INVESTMENT ARBITRATION IN CENTRAL AND EASTERN EUROPE

ELGAR ARBITRATION LAW AND PRACTICE

The Elgar Arbitration Law and Practice series is a library of works by leading practitioners and scholars covering key areas of commercial and investment arbitration. The titles in the series are analytical in approach, highlighting and unpicking the legal issues that are most critical and relevant to practice. Designed to be detailed, focussed reference works, the books in this series aim to offer an authoritative statement on the legal and procedural framework in both established and emerging areas of arbitral practice. The series will include texts covering the rules of specific arbitral bodies and national arbitration laws, regional approaches to commercial and investment arbitration, as well as sector-specific arbitration.

Titles in the series include:

International Commercial Arbitration and the Brussels I Regulation
Louise Hauberg Wilhelmsen

Investment Arbitration in Central and Eastern Europe
Law and Practice
Edited by Csongor István Nagy

INVESTMENT ARBITRATION IN CENTRAL AND EASTERN EUROPE

Law and Practice

Edited by

CSONGOR ISTVÁN NAGY

Department of Private International Law, University of Szeged, Hungary

ELGAR ARBITRATION LAW AND PRACTICE

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number:

This book is available electronically in the
Law subject collection
DOI 10.4337/9781788115179

ISBN 978 1 78811 516 2 (cased)
ISBN 978 1 78811 517 9 (eBook)

Typeset by Columns Design XML Ltd, Reading

CONTENTS

EXTENDED TABLE OF CONTENTS

CONTRIBUTORS

Ivan Bimbilovski holds a doctoral degree in Comparative Constitutional Law from Central European University, Budapest, Hungary. He has been a visiting scholar of Humboldt University, Berlin, Germany; University of Toronto, Toronto, Canada; University of Michigan, Ann Arbor, USA; Judicial Arbitration and Mediation Services Institute, San Francisco, USA, Oakland University, Rochester, USA and Lanzhou Jiaotong University, Lanzhou, China. His current academic affiliations include University of St. Paul the Apostle, Ohrid, Macedonia and Walailak University, Nakhon Si Thammarat, Thailand. He is a certified mediator, registered with the Chamber of Mediators. He was also a lecturer at the National Academy of Judges and Public Prosecutors and a Vice-Dean of the Faculty of Law, European University, Skopje, Macedonia.

Katarína Brocková is an associate professor lecturing in International Economic Law at the School of International Relations of the University of Economics in Bratislava, Slovakia. Ms Brockova has a background in civil, commercial and international law. She holds Master of Laws (LLM) degrees gained from the Comenius University School of Law in Slovakia (Law), University of Vienna School of Law in Austria (International Legal Studies), and a PhD in International Relations from the School of International Relations of the University of Economics in Bratislava, Slovakia. Her professional background includes several years of experience working as a legal counsel for international legal firms in Slovakia advising foreign investors on various aspects of the Slovak civil and commercial law. In her academic career, she specializes in international economic law, publishes on arbitration, international trade and international investment topics.

Michal Čáp is an attorney-in-law/advokát (2012) working for ROWAN LEGAL. Michal specializes in the field of international arbitration and dispute resolution. Michal is a member of the Chartered Institute of Arbitrators (MCIArb), and he was elected as the Vice-Chair of the CIArb European Branch in 2018. In the same year, he was offered a fellowship at the AIADR (Asian Institute of Alternative Dispute Resolution) with its seat in Kuala Lumpur. He is also a member of the Commission on International Arbitration of the ICC Czech Republic. Michal previously gained experience in offshore jurisdictions. He was also a trainee in international arbitral institutions (HKIAC and ICC – both in Hong Kong, where he lived for four years). Last but not least, Michal publishes and lectures on the topic of international arbitration and dispute resolution. Michal is included in the list of arbitrators of the Czech Arbitration Court, VIAC (Vienna) and SCIA, he is a member of the Council of Arbitrators of the Football Association of the Czech Republic (he has already sat as a sole arbitrator and also as chair of the tribunal), and is also a member of the AFIA (Asia-Pacific Forum for International Arbitration).

Yancy Cottrill is an attorney licensed in New York and North Dakota, USA. He is a 2012 graduate from Central European University with an LL.M in International Business Law. He has spent the better part of his career working internationally in Asia, the Pacific Islands,

Europe and the US for private law firms, for foreign governments, private companies, and currently for the State of North Dakota. Throughout his career he has drafted numerous arbitration agreements, advised government officials on multi-national agreements with arbitration clauses, written articles on arbitration settlements and national arbitration law in Mongolia, and volunteered for numerous arbitration moot competitions and conferences. He is a strong supporter of arbitration as a means to resolve disputes both privately and between nations.

Ana-Marija Ćuljak graduated from Faculty of Law, Strossmayer University of Osijek and obtained Master's degree in Law. She studied her final year of master studies in Germany at the Faculty of Law, Albert Ludwigs University of Freiburg. She is enrolled at the Faculty of Economics, Strossmayer University of Osijek Master of Economics Programme. She participated in several international moot courts, including Willem C. Vis Moot in Vienna and Foreign Direct Investment Moot at the King's College in London. In 2016 she received Distinctive Dean's Award at the Faculty of Law, Strossmayer University. Ćuljak works as an associate in a law office in Osijek, Croatia.

Rimantas Daujotas has extensive experience in disputes arising under bilateral and multilateral investment treaties and high-value commercial agreements, having served as a consultant or representative to company claimants and respondents as well as government claimants and respondents. Rimantas is advising global energy companies as well as major law firms. Rimantas is one of the leading individuals on international investment law and investor-state disputes, WTO law and international arbitration in the Baltics. Currently, Rimantas is a PhD scholar at Queen Mary University's School of International Arbitration. Rimantas was also invited as Visiting Scholar at Columbia Law School and the National University of Singapore. Rimantas is also a prolific author on international law, international investment law and arbitration. Rimantas is lecturer of WTO law at KSU University, lecturer of international investment law and arbitration at Vilnius University and Senior Associate at "Motieka & Audzevicius" PLP.

Inese Druviete is a visiting scholar with Fulbright-Schuman Innovation grant at Hamline University, US researching technology law. Inese has graduated and taught at the Riga Graduate School of Law.

Pavle Flere, is a dual (Slovenian and Serbian) national. He was born in Novi Sad, Serbia in 1979. In 2003, he obtained a degree in law from the Faculty of Law of University in Maribor, Slovenia. In 2004, he obtained a master degree in international business law from Central European University (with distinction). Thereafter, he passed a Slovenian bar exam, becoming fully licenced Slovenian lawyer, entitled to represent before all Slovenian courts and other forums. Besides being an Affiliate member of the International Compliance Association, holding an advanced certificate in business compliance, he is a holder of SDA Bocconi University UniCredit Risk Management Diploma. Mr. Flere is fluent in English, German, Serbian, Croatian and Slovenian. From 2008 until 2018 Mr Flere occupied position of Senior Legal Counsel in UniCredit Group, systematically important financial institution, where he specialized in complex cross border lending and restructuring arrangement. Thereafter, Mr. Flere joined the Triglav Group, one of the biggest insurance and finance groups in Adriatic Region, occupying position of a Senior Legal and Compliance Counsel, whereby he is actively involved in legal and compliance matters related to Triglav Group and its subsidiaries in Adriatic Region. Mr. Flere is a regular speaker at conferences related to various legal and compliance matters. Moreover, in the capacity of the legal advisor, he has been involved in many projects under auspices of international institutions such as the World Bank and the

European Commission. He publishes in the field of finance and insolvency law including EU law and international commercial arbitration.

Rita Griguolaite has LL.M in European Law from Utrecht University. Currently, she is a PhD candidate at University of Sussex (UK) and a Senior Associate at "Motieka & Audzevicius" PLP (Lithuania). Rita specializes in dispute resolution in competition law and regulatory matters in network industries with the focus on energy sector. She was a Visiting Fellow at the Institute for European Studies (Vrije Universiteit Brussels, Belgium) and the Centre for Law, Regulation & Governance of the Global Economy (University of Warwick, UK).

Gabor Hajdu is a doctoral student in the Doctoral School of the Faculty of Law in the University of Szeged. He obtained his law degree in the Faculty of Law in the University of Szeged. During his studies, he took part in several research-based contests, and reached national first place in the famous OTDK contest, competing in the category of private international law. At the end of his studies, he received a certificate from his university for his contributions to scientific endeavors as a student.

Jaroslav Heyduk specializes in dispute resolution and has unique experience with the representation of clients before the Czech courts, including the Supreme Court, the Supreme Administrative Court and the Constitutional Court. He came to ROWAN LEGAL in 2017 after working in several international law firms. In 2007, he acquired a master's degree at the Faculty of Law of Masaryk University in Brno and in 2011 joined the Czech Bar Association (ČAK). During his career he has participated as legal consultant in several arbitrations in accordance with the regulations of the ICC, international investment arbitration, and has extensive experience with arbitral proceedings in general.

Alexandra Andhov (Horváthová) is an Assistant Professor of Corporate law at the Faculty of Law, University of Copenhagen and a Fulbright Scholar at Cornell Law School (2019). She holds an S.J.D. in International Business Law (2015) and an LL.M in International Business Law from the Central European University (2011) and a iuris utriusque doctor degree in corporate law from Comenius University (2011). She has been a visiting researcher at Cornell Law School (2014) and Oxford Law School (2013). Among others, she gave guest lectures at University of Turin, University of Florence, Lund University as well as Pace University. Before joining University of Copenhagen, she was a research fellow at the CEU Business School (2012–2015) and she worked with CMS Cameron McKenna in Budapest with their litigation and arbitration team. Alexandra was called into the bar in Slovakia. Alexandra's main areas of research are corporate law, capital market law, corporate social responsibility, anti-corruption and contract law. On these topics she has published articles in numerous European as well as US law journals and reviews.

Veronika Korom is an Assistant Professor in Law at ESSEC Business School in Paris and a lecturer in law at the Paris Dauphine University and the Pázmány Péter University of Budapest. She is dual-qualified as solicitor of England and Wales and as avocat admitted to the Paris bar, and is also a member of the Budapest bar. A graduate of Eötvös Loránd University of Sciences, the University Aix-Marseille III and Oxford University, Veronika worked in university research in the field of comparative contract and company law at the Universities of Oxford, Vienna and Brussels and has practiced for some 10 years in the field of international arbitration in international law firms based in London and Paris. Veronika has particular expertise as counsel in large-scale and complex investment arbitration proceedings under the main arbitration rules, and in particular in arbitrations in the energy, mining, aviation, construction, food and oil and

gas sectors and arbitrations involving EU Member States and questions of EU law. She also serves as secretary to arbitral tribunals and regularly represents clients in various types of annulment and setting-aside proceedings, as well as in domestic enforcement proceedings.

Csongor István Nagy is professor of law at and the head of the Department of Private International Law at the University of Szeged. He is recurrent visiting professor at the Central European University (Budapest/New York) and the Sapientia University of Transylvania (Romania). He is admitted to the Budapest Bar and arbitrator at the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, Budapest. Csongor graduated at the Eötvös Loránd University of Sciences (ELTE, dr. jur.) in Budapest, in 2003, where he also earned a Ph.D. in 2009. During his studies he was a member of the István Bibó College of Law and Political Sciences and of the Invisible College. He received master (LL.M., 2004) and S.J.D. degrees (2010) from the Central European University (CEU) in Budapest/New York. As exchange student, he pursued graduate studies in Rotterdam (the Netherlands), Heidelberg (Germany) and Ithaca, New York (Cornell University). He had visiting appointments in the Hague (Asser Institute), Munich (twice, Max Planck Institute), Brno (Masarykova University), CEU Business School (Budapest), Hamburg (Max Planck Institute), Edinburgh (University of Edinburgh), London (British Institute of International and Comparative Law), Bloomington, Indiana (Indiana University), Brisbane, Australia (TC Beirne School of Law, University of Queensland) and the China-EU School of Law, Beijing; and was senior fellow at the Center for International Governance Innovation in Canada and Eurojus legal counsel in the European Commission's Representation in Hungary. He has more than 180 publications in English, French, German, Hungarian, Romanian and (in translation) in Croatian and Spanish.

Miloš Olík is the head of the dispute resolution desk at law firm ROWAN LEGAL. His practice focuses on arbitration proceedings, investment disputes, international commercial arbitration and various forms of alternative dispute resolution (mediation, negotiation). Miloš has extensive experience in arbitration proceedings under the rules of numerous institutions, for instance the ICC, LCIA, ICSID, SCC, UNCITRAL and Czech Arbitration Court. He has represented states and investors in investment disputes and multinational corporations in international commercial arbitration. Miloš has also worked as an arbitrator in over 150 arbitrations and is listed as an arbitrator with the Czech Arbitration Court and the world's leading institutions (HKIAC, CIETAC, LCIA, VIAC and SCIA). He is the Chairman of the Council of Arbitrators of the Football Association of the Czech Republic and is a member of many professional associations and organizations. He was also elected as the Chairman of the Czech National Committee of the International Chamber of Commerce (ICC) as of 2019. Miloš is the author or co-author of many publications, such as *Commentaries on the Law on Arbitration Proceedings and Enforcement of Arbitral Awards* (1st and 2nd edition), *Commentary on the New York Convention*, and the *National Report for the Czech Republic in the ICCA Handbook of Commercial Arbitration*.

Anton Petrov studied law at Sofia University, holds an LLM degree in International Business Law from the Central European University, as well as a PhD in International Law from the Bulgarian Academy of Sciences and an MBA from the University of Sheffield. He was a visiting scholar in universities in the USA and Japan. Dr. Petrov is a Senior Associate at Djingov, Gouginski, Kyutchukov & Velichkov based in Sofia, Bulgaria and a leading lawyer in the firm's Competition & EU Regulatory and Litigation practice groups. He advises on a broad range of commercial issues and has a solid track record in settlement negotiations and litigation

procedures before the civil courts and arbitration tribunals in diverse disputes over the performance of commercial contracts.

Wojciech Sadowski is a doctor in laws and Polish adwokat. He is a partner at K&L Gates LLP and a member of the international arbitration practice of the firm. He has been recognized by numerous guides as one of the leading professionals in the area of dispute resolution in Poland. For the last 15 years he has been involved in numerous investment treaty arbitrations, including pursuant to intra-EU treaties, proceedings before the European Court of Human Rights, Court of Justice of the EU, international and domestic arbitral tribunals and Polish courts. He holds a PhD degree from the Institute of Legal Studies of the Polish Academy of Science. He is an author of numerous books and articles on international dispute settlement and EU law.

Eriks Selga is a PhD student at the University of Hong Kong investigating law as a tool of institutional change. Eriks has graduated and taught at the Riga Graduate School of Law.

Katarína Šimalová is dually qualified as a US attorney and a solicitor of England and Wales. Based in London, Ms Šimalová works at a US law firm specialising in complex international arbitration and litigation disputes. She also teaches International Commercial and Investment Arbitration subjects at the School of Law, Comenius University, Slovakia and is a candidate for Fellowship at the Chartered Institute of Arbitrators where she completed Arbitration Award Writing Examination. Ms Šimalová has a background in civil law, common law and international arbitration, holding Bachelor of Laws and Master of Laws degrees in civil law gained from University of Matej Bel in Slovakia, a Graduate Diploma in Law in common law from BPP Law University in London, and a Master of Laws in US Law degree from Florida Coastal School of Law in the United States. She specializes in international arbitration, having gained her Master of Laws in Comparative and International Dispute Resolution degree from the School of International Arbitration, Queen Mary University of London, which she represented at arbitration moot competitions and where she also worked on a research project for Loukas A. Mistelis, updating his treatise *Comparative International Commercial Arbitration*. Ms Šimalová has also worked as an arbitration adviser to a set of barristers' chambers in London assisting to expand their arbitration practice and delivering lectures on arbitration topics. She participates at international commercial arbitration moots as arbitrator, speaks at arbitration conferences, publishes on arbitration topics and is involved in organizing arbitration conferences in Slovakia. Ms Šimalová has also worked on the revision of the third edition of Gary Born's treatise *International Commercial Arbitration*, covering the development of arbitration in Slovakia and its impact on international arbitration.

Elizabeta Spiroska holds a doctoral degree in law from the University St. Cyril and Methodius, Skopje, Macedonia. Her current academic position is Assistant professor. Previously she worked as a teaching assistant and secretary of the Faculty of Law (MIT University, Skopje; European University, Skopje), demonstrator (St. Cyril and Methodius in Skopje, Faculty of Law "Iustinianus Primus.") and pupillage. In 2006 she passed the bar exam. Her professional experience also includes working as an attorney at law, mediator and legal consultant. She was a vice-president of the Ethical council of the Chamber of mediators of the Republic of Macedonia and a mediator of the Institute for sociological, political and juridical research – Support center for facilitating interethnic disputes. Ms. Spiroska was a national longtime trainer of the National examinations centre of the Republic of Macedonia. She is a member of several professional associations and NGOs. She has participated in many conferences, seminars, trainings and several projects in different areas. Ms. Spiroska is author of numerous articles and

scientific papers. Spiroska's particular areas of interest are civil procedural law and alternative dispute resolution.

Cătălin Gabriel Stănescu is postdoctoral researcher (since 2016) and Marie Curie Fellow (starting from 2019) at the Faculty of Law, University of Copenhagen, and guest lecturer at Babes Bolyai University (Romania) and University of Szeged (Hungary). His research focuses on long-term energy contracts, consumer finance and non-judicial debt collection. He has extensive practical experience in the field of Romanian and international private law. In 2004, Cătălin started working as a legal counsel for Ploiesti City Hall. In 2006, he became a member of the Romanian Bar Association and opened his own practice. Cătălin also worked as in-house counsel for the Romanian subsidiaries of Österreichische Mineralölverwaltung (OMV) and Gazprom, specializing in upstream oil and gas consultancy. He holds an LL.M. degree (2011) and an S.J.D. (PhD) degree (2015) in International Business Law, both from Central European University (Budapest/New York). Cătălin often speaks on international conferences on areas related to consumer, commercial, energy and investment law. He published several monographs and a number of articles in internationally recognized law journals.

Üllar Talviste has been an attorney at law since 1979 and a member of the Estonian Bar, since its post-soviet era resurrection in 1992. Mr. Talviste served as the Chairman of the Estonian Bar from 2001–2004 and was also its representative in the CCBE (Council of the Bars and Law Societies of the European Union) during those years. He is mentioned on the list of recommended arbitrators of the Court of Arbitration of the Estonian Chamber of Commerce and Industry.

Patrycja Treder is an associate at the Warsaw office of DWF Poland and a member of the international arbitration practice of the firm. She graduated from the University of Warsaw with diploma in law and English language studies. She also holds a diploma of the ICC Arbitration and ADR Training Programme organized at the Jagiellonian University. For the last five years, she has been involved in numerous investment treaty arbitrations, as well as in proceedings before the Polish arbitral institutions and courts.

Zoltan Vig teaches Business Law at the Faculty of Economics, Finance and Administration (FEFA) in Belgrade, and subjects related to international economic relations at the Faculty of Law, University of Szeged. He obtained a degree in law (masters equivalent) at the Szeged University Faculty of Law. He holds LLM and SJD in International Business Law from Central European University in Budapest. During his studies in Budapest he worked as Teaching Assistant to Professor Stefan Messmann. He conducted research at Max Planck and Asser Institutes, as well as at Humboldt, Hamburg, Emory and Yale Universities. In 2006 he was appointed Assistant Professor, and in 2012 he was promoted to Associate Professor at Singidunum University. During his career he has taught Corporate Law, EU Company Law, EU Law and Environmental Protection Law. He has published several books and articles in Serbian, English, German and Hungarian languages. Dr Vig also gained additional practical work experience by working for Freshfields Bruckhaus Deringer international law firm. He currently works as an advisor for DBP Advokati law office in Belgrade and as a research fellow at the Hungarian Academy of Sciences.

Patricia Živković finished her undergraduate studies in 2011 at the Faculty of Law, University of Zagreb. She holds an LL.M. degree in International Business Law ('12) and an S.J.D. (PhD) degree ('16) from the Central European University (Budapest/New York). She successfully defended her doctoral thesis on the topic "The Determination, Payment, and Allocation of

Costs in International Commercial Arbitration" with the highest grade (summa cum laude). Dr Živković worked as a research assistant for Professor Emeritus Tibor Várady at the CEU during her doctoral studies and continued to work on arbitration cases as a counsel in a law firm. She actively fosters the usage of alternative dispute resolution mechanisms by co-chairing the Young Croatian Arbitration Practitioners, an association for younger members of the arbitration community in Croatia, which she also co-founded, and by coaching students from various international law faculties for participation in the Willem C. Vis International Commercial Arbitration Moot Court. Dr Živković also holds the position of an associate editor of the Kluwer Arbitration Blog. Her focus in teaching and researching includes international disputes resolution, with a particular emphasis on international commercial arbitration, private international law, commercial law, the law of the European Union, and IT law.

Mirela Župan is a professor of Private International Law at Faculty of Law University of Osijek. Her main professional interests include European private international law, particularly cross-border family relations, child protection and human rights. Župan is an author/editor of several monographs/chapters, conference proceedings and scientific articles. She is active researcher at national and EU funded projects in the area of civil justice, holder of Jean Monnet Chair on Cross-border movement of a child in the EU granted in 2016 by EACEA. Župan is actively engaged in judicial training, particularly for Croatian Juridical Academy, Academy of European Law and EJTN.

PREFACE

Central European Member States are the litmus paper of investment arbitration in Europe. One the one hand, as capital-importers, they are popular targets of investment claims: the overwhelming majority of the cases against EU Member States are proceedings launched against countries from the region. On the other hand, they, arguably, may be characterized by intensive intervention in the market, the state's strong regulatory role and the entrenched social status of public services, which, by their nature, may interfere with the economic interests of foreign investors.

Unfortunately, notwithstanding its relevance as a battlefield of investment arbitration, Central European experiences have not been analysed in a comprehensive manner. Investment protection disputes are fairly complex: arbitral tribunals judge measures that are part of the core of national regulatory sovereignty, such as national privatizations, protection of public health, regulation of prices and curbing of monopolies. Although the complexity of investment disputes makes the proper understanding of the context essential, observers not "fluent" in the local jurisdiction may, at times, face unsurmountable difficulties grasping the factual, economic, political and regulatory background.

The unique edge of this volume is that it brings to the light the core of the European experiences on investment arbitration with a contextual analysis addressing the economic perspectives, the political background and the national regulatory environment. It is the first to present the Central and Eastern European case-law of investment arbitration in a comprehensive manner to make the experiences of Europe's investment law battlefield fully accessible for practitioners and scholars alike.

The volume is made up of 14 national chapters covering Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Slovakia, Slovenia and Serbia and Montenegro and reporting on the Central European experiences from an insider's perspective.

The purpose of the national chapters is to give a comprehensive overview of the national experiences on investor-state arbitration in terms of treaty landscape, domestic legislation and (first and foremost) case-law. Given that they are written by "native speakers" of the local jurisdiction, they use sources less accessible for the wider international community. The added value of the national chapters emerges from the circumstance that investment disputes are very complex and have several political, economic and regulatory aspects which often cannot be grasped in the absence of local expertise and the command of the local language. Hence, investment arbitration cases, much more than other controversies, can be grasped only on the basis of the totality of the aspects of the matter, which are normally not fully reproduced in the award and not fully perceivable for experts coming from foreign jurisdictions. National chapters provide such an "insider's" contextual analysis.

The first section of the national chapters covers the policy and treaty landscape, extending to the reasons advanced for recourse to investor-state arbitration, the country's attitude towards investor-state arbitration, the eventual political or scholarly criticism advanced in this regard

INTRA-EU BITS AFTER *ACHMEA* – A CROSS-CUTTING ISSUE

Csongor István Nagy

Due to its immense practical importance, no volume on investment arbitration in Central Europe may avoid addressing the most significant recent development concerning the region: intra-EU BITs after the CJEU's ruling in *Achmea*.[1] In this case, the Court pronounced an arbitration clause in an intra-EU BIT non-compliant with EU law because it found that it endangered the stability of the EU's judicial architecture and encroached on EU courts' privilege to interpret EU law.[2] While the judgment came as a huge surprise, its repercussions and aftermath are still uncertain. It is unclear what the judgment's holding is, whether it covers arbitration clauses different from the one that reached the CJEU and what impact it will have on investment arbitration in Central Europe.[3] Nonetheless, it is certain that the ruling generated a huge pessimism. **0.01**

1 Case C-284/16 *Slovakia v. Achmea BV* [2008] ECLI:EU:C:2018:158.

2 For the ruling's resonance in the scholarship, see e.g. Csongor István Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law after Achmea: "Know Well What Leads You Forward and What Holds You Back"' (2018) 19(4) *German Law Journal* 981; Martins Paparinskis, 'Substantive Standards of Investment Protection Under EU Law and International Investment Law, EU Law and International Investment Arbitration' (2018) IAI Series No. 11, https://arbitrationlaw.com/library/substantive-standards-investment-protection-under-eu-law-and-international-investment-law, accessed 25 March 2019; Panos Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) 88(1) *Nordic Journal of International Law* 41–64; Quentin Declève, 'Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements' (2019) 4(1) European Papers (forthcoming).

3 Nagy (n 2) 981.

A. INTRA-EU BITS: A TRULY CENTRAL EUROPEAN ISSUE

0.02 Although intra-EU BITs are not problems related specifically to Central European Member States, it was the accession of these countries that brought them to light. Intra-EU BITs lie at the heart of investor-state disputes involving Central Europe: approximately two-thirds of the cases in the region are intra-EU matters.[4] This means that terminating intra-EU BITs would do away with the overwhelming majority of investment arbitration cases in the region. Perversely, as "usual defendants" of intra-EU investment arbitration proceedings, this development would clearly serve the interests of Central European Member States.

0.03 Intra-EU BITs had been a time bomb in the EU's constitutional architecture for decades, which was triggered by the accession of Central European countries in 2004, 2007, and 2013.[5] Old Member States abstained from entering into intra-EU BITs and the very few they concluded were not applied. After the foundation of the European Economic Community (EEC) – apart from a couple of exceptions – Member States refrained from concluding BITs with sister states. There appears to have been a general agreement not to apply BITs concluded before enlargement.[6] Although Germany entered into such an agreement with Greece in 1961[7] and Portugal in 1980,[8] these treaties contained no investor-state but only inter-state arbitration clauses and have never given rise to arbitral proceedings after the accession of Greece in 1981 and of Portugal in 1985.[9] Hence, for a long time, the problem of intra-EU BITs had remained theoretical.

4 Cecilia Olivet, *EU Investment Policy and Intra-EU BITs: The Case of Czech Republic* (Amsterdam: Transnational Institute, 2012) 2, http://just-trade.org/sites/just-trade.org/files/publications/BRIEFING%20on%20intra-EU%20BITs%20and%20Czech%20Republic-JUST-TRADE.pdf, accessed 25 March 2019.

5 See Carrie E. Anderer, 'Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty' (2010) 35 *Brooklyn J. Int'l L.* 851, 864–65.

6 See Eric Teynier, 'L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne' (2008) 1 *Paris J. Int'l Arb.* 12.

7 Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Treaty Between the Federal Republic of Germany and the Kingdom of Greece on the Promotion and Mutual Protection of Investments], Apr. 11, 1963, BGBl II at 216 (Ger.).

8 Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Treaty Between the Federal Republic of Germany and the Portugues Republic on the Promotion and Protection of Capital Investments], Jan. 21, 1982, BGBl II at 56 (Ger.).

9 See Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (2010) 21(4) *European Journal of International Law* 1049, 1065; Dominik Moskvan, 'The Clash of Intra-EU Bilateral Investment Treaties with EU Law: A Bitter Pill to Swallow' (2015) 22 *Columbia Journal of European Law* 101, 103.

Nonetheless, BITs proliferated beyond the frontiers of the realm: Central European countries – which were not members of the EU at that time – concluded several BITs with the then Member States. During the half-century between the foundation of the EEC and the enlargements in 2004, 2007, and 2013, Central European countries concluded numerous BITs with the then members of the EU. With the accession, these agreements turned into intra-EU treaties[10] and put a new subject on the table of EU law.[11] **0.04**

B. WHAT IS THE IMPACT OF THE *ACHMEA* RULING?

1. The legal analysis: what is the holding?

The first question that comes to the practical lawyer's mind when reading the *Achmea* ruling is obviously the judgment's legal purview, or put in legalese: what is the holding? The ruling is very recent and the CJEU has had no chance to revisit the issue, except AG Bot's general statement in Case 1/17[12] that *Achmea* does not concern extra-EU investment treaties. **0.05**

Preliminary rulings interpret EU law in the context of a flesh and blood case[13] and it is not rare that the CJEU distinguishes earlier rulings on the basis of the fact pattern or by means of the reasons it was based on.[14] **0.06**

The language of the ruling is rather limiting: the operative part refers to all-embracing dispute settlement clauses providing for ad-hoc arbitration. **0.07**

> 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

10 See Teynier (n 6) 12.

11 The enlargement of 2004 increased the number of intra-EU BITs to 150, the enlargement of 2007 increased the number to 191. Shan and Zhang (n 9) 1049, 1065.

12 ECLI:EU:C:2019:72.

13 Case C-112/00 *Schmidberger* [2003] E.C.R. I-5659, para 32; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] E.C.R. I-11421; Case C-478/07 *Budějovický Budvar* [2009] E.C.R. I-7721, para 64; Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-0000, para 36; Case C-384/08 *Attanasio Group* [2010] E.C.R. I-2055, para 28; Case C-197/10 *Unió de Pagesos de Catalunya v Administración del Estado* [2011] E.C.R. I-08495.

14 Case C-144/96 *ONP v. Maria Cirotti* [1997] E.C.R. I-05349, paras 21, 25–28. Case 130/79 *Express Dairy Foods Limited v. Intervention Board for Agricultural Produce* [1980] E.C.R. 1887, paras 5–8. Joined opinion of AG Warner in Case 112-76 *Renato Manzoni v. Fonds national de retraite des ouvriers mineurs*, Case 22-77 *Fonds national de retraite des ouvriers mineurs v. Giovanni Mura*, Case 37-77 *Fernando Greco v. Fonds national de retraite des ouvriers mineurs*, Case 32-77 *Antonio Giuliani v. Landesversicherungsanstalt Schwaben* [1997] E.C.R. 1647, 1662.

> 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.[15]

0.08 Accordingly, the ruling clearly does not deal with the substantive provisions of BITs. Although these may be of little use without the possibility of an arbitral procedure, they seem to have remained valid, raising the possibility of enforcing the substantive provisions of intra-EU BITs before national courts. Indeed, there is no reason to assume that national courts should not apply properly promulgated investment treaties, given that most BITs do not contain any provision depriving state courts of their jurisdiction and an allegedly invalid arbitration clause should be *a fortiori* no reason for that.

0.09 Furthermore, the dispute settlement clause embedded in Article 8 of the Netherlands-Czechoslovakia BIT submitted "*[a]ll disputes* between one Contracting Party and an investor of the other Contracting Party *concerning an investment* of the latter," (emphasis added) to ad-hoc arbitration. This implies that institutional – most notably ICSID – arbitration may not be covered by the ruling, same as investment arbitration under the Energy Charter Treaty.[16]

0.10 In the same vein, the ruling may, arguably, not extend to arbitration clauses restricting jurisdiction to expropriation matters. Contrary to the rules on the freedom of investment – which have their counterparts in EU internal market law – these provisions do not overlap with EU law. Hence, conferring jurisdiction on an arbitral tribunal as to these provisions may not encroach on the prerogatives of EU courts.

0.11 Finally, a dispute settlement clause providing specifically for arbitration within the territory of the EU might, arguably, also pass muster. Although the CJEU noted that the scope of review of an arbitral award under German law was insufficient to protect the autonomy of EU law, the ruling may be interpreted as suggesting that the possibility of an appropriate review by a Member State court might save an arbitration clause. Article 8 empowered the arbitral tribunal to select the place of the proceedings, and although it chose Germany, it could have equally chosen a place outside the EU.[17] In this case no Member State would have had power to carry out an annulment procedure.

---

15 *Achmea*, para 60.

16 See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1) paras 678–83 (distinguishing *Achmea* from cases based on the Energy Charter Treaty).

17 *Achmea*, para 52.

0.12 There are arguments to go even further with the limitation of the holding. One may reasonably argue that investment arbitration is ruled out by EU law only in matters where the investment treaty and EU law overlap, if there is no overlap, there is no clash either.[18]

0.13 The arbitral award in *Achmea* rested on considerations that, in fact, closely paralleled the EU internal market's rules on freedom of establishment and free movement of capital. It was one of the rare investment cases, which, instead of issues of property protection, dealt significantly with freedom of payments – repatriation of profits. According to the CJEU's jurisprudence, profiting from economic activities pursued in another Member State, what necessarily embraces the distribution and repatriation of profits, is an integral part of the concept of freedom of establishment and the free movement of capital.[19] Although the Slovak measure was also judged under the free and equitable treatment standard, the key issue was a Member State measure that under EU law may be conceived as a restriction of free movement.

0.14 It has to be taken into account that although fundamental human rights and rule of law are the EU's cornerstones,[20] EU law contains no effective mechanism of general application to compel Member States to respect them.[21] While the EU Charter of Fundamental Rights does provide for the protection of property,[22] it is, in principle, applicable to the institutions and bodies of the EU and applies to Member States only when and to the extent they are implementing EU law.[23] Taking this into account, it may be a situation

18 Nagy (n 2) 981.

19 Case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] E.C.R. I-04165, para 25.

20 The respect of human rights is a precondition of membership – Copenhagen criteria – established by the European Council in Copenhagen on June 21 through 22, 1993 (Conclusions of the Presidency), and is listed among the core values of the Union; according to Article 2 TEU, the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

21 See, e.g., Csongor István Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's "Federal Bill of Rights" to Member States' (2017) 27 *Indiana International & Comparative Law Review* 1; Michael Dougan, 'Judicial Review of Member State Action Under The General Principles and the Charter: Defining the "Scope Of Union Law"' (2015) 52 *Common Market Law Review* 1201.

22 Charter of Fundamental Rights of the European Union art. 17 [2010] O.J. C 83/02 [hereinafter Charter of Fundamental Rights].

23 The scope of the Charter is based on the principle that the federal bill of rights applies to the federal government and the national bill of rights applies to the national government. According to Article 51(1) of the Charter, "[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." ibid art. 51(1). Article 51(2) emphasizes that the "Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." ibid art. 51(2). See also Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European*

different from the facts of *Achmea* if a Member State terminates an individual concession contract by legislative means, refuses to issue a license for dubious reasons or an enterprise is not afforded fair trial in a domestic regulatory matter. This finds reflection in the opinion of AG Wathelet in *Achmea*, which appears to contain a very ironic reply to the Commission allegation that in the EU there is no need for BITs.

> *I do not know what the Commission means by 'full protection'*, but a comparison between the BIT and the EU and FEU Treaties shows that the protection afforded to investments by those Treaties is still a long way from being 'full'. In my view, intra-EU BITS, and more particularly the BIT at issue in the main proceedings, establish rights and obligations which neither reproduce nor contradict the guarantees of the protection of cross-border investments afforded by EU law.[24]

0.15 All in all, it seems that while *Achmea* features an anti-arbitration attitude – which may guide future cases – the ruling's holding is highly questionable. The above considerations demonstrate that the judgment's scope is much narrower than the echo it is generating. Hence, although the CJEU's anti-arbitration attitude revealed itself, the status of intra-EU BITs is not fully settled.

2. The arbitral practice: theme and variations for a holding-analysis

0.16 The question of holding is especially interesting because arbitral tribunals have started down-reading *Achmea* right away.[25] These cases did nothing but delimited the ruling's purview and preserved the prior arbitral practice in relation to matters that could be distinguished from *Achmea*. Indeed, the pre-*Achmea* era had seen numerous arbitral awards rejecting the "intra-EU" defense.[26] Arguably, the down-reading of *Achmea* may be viewed as an attempt

---

Constitutional Law Review 375, 377 ("However, from the fact that the Charter is now legally binding it does not follow that the EU has become a 'human rights organi[z]ation' or that the ECJ has become 'a second European Court on Human Rights' (ECtHR).").

24 *Achmea*, para 180.

25 The *Achmea* defense was raised in *Antin Infrastructure and others v. Spain* and in *Antaris Solar GmbH and Michael Gode v. Czech Republic* but the tribunal decided not to consider it. In *Antin Infrastructure and others v. Spain* (ICSID Case No. ARB/13/31) the proceedings were closed before the adoption of the *Achmea* ruling and the tribunal rejected the claimant's motion to reopen the proceeding in view of the ruling. See paras 55–58. In *Antaris Solar GmbH and Michael Gode v. Czech Republic* (PCA Case No. 2014-01), the arbitral tribunal refused to consider the Respondent's arguments based on *Achmea* not only because it considered them belated but also because the Czech Republic "waived any objection on the EU jurisdictional point." Para 73.

26 *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004) Partial Award; *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic* (UNCITRAL) Decision on Jurisdiction; *Achmea B.V. (formerly Eureko) v. Slovak Republic* (PCA Case No. 2008-13) Award on Jurisdiction, Arbitrability and Suspension; *European American Investment Bank AG (EURAM) v. Slovak Republic* (UNCITRAL) Award on Jurisdiction; *Ioan Micula et al. v. Romania* (ICSID

of arbitral tribunals (legal community) to push back against the political pressure imposed by the European Commission and to remind Member States and the EU that they cannot ignore the legal obligations they undertook. As noted below, this aspect was explicitly addressed by the arbitral tribunal in *Vattenfall*.[27]

0.17 In *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*,[28] the arbitral tribunal found that *Achmea* does not apply to investment arbitration under the Energy Charter Treaty (ECT), arguing that the ruling extends to intra-EU investment treaties and the ECT is not such a treaty, as it has a good number of signatories who are not members to the EU.[29]

0.18 The same line of reasoning was followed in *Vattenfall AB and others v. Federal Republic of Germany*,[30] where the tribunal emphasized that the ECT's arbitration clause (Article 26) is unambiguous in subjecting Contracting Parties, including the EU itself, to arbitration and, thus, reflects the EU's unequivocal assent to arbitration without any carve-out as to intra-EU BITs.

> 187. It would have been a simple matter to draft the ECT so that Article 26 does not apply to disputes between an Investor of one EU Member State and another EU Member State as respondent. That was not done; and the Tribunal has been shown no indication in the language of the ECT that any such exclusion was intended. The

Case No. ARB/05/20) Award; *The PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14) (the decision on jurisdiction is not public), see Luke Eric Peterson and Zoe Williams, 'Spain Solar Claims Update: Jurisdictional Ruling Comes Down in an ICSID Case, As a Pair of Awards Loom – And Two More ECT Arbitrations Get Underway' (2016) *IA REPORTER*, July 4 2016; *Electrabel S.A. v. Republic of Hungary* (ICSID Case no. ARB/07/19) Award; *EDF International S.A. v. Republic of Hungary* (UNCITRAL) (award not public); *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30) Decision on Jurisdiction; *Charanne B.V. & Construction Investments S.a.r.l. v. Kingdom of Spain* (SCC Arb. No. 062/2012) Award; *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain* (SCC V2013/153); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) Award; *WNC Factoring Ltd. v. Czech Republic* (UNCITRAL, PCA Case No. 2014-34) Award; *I.P. Busta & J.P. Busta v. Czech Republic* (SCC Case V 2015/014) Final Award; *Anglia Auto Accessories Ltd. v. Czech Republic* (SCC Case V 2014/181) Final Award; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36) Award; *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain* (SCC Arbitration 2015/063) (the tribunal referred to the *Achmea* case, which was at that time pending); *PL Holdings S.à.r.l. v. Republic of Poland* (SCC Case No. V 2014/163) (the tribunal referred to the *Achmea* case, which was at that time pending). The intra-EU jurisdictional defense was also touched upon in *United Utilities (Tallinn) B.V. et al. v. Republic of Estonia* (P.O. No. 2, ICSID Case No. ARB/14/24.): though Estonia considered submitting it, in the end, it refrained from spelling it out – presumably because this defense had consistently failed before arbitral tribunals.

27 *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12) ("Decision on the *Achmea* Issue").

28 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1) (ECT).

29 ibid paras 678–83.

30 *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12) ("Decision on the *Achmea* Issue").

> Tribunal's responsibility is to interpret and apply the ECT, which defines the Tribunal's jurisdiction.
>
> 188. Taking into account the wording of Article 26 ECT, read together with the above provisions and the EU Statement, the Tribunal cannot agree that intra-EU arbitrations have been carved out from the application of Article 26 ECT. As a Contracting Party to the ECT, the EU has accepted the possibility of arbitration proceedings under Article 26, even against itself, without making a distinction between investors from EU or non-EU Member States. There is no language suggesting that EU Member States have "transferred competence" to the EU in respect of intra-EU arbitrations, or that such arbitrations are barred.

0.19 The tribunal attached great importance to the fact that, contrary to the EU's normal practice, the ECT contains no "disconnection clause." Such clauses are meant to ensure that mixed agreements apply to third states only and not as between Member States.[31] Very tellingly, "the *travaux préparatoires* of the ECT reveal that during negotiation of the ECT, the EU had proposed the insertion of a disconnection clause [but] that clause was ultimately dropped from the draft treaty."[32]

0.20 The path beaten in *Masdar* and *Vattenfall* was followed in subsequent arbitral matters. In *Foresight Luxembourg and others v. Kingdom of Spain*,[33] the tribunal, quoting *Masdar* at great length, concluded that *Achmea* was "irrelevant to the Respondent's jurisdictional objection."[34] In the same vein, in *Greentech Energy Systems A/S and others v. Italian Republic*,[35] the tribunal held that "the decision [in *Achmea*] has no preclusive effect such as to remove its jurisdiction over the present dispute"[36] and reiterated that the ECT is different from the intra-EU BIT that was addressed in *Achmea*.[37]

0.21 In *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*,[38] the tribunal held that in *Achmea* the BIT provided for ad-hoc arbitration and, hence, the ruling does not apply to ICSID arbitration.

> 257.Thereby, [pursuant to Arts. 53 and 54 of the ICSID Convention] Hungary as a party to the ICSID Convention is expressly bound by the Tribunal's Award in the present case, has no option of appeal outside the ICSID system, and has to recognize

31 ibid paras 201–06.
32 ibid para 205.
33 *Foresight Luxembourg and others v. Kingdom of Spain* (SCC Case No. 2015/150) paras 219–21.
34 ibid paras 220–21.
35 *Greentech Energy Systems A/S and Others v. Republic of Italy* (SCC Case No. 095/2015).
36 ibid para 395.
37 ibid para 396.
38 *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35) ("Award").

> the present Award as binding and enforce the pecuniary obligations imposed by this Award within its territories as if it were a final judgment of a court in Hungary.
>
> 258. The Achmea Decision contains no reference to the ICSID Convention or to ICSID Arbitration. Therefore, and in view of the above mentioned determinative differences between the Achmea case and the present one, the Achmea Decision cannot be understood or interpreted as creating or supporting an argument that, by its accession to the EU, Hungary was no longer bound by the ICSID Convention.
>
> 259. There is no rule in EU law that provides that these obligations under the ICSID Convention are inconsistent with EU law or that obligations under the ICSID Convention have been terminated or replaced by the accession to the EU. Regardless of what may be argued from the Achmea Decision regarding BITs between EU Member States, as regard jurisdiction under the ICSID Convention it is undisputed that Hungary did not expressly terminate its participation in and submission to arbitration pursuant to the ICSID Convention when it joined the EU in 2004.
>
> 260. The Tribunal also cannot find that the accession to the EU was an implied withdrawal from the ICSID Convention. There was no denunciation of the ICSID Convention, pursuant to Art. 71 thereof.
>
> …
>
> 263. The Achmea Decision itself does not support any other conclusion. As mentioned above, the CJEU did not say anything in the Achmea Decision about the effect of its Decision on consent to arbitration under Art. 25 of the ICSID Convention.

Although these awards, at first glance, may appear to be in sharp contrast to the CJEU's attitude in *Achmea*, after all, it is not the court's state of mind but its ruling that is binding.

3. The political analysis

0.22 Contrary to the above uncertainties, the Commission made utmost use of the emerging possibility to wipe out intra-EU BITs, as it considers them to be irreconcilable with the European integration. After the adoption of the *Achmea* ruling, the Commission quickly released a communication to demonstrate that EU law also provides protection in cases where intra-EU BITs do.[39] Nevertheless, the fact that the Commission felt that it needed to launch out into explanations suggests that the "same protection" argument is not as clear as the Commission would like it to be.

39 Commission Communication on the Protection of intra-EU investment, COM(2018) 547/2. In *Greentech Energy Systems A/S and Others v. Italy* (SCC Case No. 095/2015), the tribunal emphasized that the Communication is not an "authoritative interpretation of the scope of *Achmea*." Para 402.

0.23 While EU law does have a comprehensive regime on free movement, which actually exceeds the benefits secured by BITs, it does not provide for a comprehensive protection of property rights, including the protection of legitimate expectations. This proposition is not changed by the fact that there are various means in EU law that can be used for this purpose, given that EU law is a torso in this regard.

0.24 As a fundamental principle, EU rule of law and human rights (including property protection) apply only to matters coming under the scope of EU law. The EU Charter of Fundamental Rights applies only to EU institutions, it applies to Member States only when they are implementing EU law.[40] The CJEU's ruling in *Siragusa*[41] demonstrates well how this affects the protection of investments. Here, the Court encountered a genuine investment protection case: Mr. Siragusa made alterations to his property in a landscape conservation area and was ordered to restore the site to its former state. He argued that the acts of Italy impaired his right to property enshrined in Article 17 of the Charter. It is easy to parallel this fact pattern with the archetype of investment protection cases. However, the CJEU refused to inspect whether the property rights of Mr. Siragusa were violated. It held that the Italian authorities were not implementing EU law[42] and confirmed that the purpose of the Charter is to ensure the protection of fundamental rights in the sphere of EU activity, that is, it is not meant to shelter fundamental rights from Member States in general.[43]

0.25 Nonetheless, the above plight did not discourage the Commission from putting political pressure on Member States to sign up for a political declaration confirming the position that intra-EU BITs are dead and promising to inform arbitral tribunals about this stance and to terminate the existing intra-EU BITs by 6 December 2019 with all sunset and grandfathering clauses being considered inapplicable after this date.[44] While most Member States were quick to declare even investment arbitration under the ECT invalid, six of them rejected that conclusion. It is beyond legal analysis to ponder on the motivations and economic interests of these Member States and how these impacted on the legal position they took.

40 Article 51 of the Charter.

41 Case C-206/13 *Siragusa* [2014] E.C.R. 126.

42 See ibid para 30.

43 See ibid paras 31–33.

44 Declaration of the representatives of the governments of the Member States, of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union.

0.26 This arrangement appears to be most unfortunate for various reasons. It shows well why legal issues should be decided by courts of law (and arbitral tribunals) and not by politicians making political declarations. The Commission's endeavors resulted in three declarations in accordance with the Member States' divergent economic and political interests and, not surprisingly, all of them jumped the delicate issue of holding-analysis. Although Member States did not consistently follow their own economic interests when deciding whether to sign up for the joint declaration (old Member States were interested in maintaining the scheme of intra-EU BITs), six Member States made two declarations separate from the majority. Five Member States (Finland, Luxembourg, Malta, Slovenia, and Sweden) made a joint declaration[45] and Hungary a separate one.[46] There is a subtle but substantial difference between the two "dissenting" declarations in terms of *Achmea*'s applicability to ECT arbitration. The joint declaration takes up a waiting position: it stresses that the ruling is "silent on the investor-state arbitration clause in the Energy Charter Treaty" and proposes to await the judicial ascertainment of whether it applies to the ECT or not.[47] On the contrary, Hungary's declaration categorically expresses the stance that *Achmea* does not concern arbitration under the ECT.[48]

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.

46 Declaration of the representative of the government of Hungary, of 16 January on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union.

47 "The Member States note that the *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty. 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 is currently contested before a national court in a Member State. [This is a reference to the annulment proceedings before the Svea Court of Appeal in Case No 4658-18 *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. the Kingdom of Spain* (SCC Arbitration, 2015/06).] Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty."

48 "8. Hungary further declares that in its view, the *Achmea* judgment concerns only the intra-EU bilateral investment treaties. The *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty (hereinafter: 'ECT') and it does not concern any pending or prospective arbitration proceedings initiated under the ECT. 9. Against this background, Hungary underlines the importance of allowing for due process and considers that it is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra-EU application of the ECT. The ongoing and future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States."

C. WHAT REMAINS OF INTRA-EU BITS AFTER *ACHMEA*?

0.27 The impact of *Achmea* will be, in various regards, what the majority of the legal community thinks of it and the ruling does leave a few doors open that could be of practical relevance.

0.28 First, as argued above, the holding of the ruling is far from limitless, leaving arbitral tribunals with a substantial residual power. The arbitral tribunals' down-reading is based on a reasonable analysis. The ruling does leave the status of the ECT open and it is, indeed, at least dubious whether it can be stretched to this. The ECT is a multilateral investment treaty having quite a few parties which are not members to the EU. The arbitral tribunal in *Vattenfall* argued very convincingly that the EU's attempt to suppress arbitration under the ECT may be easily viewed as an attempt to get out of freely assumed duties. This issue is being currently considered by the Svea Court of Appeal in Sweden in *Novenergia II v. Spain*.[49] The Svea Court of Appeal was requested to refer this issue to the CJEU.[50]

0.29 Second, an interesting question is whether the invalidity is categorical or merely an objection that may be waived or subject to procedural hurdles. Articles 53–54 of the ICSID Convention preclude all appeals and remedies under national law and oblige Contracting States to afford the same treatment to ICSID awards as to the "a final judgment of a court in that State." Recently, in *PL Holdings S.à.r.l. v. Republic of Poland*,[51] the Svea Court of Appeal refused to set aside an arbitral award resting on the Luxembourg-Poland BIT, because Poland's jurisdictional objection was belated. Although Poland raised the "intra-EU" defense in the course of the arbitral proceedings, this occurred beyond the deadline set by the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Hence, the Svea Court of Appeal held that the objection was time-barred and could not be used as a ground of annulment, as the argument that there was no valid arbitration agreement was precluded by the Swedish Arbitration Act.[52]

0.30 Third, an interesting experiment could be the application of the substantive provisions of intra-EU BITs by national courts. Notably, the CJEU's ruling in *Achmea* dealt solely with an arbitration clause, it clearly did not address substantive provisions protecting investors, by way of example, from illegal

49 SCC Case No. 2015/063.
50 See www.italaw.com/cases/6613, accessed 25 March 2019
51 SCC Case No. V 2014/163.
52 The fact that the jurisdictional objection was belated was confirmed in para 305 of the arbitral award.

and uncompensated expropriation. The fact that the parties stipulated arbitration does not imply that they ousted Member State courts' jurisdiction to apply these provisions, if they are requested to.

0.31 Fourth, the discourse on *Achmea* has so far neglected a very important issue: treaty shopping. Whatever the proper interpretation of the ruling may be, the general feeling is that it made arbitration under intra-EU BITs very risky. This may incite investors to seek alternative ways of protection and one of the obvious options is treaty shopping. EU investors may make investments in other Member States via third countries (or transfer their interests to special purpose vehicles in third countries) and claim the benefits of extra-EU BITs in intra-EU matters.[53]

0.32 While some have acknowledged treaty shopping with aversion, the vast majority of arbitral awards, in fact almost all of them, have been intensely dismissive of piercing the corporate veil in cases where the BIT contained no specific requirements of substantive link or denial of benefits clause. In reality, "it has become so easy for foreign investors to relocate to different jurisdictions that the contents of nationality have largely lost their essence."[54] Although piercing the corporate veil is a living doctrine, it is exceptional and applies only to abusive practices. According to the arbitral practice, the mere fact that the nationals of a country establish a company in another country is, in itself, not an abuse justifying the piercing of the corporate veil.[55]

53 Csongor István Nagy, 'Extra-EU BITs and EU law: Immunity, "Defense of Superior Orders", Treaty Shopping and Unilateralism' in Csongor István Nagy (ed), *Investment Arbitration and National Interest* (Council on International Law and Politics, Indianapolis 2018) 143–48.

54 Julien Chaisse, 'The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration' (2015) 11 *Hastings Business Law Journal* 225, 228.

55 *ADC Affiliate Limited & ADMC Management Limited v. Republic of Hungary* (ICSID Case No ARB/03/16) Award (October 2, 2006); *Saluka Investments BV v. Czech Republic* (UNCITRAL) Partial Award (17 March 2006). *Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (ICSID Case No ARB/10/11 and 10/18) Decision on Jurisdiction (August 19, 2013); *Tokios Tokelés v. Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction (April 29, 2004); *Rompetrol Group NV v. Republic of Romania* (ICSID Case No ARB/06/3) Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (April 18, 2008); *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No ARB/07/16) Award (November 8, 2010); *KT Asia Investment Group BV v. Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award (October 17, 2013) paras 111–39. The very rare exception that goes against the above clear line of case-law is *Venoklim Holding BV v. Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/22) Award (April 3, 2015).