DEAD OR ALIVE? THE FOREIGN INVESTMENT PROTECTION IN THE EU AFTER THE EXPIRY OF THE INTRA-EU BITS.

Aleksander Gubrynowicz[*] & Marek Wierzbowski[**]

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When we began to think about the content of this contribution, the legal framework surrounding intra-EU investment seemed to have been fragile but still predictable. After the Court of Justice of the European Union (CJEU) landmark decisions in *Achmea,*[1] *Komstroy,*[2] *Republiek Polen*[3] and, more importantly, the termination of almost all Intra EU Bilateral Investment Treaties (BITs) through the May 5, 2020 Termination

[*] Aleksander Gubrynowicz (1974) is an Assistant Professor at the Faculty of Law and Administration, University of Warsaw. He is an expert in International Investment Law, International Environmental Law, and the History of International Law, as well as an expert in international relations, notably Central and Eastern Europe. His most recently published book is titled 1989—AUTUMN OF NATIONS, COLLEGE EUROPE IN NATOLIN (2021) (co-authored with. A. Burakowski and P. Ukielski).

[**] Marek Wierzbowski is a Professor of Law at Warsaw University School of Law. He also taught as a visiting Professor at a few American law schools. He was a partner of Linklaters.

1. Case C-284/16, Slovakische Republik v. Achmea B.V., ECLI:EU:C:2018:158 (Mar. 6, 2018).

2. Case C-741/19, République de Moldavie v. Komstroy L.L.C., ECLI:EU:C:2021:655 (Sep. 2, 2021).

3. Case C-109/20, Republiken Polen v. P.L. Holdings Sàrl, ECLI:EU:C:2021:875 (Oct. 26, 2021).

Agreement (TA),[4] we are inclined to believe that with these radical steps, the EU indeed brought an era to its end. Nonetheless, the article argues that by leaving the EU, investors were left without other protections than the one granted by EU law. Thus, the EU organs produced other problems that sooner or later will have to be resolved. However, the willingness of the EU organs to address the concerns is not certain at the present moment. Despite these uncertainties, we are convinced that the current *status quo* is untenable.

This contribution is divided into four parts. The first part restates the critical milestones of the persisting conflict between the EU organs and the world of investment arbitration based on the Intra-EU BITs. The second part discusses the legacy of the landmark *Achmea* decision that examines the provisions of the Termination Agreement to assess the current legal status of the EU investment made by the EU investors in EU countries other than the country of registration or citizenship. The third part explores the major problems of the current situation, and our assessment of it from the international investment law perspective. The fourth and last part is the discussion of potential solutions that could improve the current legal status, which principally leaves EU investors without any protections offered by the IIAs whenever they invest their capital within the EU borders. That part expresses our support for the European Investment Court concept as the only viable alternative, keeping in mind the current situation in Europe and elsewhere.

To conclude, we reassume our findings and restate our argument on a European Investment Court as an improvement or even the best solution to existing or emerging problems in the foreseeable future. At the same time, we concede that such an institution (having all characteristics of a Permanent Court) also has drawbacks. Of course, the ultimate model or set of solutions adopted at the EU level will remain to be seen.

PART I

The origins of the conflict of norms arising from the CJEU and investment arbitration tribunals diverging interpretations have been previously thoroughly examined.[5] Without going into detail, the essence of

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

5. The robust literature that has developed during the last fifteen years includes: Marek Wierzbowski and Aleksander Gubrynowicz, *Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHEUER 544 (Christina Binder et al. eds., 2009); Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is EC Law*

the problem boils down to two points. Firstly, although some standards granted to investors by BITs are expressly recognized by EU law, not all of them are directly mirrored therein. Further, although the prohibition of expropriation without compensation is mentioned in Article 17 of the EU Charter of Fundamental Rights, its enforcement in practice is usually strictly dependent upon the scope of property protection in Member States' domestic laws, rather than in EU law.[6] Secondly, the legal bases, the structure of the CJEU, and investment arbitration tribunals are not the same. Thus, their tasks and competencies partially encroach upon each other.

These complex relations necessarily have some potential of jurisdictional conflict. Still, during the last fifteen years, neither legal practitioners nor academics could offer a constructive solution. Although the problems arising from interpretation discrepancies were more painful for the EU than for the *ad hoc* tribunals (composed of arbitrators settling only one dispute submitted to them) the EU authorities waived the issue. Over many years, the EU Commission failed to address the increasing tensions. The breakthrough started with the *Achmea* case[7] when the Grand Chamber of the CJEU unequivocally declared the Slovakian-Dutch BIT Arbitration Clause in conflict with Article 267 and 344 of TFEU.[8]

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an Obstacle?, 58 INT'L & COMPAR. L. Q. 297 (2009); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law,* 46 COMMON MKT. L. REV. 383 (2009); Markus Burgstaller, *The Future of Bilateral Investment Treaties of EU Members States, in International Investment Law and EU Law,* EUR. Y.B. INT'L ECON. L. 76-77 (Marc Bungenburg et al. eds., Springer-Verlag, Berlin, Heidelberg 2011); August Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the* Eastern Sugar *and* Eureko *Investment Arbitrations,* 39 LEGAL ISSUES ECON. INTEGRATION 157 (2012); Panos Koutrakos, *The Relevance of EU Law for Arbitral Tribunals – (Not) Managing the Lingering Tension,* 17 J. WORLD INV. & TRADE 873 (2016); Paschalidis Paschalis, *Case C-567/14 Genetech: EU Law Confronted with International Arbitration,* 5 EUR. INT'L ARB. REV. 59 (2016); Nikos Lavranos, *Black Tuesday: the end of intra-EU BITs,* THOMSON REUTERS PRAC. L. ARB. BLOG (Mar. 7, 2018) http://arbitrationblog.practicallaw.com/black-tuesday-the-end-of-intra-eu-bits/; Steffen Hindelang, *The Limited Immediate Effects of CJEU's Achmea Judgement,* VERFASSUNGSBLOG (Mar. 9, 2018) https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/; Steffen Hindelang, *Circumventing Primacy of EU Law Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-Se Treaties: The Case of Intra-EU Investment Arbitration,* 39 L. ISSUES ECON. INTEGRATION 179 (2012).

6. The differences amongst the property regimes in the Member States are explainable by the limited competencies of the EU in this area. *Compare* Article 345 of TFEU, which states that "the Treaties shall in no way prejudice the rules in the Member States governing the system of property ownership." Consolidated Version of the Treaty of the Functioning of the European Union art. 345, Oct. 26, 2012, O.J. (C 326) 55.

7. Case C-284/16, Slovakische Republik v. Achmea B.V., ECLI:EU:C:2018:158 (Mar. 6, 2018).

8. Consolidated Version of the Treaty of the Functioning of the European Union, *supra* note 6, art. 267 (determining the procedures of questions for preliminary rulings, which, dependent on the case, can be or must be submitted by the Member States domestic courts); *Id.* art. 344

CJEU addressed the issue of compatibility of the BIT Investor-State Dispute Settlement (ISDS) with the Founding Treaties in its analysis and final ruling. The problem of substantial guarantees usually granted to investors in BITs (e.g., FET, NT, or MFN clauses) exceeded the scope of the analysis in *Achmea*. Nonetheless, some Member States interpret this landmark case as a clear signal that the era of Intra-EU BITs came to an end. Even before the judgment was handed down, they began to denounce or terminate upon mutual agreements all BITs to which they were Parties.[9] And as it becomes clear today—they were not wrong. On January 15, 2019, the Declaration of twenty-two Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union was adopted.[10] Its Signatories announced that, "[i]n light of the *Achmea* judgment, Member States would terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally."[11]

Nonetheless, *Achmea* failed to address many specific concerns—notably, the problem of pending proceedings before investment arbitration tribunals also was not adequately examined.[12] Therefore, as the EU Member States could not agree on a concerted action, the negotiations on the Agreement mentioned in the 2019 Declaration lasted until May 5, 2020, when twenty-three of twenty-eight EU Members signed the Termination Agreement quoted above. Its most important provisions can be summarized as follows:

> 1) Upon the date of entry into force of the Termination Agreement's provisions, the Intra-EU BITs that are still legally binding are deemed to have expired (art. 1 (1));[13]

(excluding the possibility to submit disputes falling within the scope of the treaties, reserving the monopoly of the EU judiciary organs to interpret and apply the EU Founding Treaties).

9. This trend concerns, inter alia, Poland. *Cf.* Marcin Orecki, *Bye Bye BITs? Poland Reviews Its Investment Policy,* KLUWER ARB. BLOG (Jan. 31, 2017) http://arbitrationblog.kluwerarbitration.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/.

10. Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union, Jan. 15, 2019, I.L.M. [hereinafter 2019 Declaration].

11. *Id.*

12. For more on this topic, see Łukasz Kułaga, *Implementing Achmea: The Quest for Fundamental Change in International Investment Law,* POLISH Y.B. INT'L L. 227, 236 (2019).

13. One of the Preamble motives to the Agreement states that the Parties to it "agree that this Agreement is without prejudice to the question of compatibility with the EU Treaties of substantive provisions of intra-EU bilateral investment treaties." Nonetheless, it does not seem possible to limit the legal effect of the TA to the Intra-EU BITs Arbitration Clauses only because

2) The entry into force of the Termination Agreement effectively nullifies all legal effects that sunset clauses could eventually produce (art. art 2(2) and (3)). More precisely, from the perspective of this Agreement, the issue of whether the sunset clause was in operation at the moment of the Termination Agreement's entry into force or not—is irrelevant. In any case, States Parties to the Agreement are under the duty to remove any legal effects that a sunset clause laid down in their Intra-EU BITs may eventually produce;

3) In line with the primary goal of Member States Parties to the Termination Agreement being implementation of the *Achmea* case, art. 4 clearly states that there's an irreconcilable contradiction between the Arbitration Clauses laid down by the Intra-EU BITs and the TFEU provisions. Therefore, all proceedings launched before investment arbitration tribunals are divided into three groups, and the date of March 6, 2018 (when the CJEU handed down the *Achmea* judgment) plays the decisive role as the division criterion:

a) The proceedings initiated after this date (so-called "New Arbitration Proceedings" (*cf*. art. 1(6)) are considered in flagrant contradiction with art. 5 of the Termination Agreement. As they are presumably based on the expired Arbitration Clauses, they should be deemed null and void *ab initio;*

b) "Concluded Arbitration Proceedings" means any Arbitration Proceedings which ended with a settlement agreement or with a final award issued before March 6, 2018 (art. 1(4)).[14] The results of these proceedings (notably the effects of executed awards) remain unaffected by the Termination Agreement's provisions;

c) Pending Arbitration Proceedings means any Arbitration Proceedings initiated before March 6, 2018, that do not qualify as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement

4) From all kinds of proceedings mentioned under 3), most of the other Termination Agreement's provisions concern pending proceedings. Their purpose aims at quickly quashing all proceedings pending before investment arbitration tribunals. The means to achieve this goal are different: sometimes they are addressed to the States-Parties to the

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Article 2 and 3 are drafted in a very categoric manner. Further, provisions and the titles of its Annexes A and B read together with other Preamble's motives unequivocally supporting the claim that the actual purpose of the TA was to strip off all Intra-EU BIT from any legal effects they eventually could still produce as quickly as it is possible.

14. Termination Agreement, *supra* note 4, art. 1(4)(a)-(b) (stating further that "(a) the award was duly executed prior to 6 March 2018, even where a related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or (b) the award was set aside or annulled before the date of entry into force of this Agreement").

> Agreement;[15] on other occasions, they seek to get investors inclined to withdraw their claims in return, offering alternative dispute settlement procedures.[16] Notwithstanding what kind of ISDS is to be applied, the central tenet of these provisions is the same, that is, to preclude the existing BITs from producing any other legal effects and terminate the ongoing proceedings as soon as possible.

Against this backdrop, it is worth noting that more recently, *Achmea*'s dicta (whose central tenets were meticulously elaborated in the Termination Agreement) have been further developed. Thus, the position of the EU became even stricter. On October 26, 2021, the Luxembourg Tribunal Grand Chamber once again handled the issue concerning the Intra-EU dimension of the international investment law.[17] This time, the dispute centered around the legality of the *ad hoc* arbitration agreement concluded between Member State and investor containing the arbitration clause, whose content is identical to the one laid down in the expired BIT. This case does not clarify everything, and its potential impact remains to be seen. Nonetheless, as such agreements are concluded to continue the same pending proceedings, but on a different legal basis, such clauses are not compatible with the TFEU.[18]

Another landmark judgment handed down fairly recently in *Komstrory*. This case and the CJEU's settlement should be considered as a new stage of the EU anti-Intra-EU IIAs crusade, as the dispute arose under the European Energy Charter. Even though the factual background did not fall within the

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15. *Cf. id.* art. 7 (imposing the formal duty to inform the arbitrators about the legal consequences of the Achmea judgement as laid down in Article 4 mentioned above).

16. *Cf. id.* art. 9(1)-10 (stipulating that former conditions of extra-arbitration settlement between investors and States Parties to the TA and the TA directs the pending dispute into the channels of the domestic judiciary).

17. The court openly stated:

To allow a Member State, which is a party to a dispute which may concern the application and interpretation of EU law, to submit that dispute to an arbitral body with the same characteristics as the body referred to in an invalid arbitration clause contained in an international agreement such as the one referred to in paragraph 44 above, by concluding an *ad hoc* arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158).

Case C-109/20, Republiken Polen v. P.L. Holdings Sàrl, ECLI:EU:C:2021:875 (Oct. 26, 2021).

18. The CJEU correctly noticed that—having regard that the *Achmea*'s aim was to terminate all legal effects of the existing Intra EU BITs—the acceptance of the *ad hoc* arbitration agreements as a valid ground for their continuation would mean the acceptance of *praeter legem*. (*cf.* point 54 of this judgment). The question whether the case under consideration should be read more generally (that is, as a signal that the CJEU is not ready to tolerate any investment tribunals based on *ad hoc* agreements) seems to be left unanswered. Still, keeping in mind the current trends in the EU policy, the answer in the affirmative appears to be not probable.

scope of the international investment law and there was no connection between the litigants and the EU,[19] the Paris court that was supposed to execute the award took the occasion to ask the CJEU for their preliminary ruling. Although the Justices' answer is not unequivocal, it still contains the strong implication that from the perspective of the EU Treaties, the Arbitration Clause laid down in Article 26 of the Charter is very problematic. To be sure, it is a bit premature to posit that the current ISDS laid down in the EEC is as dead as the case of ISDSs based upon provisions of expired Intra-EU BITs. Nonetheless, it can be taken for granted that the future case law will also address the problem of the compatibility of this article with the EU primary law.[20] Regarding the opinions formulated at the margins of the main proceedings in *Komstroy*, one should not be surprised if the Intra-EU dimension of the ISDS mechanism will be analyzed through the same (or at least very similar) lens as these used in *Achmea* or *Polen Republiek.*[21]

Although on May 5, 2020, twenty-three Member States signed the Termination Agreement, Austria, Finland, Sweden, and Ireland still have not acceded to this instrument. It is also true that, aside from Ireland's specific case,[22] Austria, Sweden, and Finland did not terminate their Intra-EU BITs.[23] Moreover, these agreements still remain in force.[24] The

19. At the heart of Komstroy was the contract to supply energy between Moldova and one Ukrainian company, that allegedly was not fulfilled by the defendant in this case. *See* Case C-741/19, République de Moldavie v. Komstroy L.L.C., ECLI:EU:C:2021:655 (Sep. 2, 2021).

20. As early as 2019, acting under Article 218(11) of TFEU, Belgium requested CJEU opinion in this matter. *See Request for an Opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU* (Opinion C-1/20), Feb. 15, 2021, O.J. (C 53/18). As of now, the question has not been answered yet.

21. République de Moldavie v. Komstroy L.L.C., ECLI:EU:C:2021:655, ¶ 50, 52, 62, 64. Further, the court openly states:

It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves. In light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.

See also Id. ¶ 65.

22. CZECH REPUBLIC—IRELAND BIT (1996), INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1192/czech-republic---ireland-bit-1996- (last visited Nov. 10, 2022).

23. Julian Scheu, *Note on Intra-EU BITs Not Covered by the Termination Agreement,* UNIV. OF COLOGNE INT'L INV. L. CTR. COLOGNE (2020), https://iilcc.uni-koeln.de/sites/iilcc/user_upload/IILCC_Note_on_Intra-EU_BITs_NOT_Covered_by_the_Termination_Agreement_05_2020.pdf.

European Commission is not inclined to tolerate such a dissent, unless there is a lack or partial implementation of the TA by the Member States-Parties to it.[25] Against this backdrop, it is somewhat reasonable to assume that, on the one hand, the mere refusal to sign the Termination Agreement does not protect the Member State from eventual infringement proceedings based upon Article 258 of the TFEU. On the other hand, the European Commission seems to be politically determined to eradicate all Intra-EU BITs' legal effects as soon as possible. Moreover, it does not hesitate to use the instruments it has at its disposal to speed up the day when this process is effectively completed.[26]

PART II

In the eyes of EU institutions, there is no doubt that the key argument against the prolongation of the existing *status quo* has been the threat that the *ad hoc* tribunals constituted the autonomy of the European legal order and its effectiveness in general.[27] The term *autonomy* has never been anchored in the text of the Founding Treaties; the Court of Justice's jurisprudence developed and defended the concept. Perhaps these origins

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24. *International Investment Agreements Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last visited Nov. 10, 2022).

25. As early as on May 14, 2020, EU Commission initiated infringement proceedings against Finland and UK for failing to remove all legal effects of the Intra EU-BITs to which both states are parties. The Commission urges Finland and the United Kingdom to terminate their Bilateral Investment Treaties with other EU Member States. *May Infringements Package: Key Decisions*, EUR. COMM'N. (May 14, 2020), https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_859. On December 2, 2021, through formal letters, the EU Commission officially initiated infringement proceedings. *Commission urges Austria, Sweden, Belgium, Luxemburg, Portugalia Romania and Italy to terminate Bilateral Investment Treaties (BITs) with other EU Member State*s. *December Infringements Package: Key Decisions*, EUR. COMM'N. (Dec. 2, 2021), https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

26. The EU Commission's determination goes so far that when Spain executed the award for the compensation to the Luxemburg-based company in July 2021, Brussels launched a formal investigation against Madrid alleging the breach of TFEU art. 108 (2) prohibiting the state aid. *See* Procedures Relating to the Implementation of the Competition Policy, 2021 O.J. (C 450) 5.

27. *See* Case C-284/16, Slowakische Republik v. Achmea BV, ECLI:EU:C:2017:699, ¶¶ 42, 45, 56 (Sep. 19, 2017); Case C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2017:699, ¶¶ 42, 44, 52, 62 (Sep. 2, 2021). The origins of the concept of autonomy of the European legal order can be found in such milestones of the EU jurisprudence. *See, e.g.*, Case C-26/62, Van Gend en Loos v. Administratie der Belastingen, [1963] E.C.R. 1; Case 6/64, Costa v. ENEL, [1964] E.C.R. 585, 593. Notably in the latter the court famously stated that by contrast with ordinary international treaties, the EEC Treaty has created its own legal system. On the concept of Autonomy of the EU legal order, see RENE BARENTS, THE AUTONOMY OF COMMUNITY LAW 172 (2004); Marcus Klamert, *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope*, EUR. L. REV. 42, 815 (2017).

allow a better understanding of why the CJEU clung to its specific and unique role of the EU law chief interpreter for whom the last word in all disputes on European law is strictly reserved.[28] In this sense, the case law discussed above should be seen as a continuation of the previous trend in the CJEU jurisprudence seeking to protect the Court's competencies (with the approval of the Member States and other EU institutions), which the Court deemed its own. While discussing *Achmea,* the Justices referred back to their previous Opinion 2/13, which effectively buried any hopes for the EU's quick accession to the European Court of Human Rights (ECHR).[29] As it is generally well known, they declared such a step as *liable adversely to affect the specific characteristics of EU law and its autonomy.*[30] They also expressed concern that even a mere hypothesis that another international judiciary organ than the CJEU may decide the division of powers between the EU and its Member States is sufficient ground to block the initiative.[31]

In hindsight, it seems that the CJEU created insurmountable barriers for *ad hoc* tribunals based on Intra-EU BIT arbitration clauses. Since Opinion 2/13 rejected the idea of establishing a stable framework of cooperation with the ECTHR that had all specifics of a permanent international court, it was rather clear that any cooperation with *ad hoc* investment tribunals is out of the question for the same reasons. If the former is stable (and more predictable in its jurisprudence), and the latter are not (and their jurisprudence is less predictable than the case law of a judiciary organ) then, *a fortiori* the CJEU was less inclined to tolerate the existing *status quo.* Moreover, *ad hoc tribunals* could not have been subdued to any form of judicial control performed by the EU judiciary.[32]

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28. Case Opinion 1/91, Opinion Pursuant to Article 228 of the EEC Treaty, 1991 E.C.R. I-6079, ¶ 46, 71.

29. Case C-284/16, Slowakische Republik v. Achmea BV, ECLI:EU:C:2017:699, ¶ 32 (Sep. 19, 2017).

30. Case Opinion 2/13, Opinion Pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454, ¶ 200 (Dec. 18, 2014).

31. The Court provides that:

Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.

Id. ¶ 221.

32. Ad hoc investment arbitration tribunals do not meet the conditions of a court in the meaning of the TFEU Article 267. *Cf.* Case C-407/98, Katarina Abrahamsson, Leif Anderson v. Elisabet Fogelqvist, 2000 E.C.R. I-5562. It is rather indisputable that they may not send any questions to the CJEU for preliminary rulings. For more on the contradiction between TFEU art. 267 and Intra EU BITs, see Case C-284/16, Slowakische Republik v. Achmea BV,

Therefore, the EU institutions logically concluded that the sole solution to bring the ongoing tensions between the Intra-EU BITs as applied by investment arbitration and the EU itself is to terminate these agreements, and this time for good.[33]

A discussion regarding the fundamental issue whether such an attitude of the CJEU defending the autonomy of the EU legal order is doctrinally correct exceeds this note's scope.[34] However, we note that even the radical critics of the Luxemburg Tribunal case law discussed above do not fail to admit that the rationale is comprehensible. The ongoing discussion is not about the principle of the autonomy of the EU legal order, but rather the proportionality. Thus, what is criticized is not the principle but the way the CJEU interprets it, notably that it interprets it at the expense of the EU Member States' rights and obligations flowing out from international law, not European law.[35] Further, we note that, regardless of the merits of these critiques, they were able to influence neither the CJEU case law nor the EU foreign investment policy.

ECLI:EU:C:2017:699, ¶¶ 49, 58-60 (Sep. 19, 2017); Case C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2017:699, ¶ 53 (Sep. 2, 2021).

33. *But see* Dimitry Vladimirovich Kochenov & Nikos Lavranos, Achmea *versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, HAGUE J. ON RULE L. (Mar. 17, 2021) (arguing that it was possible to allow the institution of questions for preliminary rulings in the proceedings performed by the Intra-EU BIT *ad hoc* tribunals).

34. The literature on this topic is already robust. Amidst ongoing discussions about the CJEU's attitude towards IIAs, it seems that all substantial theoretical *pros* and *cons* have been examined. *See, e.g.*, Cristina Contartese, *The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again*, 54 COMMON MKT. L. REV. 1627 (2017); Marja-Liisa Öberg, *Autonomy of the EU Legal Order: A Concept in Need of Revision?* 26 EUR. PUB. L. 705 (2020) (arguing that "[c]losely connected to the expansion of the EU's normative influence globally and in its neighbourhood is the necessity to set up effective institutional and procedural frameworks, including judicial protection mechanisms. The keen protection of the autonomy of the EU legal order in such instances conflicts sharply with the Union's interests and foreign policy strategies and may well warrant a review of the current paradigm of the autonomy of the EU legal order."); JED ODERMATT, INTERNATIONAL LAW AND THE EUROPEAN UNION 176 (2016). *See* Daniel Halberstam, "*It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, *in* MICH. L., PUB. L. & LEGAL THEORY RES. PAPER SERIES (2015), for defense of the CJEU's stance.

35. *See, e.g.*, Kochenov & Lavranos, *supra* note 33, at 5 ("while it may be understandable from the point of view of the Court to protect its turf and its authority as being the highest judge as far as the interpretation and application if EU law is concerned, this attitude at the same time undermines the coherence of international law"); Öberg, *supra* note 34, at 737 (noting that, "[t]he CJEU's restrictive stance is well justified in the light of its role in the EU legal order as an authoritative interpreter and engine for the development of legal doctrines, despite occasional challenges from the Member States…. A more lenient approach to autonomy would enable the Union to more efficiently build partnerships, set up international organizations and bodies as well as to participate in their activities").

On the contrary, during the last eighteen months, we witnessed unprecedented but very coherent actions orchestrated by the CJEU and other institutions that target the very existence of Intra-EU BITs and pose a genuine threat to the ISDS under ECT. After *Komstroy*, it seems that any hope that the case law discussed in this article will become more inclined to seriously take these criticisms into consideration are erroneous. As the CJEU turned its deaf ear to those who demanded a more flexible stance on the autonomy principle, we need to accept this position and look at what could (and should) be done within the legal framework imposed on investors by the EU.

PART III

At first glance, although the existing Intra-EU BITs are about to expire (or have already expired), they may still produce legal effects. The purpose of Article 2(2) and 3 of the TA is to extinguish any effects of the sunset clauses. Some scholars and practitioners opine that both provisions, once in force, will produce the retroactive effect and should be ignored.[36] This proposition (if accepted by the *ad hoc* tribunals) can result in situations where the arbitrators will settle a dispute submitted to them according to the previous BIT provisions. According to the same line of reasoning, the awards would contradict the TA and thus would be non-enforceable within the EU Member States jurisdictions; nonetheless, the investors are not foreclosed from seeking their enforcement in some third countries (including the UK).[37] Therefore, if one assumes these claims are theoretically correct, the EU anti-EU BIT policy can produce only limited effects. For once, it is probable that *ad hoc* investment tribunals, while settling the disputes in the ongoing proceedings arising from the Intra-EU BITs, will partially gloss over the TA provisions. Secondly, while the EU can effectively prevent its Member States' domestic courts from executing these awards, it is powerless against the decisions of the US, UK, or Australian judiciary organs. Nonetheless, this vision of the future

36. Kochenov & Lavranos, *supra* note 33, at 9.

37. *Id*. at 18. *See,accord, e.g.*, Debin Bray & Surya Kapoor, *Agreement on the Termination of Intra-EU BITs: Sunset in Stone?* KLUWER ARBITRATION BLOG (Nov. 4, 2020), http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/; Laura Halonen, *Termination of Intra-EU BITs: Commission and Most Member States Testing the Principle of Good Faith under International Law*, KLUWER ARBITRATION BLOG (May 13, 2020), http://arbitrationblog.kluwerarbitration.com/2020/05/13/termination-of-intra-eu-bits-commission-and-most-member-states-testing-the-principle-of-good-faith-under-international-law/.

relationships between the EU and the Arbitration world has at least two drawbacks: one theoretical and one practical.

The commentators fingering the contradiction between the TA and CJEU case law on one side and international law on the other usually base their arguments on the provision VCLTs.[38] They emphasize Article 26 (good faith), Article 28 (prohibition of retroactivity), and Article 70, which is usually quoted as allegedly stating that "the termination of a treaty under its provisions or in accordance with the present Convention…does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." But this reading of the VCLTs is not free of controversy. One should not forget that the 1969 Vienna Convention concerns the treaties, which are legally binding documents creating rights and duties for sovereign subjects of international law. Therefore, Article 26 and 28 should be understood as legal bases creating some rights and obligations for states rather than individuals. Secondly, Article 70 (1) begins with the following words, "unless the treaty otherwise provides or the parties otherwise agree." It follows that the VCLT indeed creates a presumption that rights and duties acquired in the wake of the execution of provisions in an agreement are not affected. Still, this presumption can be rebutted through another agreement,[39] and this is what the EU Member States did. They concluded that the TA effectively terminated Intra-EU BITs, sunset clauses included. Thus, without denying that retroactivity is, as a matter of principle, forbidden under international law, it is nonetheless clear that the VCLT provisions provided some exceptions. Therefore, setting aside the issue, what actually will be the reaction of *ad hoc* arbitration tribunals confronted with art. 2(2) and 3 of the TA,[40] with this interpretation suggesting that ignoring these provisions is not based on solid theoretical ground.

Moreover, the scenario where *ad hoc* tribunal awards are enforceable everywhere but in the EU is not optimal for the EU or its investors and Member States. This situation unnecessarily elongates the conflict with EU institutions without bringing any profits to any stakeholders. If the ultimate

38. *Cf*. Kochenov & Lavranos, *supra* note 33, at 13.

39. *See* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 871 (2009).

40. As it is generally acknowledged, in *Magyar Farming Company*, the arbitrators rejected Hungary's argument that in the wake of the *Achmea* judgment, the jurisdiction of the investment tribunal may be determined exclusively by the European, not international, law. Case Magyar Farming Company Ltd., Kintyre Kft, and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27, Award, ¶ 207, 210 (Nov. 13, 2019). At this moment, there are no reliable information on how these tribunals interpret the Termination Agreement; therefore, we must still wait for the jurisprudence to come.

goal of this *business-as-usual* scenario were some concessions from the CJEU or the EC, perhaps the tactics based upon disregarding what the EU does would be recommendable. However, such a tactic cannot make EU institutions' stance on the Intra-EU BITs more flexible, let alone influence their attitude more substantially. The strategy based on the TA's ignorance will probably cost more and be more counterproductive in the long term.

For now, the problem is that the EU appears to be sincerely convinced that the denial of arbitration is not particularly harmful to its investors. This conviction seems to hinge upon two premises. First, all standards provided for in BITs are reflected in EU law. Second, domestic courts can enforce them without any particular problems because of their sufficient European anchorage. Against this conviction, it must be admitted that the EU's current path seems risky and unpromising. As Kochenov and Lavranos diligently demonstrated, these prerequisites are problematic or even flawed theoretically and practically. In particular, we subscribe to their view that Intra-EU BITs contain specific clauses (e.g., MFN or expropriation clauses) that are not directly mirrored within EU law.[41] It is also true that the CJEU's conviction that Member States domestic courts are still ready to act upon following the mutual trust principle to the extent necessary to enforce investors' rights efficiently does not find sufficient support in empirical data.[42] It is allowed to think the ongoing anti-Intra-EU policy partially echoes the arguments that test conventional wisdom by suggesting a strong link between the development of democratic standards and BITs.[43] The Court is nonetheless naïve to believe that the mere extinction of *ad hoc* tribunals will automatically make business circles ready or more inclined to

41. Kochenov & Lavranos, *supra* note 33, at 10, 18.

42. Kochenov and Lavranos emphasize that the court fails to mention that in the context of the deterioration of the independence of the judiciary and the quality of the rule of law in a number of EU Member States, the Union does not boast too many ways to actually ensure the substantive good functioning of the judiciaries and state machineries in question. *See id.* at 18; *see also id.* at 10, 15-16. In their opinion, previous experiences suggest that the EC Commission is not hurried to use the measures which are at its disposal to enforce investor rights, when Member States domestic organs failed to execute them. *Id.* at 15. Still, there are some other fundamental issues that make the CJEU attitude problematic. Notably, we are not persuaded that under current circumstances, domestic judiciaries in Europe are sufficiently prepared to settle technically complex disputes between the foreign investors and host states. This issue should have been much better examined before the EU embarked upon the eradication policy targeting existing Intra-EU BITs.

43. *Cf.* Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy*, 31 EUR. J. INT'L. L. 289, 312 (2020).

settle their disputes in standard channels of domestic judiciaries.[44] Keeping all these circumstances in mind, we must consider feasible alternatives to the current *status quo*.

PART IV

A close look at the European Commission documents concerning the current and future status of the Intra-EU foreign investment reveals they are not entirely coherent. On the one hand, Brussels declares that EU law offers appropriate substantial and procedural guaranties to EU investors. On the other hand, it admits openly that some modifications advantageous to EU investors could be necessary or recommendable.[45] Despite some pessimistic voices, it seems that room for negotiations on the future model of Intra-EU investment protection still exists.

To be sure: this room is determined by EU legislation and the CJEU's case law. Therefore, some innovations discussed previously are simply out of the question.[46] Furthermore, although the mechanisms under discussion are numerous,[47] the institution that the EU dramatically lacks in the face of expiring Intra-EU BITs is a dispute settlement body or another ISDS system viable for all stakeholders. Against this backdrop, we take note of Opinion 1/17,[48] where the CJEU accepted—as a matter of principle—the ISDS system supervised by the First Instance Tribunal and Appeal Tribunal established by CETA. It is not easy to see why this system could not be a reference point for a future Intra-EU ISDS. After all, if the Court, which was previously so keen not to jeopardize the autonomy of the EU legal order, conceded slightly on this point in relations with a non-Member State, why could it not accept the same logic regarding the EU investors?

We cannot see any valid grounds for such a differentiation. Moreover, we believe that at least two causes strongly advocate for the concept of a

44. The reasons why it would be naïve are exactly the same reasons mentioned in Mark E. Villiger's Commentary on the 1969 Vienna Convention on the Law of Treaties. *See* VILLIGER, *supra* note 39.

45. *Cf*. Inception Impact Assessment on Investment protection and facilitation framework (EC) No. 2716046 of 26 May 2020, at 3-4.

46. This remark concerns these mechanisms, which could have been engrafted upon the existing structure of the Intra-EU BITs., notably preliminary questions. As these agreements expired (or are about to expire), it is highly unlikely that the Luxemburg Tribunal will answer a question submitted by a body whose legal bases are, in its own opinion, non-existing. Therefore, any continuation of debate on the acceptability of *ad hoc* tribunals' questions for preliminary ruling addressed to the CJEU is pointless.

47. Kochenov & Lavranos, *supra* note 33, at 15.

48. Case Opinion 1/17, Opinion Pursuant to Article 218(11) TFEU, ECLI:EU:C:2019:341 (Apr. 30, 2019).

European Investment Court (EIC). First, the immediate effect of Intra-EU BIT expiration is the reverse discrimination of the EU investors against their competitors registered in non-Member States. Even though reverse discrimination is hardly ever a breach of international law, it is detrimental to EU investors. It should not be tolerated in the medium, let alone long-term. Ironically, the fact remains that under the current status quo, a U.S. investor who invested in one of the Central or East EU Member States may claim damages before *ad hoc* investment tribunals, while the investor from Germany or France may not.

Second, it is not a secret that, as of now, none of the FTA Agreements between the EU and non-Member States is fully operational (at least not in regard to their ISDS systems). It could be interesting to set up within the EU an institution that could serve as a model demonstration to all potential stakeholders. Further, such a European Investment Court could gather experiences or lessons before the EU embarks upon more advanced ISDS projects (such as the Multilateral Investment Court).

Keeping in mind that this presumed European Investment Court would be an institution linked with the rest of the EU institutional regime, it seems rather evident that, once it is established and set in motion, it could send questions mentioned in Article 267 of TFEU, although its relation with the CJEU should be further explored. Nonetheless, investors probably won't accept such subordination if they are not assured that the future EIC is genuinely able to settle their disputes according to most of the standards they are familiar with, specifically, those developed by the *ad hoc* investment tribunals. Still, the question of how to strike the proper balance between the conflicting interests of investors and EU Member States (potential respondents) is a question that falls out of the scope of the present analysis.

CONCLUSIONS

Even though some *ad hoc* tribunals are still working to settle the pending disputes as quickly as possible, the previous system based on the Intra-EU BITs is on the verge of total collapse. Undoubtedly, the direct cause of this dramatic change was the dogmatic EU policy that, by pushing forward the principle of autonomy of the European legal order, made the Intra-EU BITs extinct just within three years. Although some arbitrators may ignore the developments discussed above, it does not seem to be a valid and attractive option in the longer term. Therefore, the concept of an EIC is the most viable one in current circumstances because it appears to be the sole concept upon which all stakeholders eventually could find a compromise.

While we support the EIC, we are aware that the concept also brings some inconveniences to investors. Some of them have already been discussed in the literature on Tribunals to be established under the FTA, concluded by the EU with some third states.[49] The same problems will likely arise when the EU tries to implement the EIC concept into practice. Under current circumstances, however, no other alternative seems to be on the negotiating table. Understandably, the EU policy is shocking to some commentators and practitioners. The possibility of appointing its arbitrator has never been attractive to many investors. However, for the reasons discussed in this article, we cannot guarantee that the EU policy will shift back. The world of *ad hoc* tribunals established upon classic BITs becomes European history. Therefore, we are looking ahead and advocating for a solution that will not please stakeholders entirely, but should be palatable enough for the majority to accept.

49. Jin Woo Kim & Lucy M. Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges* 16 GLOB. TRADE & CUST. J. 181, 182 (2021) (mentioning the problems of relation between these treaties and the 1965 Washington Convention further drawing the attention to another problem, "a potential for increases in the cost and/or duration of proceedings arising out of the appeal mechanism. Stakeholders have also raised concerns around the caliber and practical experience of potential arbitrators willing to be appointed to the ICS").