar 1 Sàrl, et al v Kingdom of Spain, SCC Case No 2015/150, Final Award, 14 November 2018. Paras 218–219.

Marfin Investment Group v The Republic of Cyprus, ICSID Case No ARB/13/27, Award, 26 July 2018.

RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà r.l v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018.

Antin Infrastructure Services Luxembourg Sà.r.l and Antin Energia Termosolar BV v Kingdom of Spain, ICSID Case No ARB/13/31, Award, 15 June 2018.

US District Court for the District of Columbia, Viorel Micula v The Government of Romania, Civil No 1:14-cv 00600, Decision on the Claimant's Motion to confirm the ICSID Award.

Secondary sources

Behn D, Fauchald O and Langford M (eds), The Legitimacy of Investment Arbitration: Empirical Perspectives. (Cambridge University Press 2022).

Berger J, International Investment Protection in Europe: The EU's Assertion of Control (Routledge 2020).

Polanco R, Return of the Home State to Investor-State Disputes (Cambridge University Press 2018).

Binder Ch and Schreuer Ch, International investment law for the 21st century: essays in honour of Christoph Schreuer (2009).

Bogdandy A, Bast J, Principles of European Constitutional Law (2nd edn, Oxford 2010). Paasivirta E, 'European Union and Dispute Settlement: Managing Proliferation and Fragmentation' in Cremona M, Thies A, Wessel R(eds), The European Union and International Dispute Settlement, (Hart Publishing 2017).

Happold M and De Boeck M, 'The European Union and The Energy Charter Treaty: What Next After Achmea?' in Mads Andenas, Matthew Happold and Luca Pantaleo (eds), The European Union as an Actor in International Economic Law (T.M.C. Asser Press: 2019).

Tomuschat Ch, 'The European Court of Human Rights and Investment Protection' in International Investment Law for the 21st Century (2009) 636.

Benvenisti E, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.

Bronckers M, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18 Journal of International Economic Law 655.

Foster G, 'Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' (2011) 49 Columbia Journal of Transnational Law 201.

Puig S and Shaffer G, 'Imperfect Alternatives: Institutional Choice and The Reform of Investment Law' (2018) AJIL 361.

Allen B and Soave T, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' (2014) 30 JLCIA.

Choi W, 'The Present and Future of The Investor-State Dispute Settlement Paradigm' (2007) JIEL.

Hindelang S 'Conceptualisation and Application of the Principle of Autonomy of EU Law – CJEU's judgment in Achmea Put in Perspective' (2019) 44 E.L.Rev.

Kochenov D, Lavranos N 'Rule of Law and the Fatal Mistake of Achmea: Could the Intra-EU BITs Have Been the Last Hope for Justice in Captured Illiberal Member States?' (Reconnect, 2020) Working paper No.12.

Damjanovic I and Sadeleer N, 'I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal' (2019) 4 EU Papers.

Moreno-Lax V and Zeigler K, 'Autonomy of the EU Legal Order - A General Principle?: On the Risks of Normative Functionalism and Selective Constitutionalisation' (EUI 2021) Working paper No. 15.

István Nagy C, 'Intra-EU Bilateral Investment Treaties and EU Law after Achmea: 'Know Well What Leads You Forward and What Holds You Back' (2018) 19 German Law Journal 981.

Alvarez J, 'ISDS reform: The Long View' (NYU 2021) Public Law Research Paper No. 22-02.

Uzelac A, 'Why Europe Should Reconsider Its Anti-Arbitration Policy In Investment Disputes' (AJEE Journal 2019).

Gáspár-Szilágyi S and Usynin M, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment' (Brill – Martinus Nijhoff Publishers2019) European Investment Law and Arbitration Review.

European Commission, The 2021 EU Justice Scoreboard (European Commission COM No 389, 2021).

ECHR, Annual Report 2020 (provisional edn).

European Parliament, Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (Sarghentini Report), 2017/2131(INL).

Sariev T and Nurlankyzy P, 'Investment Court In Kazakhstan - Trials & Appeals & Compensation - Kazakhstan' (Mondaq.com, 2022) https://www.mondaq.com/trials-appeals-compensation/528810/investment-court-in-kazakhstan accessed 16 June 2022.

Taton X and Croisant G, 'Intra-EU Investment Arbitration Post-Achmea: A Look At The Additional Remedies Offered By The ECHR And EU Law - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2018/05/19/intra-eu-investment-arbitration-post-achmea-a-look-at-the-additional-remedies-offered-by-the-echr-and-eu-law/ accessed 16 June 2022.

Shmidt Sh, 'Thoughts on the Legitimacy, Sustainability and Future of ISDS in Times of Crisis' (Arbitration & Litigation Law Firm Austria | OBLIN, 2022) https://oblin.at/newsletter/thoughts-on-the-legitimacy-sustainability-and-future-of-isds-in-times-of-crisis/https://oblin.at/newsletter/thoughts-on-the-legitimacy-sustainability-and-future-of-isds-in-times-of-crisis/ accessed 1 February 2022.

Depalma A, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say (Published 2001)' (Nytimes.com, 2022) https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html accessed 16 June 2022.

American Society of International Law, 'Debate: Designing the Investor State Dispute Resolution System from Scratch' (Youtube, 8 January 2018) https://www.youtube.com/watch?v=b7vD6Buu6PY accessed 16 June 2022.

Georgetown Law, 'Workshop: ISDS Reform in Latin America' (2019) ISDS Reform in Latin America (georgetown.edu) accessed 16 June 2022.

Fouchard C and Krestin M, 'The Judgment of The CJEU In Slovak Republic V. Achmea – A Loud Clap of Thunder on The Intra-EU BIT Sky! - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ accessed 16 June 2022.

'The Latest Chapter Of The Intra-EU Investment Arbitration Saga: What It Entails For The Protection Of Intra-EU Investments And Enforcement Of Intra-EU Arbitral Awards' (Gibson Dunn, 2022) https://www.gibsondunn.com/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards/#_ftn3 accessed 17 June 2022.

Pettazzi G and Prantl D, 'The Agreement Terminating Intra-EU Bits' (Freshfields Bruckhaus Deringer, 2022) https://riskandcompliance.freshfields.com/post/102g7ke/the-agreement-terminating-intra-eu-bits accessed 17 June 2022.

Greil Ch, 'The New Agreement Terminating Intra-EU Bits - A Short Overview' (Lexology, 2022) https://www.lexology.com/library/detail.aspx?g=c0a0b155-fadc-4f0a-8c48-c7fef0a050d9 accessed 17 June 2022.

Gupta N and Kryvoi Y, 'Termination Of Intra-EU Bits: Legal And Practical Consequences For Pending And Future Disputes' (Prof Yarik Kryvoi | Blog on Law, Policy and Reforms, 2022) http://kryvoi.net/blog/termination-of-intra-eu-bits-legal-and-practical-consequences-for-pending-and-future-disputes/ accessed 17 June 2022.

Esmé Y, 'ECT Modernisation Perspectives: An Update - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2021/08/05/ect-modernisation-perspectives-an-update/ accessed 17 June 2022.

Croisant G, 'CJEU Extends Achmea To Ad Hoc Arbitration Agreements Identical To Intra-EU Bits' Arbitration Clause - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2021/10/28/cjeu-extends-achmea-to-ad-hoc-arbitration-agreements-identical-to-intra-eu-bits-arbitration-clause/ accessed 17 June 2022.

Croisant G, 'Micula Case: The General Court Quashes The Commission'S Decision And Rules That The Award Is Not State Aid - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2019/06/19/micula-case-the-general-court-quashes-the-commissions-decision-and-rules-that-the-award-is-not-state-aid/ accessed 17 June 2022.

Lozano C, 'More Than A Friend Of The Court: The Evolving Role Of The European Commission In Investor-State Arbitration - Kluwer Arbitration Blog' (Kluwer Arbitration Blog, 2022) http://arbitrationblog.kluwerarbitration.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/ accessed 17 June 2022.