The Impact of the Achmea Ruling on Intra-EU BIT Investment Arbitration

A Hungarian Perspective

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Abstract

The Achmea judgment of the CJEU brought the worlds of EU law and investment arbitration on a collision course. The judgment sent shockwaves through the EU investment arbitration community, which feared that Achmea would be the death knell of intra-EU BIT arbitration. In the years since Achmea, however, arbitral tribunals, ad hoc committees and national courts have found ways around Achmea, effectively eliminating its practical impact on intra-EU investment disputes. On 5 May 2020, the majority of EU Member States adopted a multilateral agreement that seeks to terminate intra-EU BITs and provides for a transitional regime for pending arbitrations in order to give effect to Achmea. This agreement, once ratified, will mark the end of intra-EU BIT arbitration in the future, although its impact on pending proceedings remains unclear. With its 22 intra-EU BITs and several arbitration proceedings pending under these treaties, Hungary has relied heavily (albeit unsuccessfully thus far) on Achmea in recent years as part of its defense strategy. The final termination of intra-EU BITs will be a win for Hungary in the short term, as no new investment arbitrations can be pursued by EU investors against Hungary. In the long term, however, the termination of intra-EU BITs will leave Hungarian companies who invest in the EU without sound legal protection and may even adversely impact Hungary's standing as an attractive place for EU investment.

Keywords: Achmea, Intra-EU BIT, investment arbitration, investment protection, Hungary.

1. Introduction

In the now infamous judgment of 6 March 2018 in *Achmea*, the CJEU was finally given the opportunity to rule on the compatibility with EU law of the dispute resolution mechanisms contained in bilateral investment protection treaties (BITs) concluded between Member States of the EU (intra-EU BIT). In the past decade, the almost 200 intra-EU BITs have given rise to close to 100 arbitration

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proceedings against the 'new' EU Member States of Central and Eastern Europe,[1] and the question of the treaties' compatibility with the EU treaties has sparked heated debate both in the international arbitration community and among EU lawyers. Arbitral tribunals sitting under intra-EU BITs have reached settled case-law according to which intra-EU BITs and EU law are complementary rather than incompatible and have gone on to conclude that EU law therefore does not affect the validity or applicability of these treaties and their dispute resolution mechanisms.

Responding to the questions of the referring German Federal Court of Justice (*Bundesgerichtshof*), however, the CJEU arrived at the opposite conclusion. It found that intra-EU BITs undermine the autonomy of EU law by establishing an alternative dispute resolution mechanism that does not guarantee that disputes involving the application or interpretation of EU law will be submitted to the CJEU. It therefore concluded that EU law precludes the application of investor-State arbitration provisions contained in intra-EU BITs.

The *Achmea* case set two previously separate worlds on a collision course: international investment law and arbitration on the one hand, and EU law on the other. It sent shockwaves through the European investment arbitration community, which perceived *Achmea* as a 'death sentence' for intra-EU investment treaty arbitration.[2] In several ongoing intra-EU BIT proceedings, the respondent Member States relied on the *Achmea* judgment in their attempts to obtain a dismissal of the claims. With its 22 intra-EU BITs[3] and four pending intra-EU BIT proceedings at the time of the CJEU's *Achmea* judgment (with an aggregate value of several hundred million euros), Hungary was naturally heavily impacted by the Court's ruling.[4] In response to *Achmea*, Hungary decided to fundamentally alter its defense strategy and to move away from its traditional

1 UNCTAD, IIA Issues Note, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, December 2018. *See also* The ICSID Caseload – Statistics. Special Focus – European Union, April 2017.

2 *See e.g.* Nikos Lavranos, 'Black Tuesday: The End of Intra-EU BITs', *Practical Law Arbitration Blog,* 7 March 2018; Von Daniel Thym, 'The CJEU Ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals', *EU Law Analysis,* 9 March 2018; Burkhard Hess, 'The Fate of Investment Dispute Resolution After the Achmea Decision of the European Court of Justice', *Max Planck Institute Luxembourg for Procedural Law Research Paper Series,* 2018/3, 2 April 2018, p. 7.

3 Today, Hungary has intra-EU BITs with Germany, Belgium and Luxembourg, France, the UK, Sweden, the Netherlands, Denmark, Austria, Finland, Cyprus, Greece, Spain, Portugal, Poland, the Czech Republic, Slovakia, Romania, Bulgaria, Croatia, Slovenia, Lithuania, and Latvia; *see* UNCTAD Investment Policy Hub, International Investment Agreements Navigator, at https://investmentpolicy.unctad.org/international-investment-agreements/countries/94/hungary?type=bits. Hungary had also concluded a BIT with Italy that has since been terminated.

4 Of the 16 investment arbitration proceedings that have been brought against Hungary to date, 9 were brought under intra-EU BITs.

doi: 10.5553/HYIEL/266627012020008001004

position of not objecting – unlike other Central and Eastern European states[5] – to the tribunals' jurisdiction on the basis of the applicable treaty's incompatibility with EU law.[6] Stepping up its efforts to finally put an end to intra-EU BIT arbitration, the European Commission has filed requests for leave to intervene as *amicus curiae* in pending intra-EU BIT proceedings, including Hungary's pending proceedings, in which it had previously taken little interest. In addition, Hungary applied for both the revision and the annulment of unfavorable intra-EU BIT awards by reference to *Achmea*.

Despite the arbitration community's initial fears and the respondent Member States' every effort to use *Achmea* to their advantage with the active assistance of the Commission, the impact of the CJEU's judgment on intra-EU BIT arbitration has been far more limited than anticipated. Hungary's failed attempts to resist arbitration and obtain the annulment of unfavorable awards by reference to *Achmea* illustrates this clearly. In fact, *Achmea*'s impact seems to have been so limited that EU investors felt encouraged to continue to rely on intra-EU BITs to bring new claims against Central and Eastern European states even in the aftermath of *Achmea*.[7] The battle over the applicability of intra-EU BITs has therefore moved on to two new fronts – namely the enforcement of intra-EU BIT awards and the termination of intra-EU BITs, where *Achmea* finally seems to have some bite.

This paper aims to give a brief overview of *Achmea*'s impact on investment arbitration pursuant to intra-EU BITs in the EU, with emphasis on arbitrations involving Hungary. To do so, it will first trace the origin of intra-EU BITs and the roots of the concern regarding their compatibility with EU law (Section 2) and will then present the factual background of, and the findings made in, the CJEU's *Achmea* judgment (Section 3). Next, it will consider *Achmea*'s relatively limited

5 Other Central and Eastern European states pursued a fundamentally different strategy, systematically raising the EU law objection to the jurisdiction of intra-EU BIT tribunals; *see e.g. Eastern Sugar BV v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 *(Eastern Sugar)*, paras. 95-110; *WNC Factoring Ltd v. The Czech Republic,* PCA Case No. 2014-34, Award, 22 February 2017 *(WNC Factoring)*, paras. 66-68; *PL Holdings S.à.r.l. v. Poland,* SCC Case No. V 2014/163, Partial Award, 28 June 2017, paras. 301-304; *European American Investment Bank AG v. Slovak Republic,* PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 *(EURAM)*, paras. 55-90.

6 In the intra-EU BIT proceedings conducted against Hungary, Hungary had not raised the EU law objection to jurisdiction prior to *Achmea*; *see e.g. Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, conducted under the Cyprus-Hungary BIT; and *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi Kft. v. Hungary*, ICSID Case No. ARB/12/2, conducted under the Netherlands-Hungary BIT. In the intra-EU Energy Charter Treaty arbitrations conducted against Hungary prior to *Achmea*, not only did Hungary not raise an EU law objection to jurisdiction, but when the Commission intervened in the proceedings as *amicus curiae* to argue the tribunal's lack of jurisdiction based on EU law, Hungary failed to endorse the Commission's arguments and specifically distanced itself from its EU law objection to jurisdiction; *see e.g. Electrabel v. Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 4.54, 5.26-5.30.

7 *See e.g. Société Générale S.A. v. Republic of Croatia*, ICSID Case No. ARB/19/33; *Marko Mihaljevic v. Republic of Croatia*, ICSID Case No. ARB/19/35; *Adria Group B.V. and Adria Group Holding B.V. v. Republic of Croatia,* ICSID Case No. ARB/20/6.

impact on intra-EU BIT proceedings thus far, in particular on the recent arbitrations conducted against Hungary (Section 4). It will then consider the ultimate fate of intra-EU BITs, which are set to be terminated by the Member States in the very near future in order to eliminate the incompatibility with EU law identified by the CJEU in its *Achmea* judgment (Section 5). The paper will conclude with an outlook on the future (Section 6).

2. The Origin of Intra-EU BITs and Concerns Regarding Their Compatibility With EU Law

The origin of the phenomenon of intra-EU BITs dates back to the 1990s.[8] At the time, the then European Community urged the newly independent Central and Eastern European states to create a favorable investment climate and to enter into BITs with Member States to encourage European investment flows into their economies. Attracting foreign investment was seen as essential to the economic and industrial reconstruction of the Central and Eastern European states in the aftermath of Communism and as helping their transition from a planned to a market economy to prepare for being considered for EU accession at an undetermined time in the future.

As a first step towards accession, almost identically worded association agreements (the so-called 'Europe Agreements') were signed with the Central and Eastern European states in the early 1990s. These set out a framework for political dialogue and promoted the expansion of trade and economic relations. Article 72 of the Europe Agreement signed with Hungary, for example, recommended the "conclusion, where appropriate of agreements between Member States and Hungary on investment promotion and protection, including the transfer of benefits and the repatriation of capital."[9]

Consequently, a large number of BITs were signed between the Member States and the Central and Eastern European candidate states in the 1990s and the early 2000s. By mid-1990, Hungary had BITs in place with all Member States (except Ireland) and subsequently went on to conclude BITs with all Central and

8 At the time, the six founding states of the EU had not concluded a BIT among themselves. Germany had concluded agreements with other European States that had yet to join the EU; *see* the Germany-Greece BIT (1961) and the Germany-Portugal BIT (1980).

9 Article 72(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part. *See also* Article 73 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part; Article 74 of the Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part. The Europe Agreement signed with Croatia in 2005 also encouraged the conclusion of BITs between Croatia and the Member States of the EU; *see* Article 85 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part. Croatia joined the EU on 1 July 2013.

doi: 10.5553/HYIEL/266627012020008001004

Eastern European states.[10] Bearing witness to the successful reconstruction of their economies, the Central and Eastern European states qualified for accession and joined the EU in three successive waves in 2004, 2007 and 2013, resulting in close to 200 BITs becoming 'intra-EU BITs'.[11]

Although the Commission conducted an EU law compatibility review of Central and Eastern European states' BITs with third states upon their EU accession, it failed to review BITs signed with the Member States.[12] It did not suggest that these BITs would have to be amended or terminated as a condition of EU accession,[13] and the BITs themselves did not provide that the agreements would be affected by EU accession in any way. They therefore remained fully in force following enlargement and were increasingly relied on by EU investors in bringing compensation claims against Central and Eastern European states for many hundreds of millions of euros.

The rising number of intra-EU arbitration proceedings drew increasing criticism from respondent states and civil society, who viewed these treaties as undermining the principle of mutual trust and favoring the interests of businesses at the expense of democracy and the regulatory independence of States.[14]

The Commission also took a very critical position against intra-EU BIT arbitration, which it considered to be an outright "anomaly within the Internal Market".[15] The Commission was concerned that EU rules may be circumvented as a result of the implementation of arbitral awards rendered on the basis of intra-EU BITs and that intra-EU BIT arbitration would thus undermine the application of EU law within the EU.[16] In addition, according to the Commission, intra-EU

10 For a more detailed analysis of Hungary's BIT program, *see* János Katona, *Bilateral Investment Treaty Overview – Hungary, Investment Claims,* Oxford University Press, Oxford, 2015; Veronika Korom, 'Hungary', *in* Csongor István Nagy (ed.), *Investment Arbitration in Central and Eastern Europe – Law and Practice,* Edward Elgar, Cheltenham, 2019, pp. 156-174.

11 The network of BITs between Member States and candidate countries for membership is not complete; of the 351 possible treaties between the 28 (currently: 27) Member States, only around 200 treaties have been concluded. Interestingly, starting in the second half of the 1990s, candidate countries also concluded BITs with each other.

12 *See Eastern Sugar,* para. 119: Commission Letter of 13 January 2006. *See also* Annual EFC Report to the Commission and Council on the Movement of Capital and the Freedom of Payments, 4 January 2007, p. 7.

13 *See e.g.* Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 4 January 2007; Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 8 January 2008.

14 Cecilia Olivet, 'A Test for European Solidarity – The Case of Intra-EU Bilateral Investment Treaties', *Transnational Institute*, January 2013.

15 European Commission observations of 7 July 2010, quoted in *Eureko B.V. v. The Slovak Republic,* PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 *(Eureko jurisdiction)*, para. 177.

16 The Commission was mainly concerned about the circumvention of EU State aid rules on the basis of intra-EU BITs. *See* Press Release, *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties,* 18 June 2015; European Commission, *Inception Impact Assessment on the Prevention and Amicable Resolution of Investment Disputes Within the Single Market,* FISMA B1, 25 July 2017.

BITs violated the prohibition against discrimination on grounds of nationality and the exclusive competence of the CJEU to interpret EU law.[17]

The Commission therefore tried to discourage and ultimately suppress recourse to investor–State arbitration in intra-EU disputes by resorting to different means. *(i)* First, it exerted political pressure on the Member States to terminate their intra-EU BITs. While some Member States voluntarily complied,[18] the majority wished to maintain the existing intra-EU BITs.[19] In response, the Commission commenced infringement proceedings against five Member States whose intra-EU BITs had given rise to some of the most prominent investor–State disputes and who had failed to voluntarily terminate the treaties.[20] *(ii)* Second, it pursued a campaign of *amicus curiae* interventions in a large number of intra-EU BIT arbitrations to denounce the validity of the treaties and, consequently, the jurisdiction of the tribunal.[21] Despite the Commission's efforts, however, intra-EU BIT tribunals consistently rejected the Commission's arguments and confirmed their jurisdiction. *(iii)* Third, faced with the Member States' opposition to intra-EU BIT termination, and with the tribunals' dismissal of its arguments on their lack of jurisdiction, the Commission turned against EU investors, seeking to discourage them from bringing claims by rendering the enforcement of the awards impossible. In *US Steel v. Slovakia*, for example, the Commission's threat to use all available legal avenues to contest the investor's efforts to collect on a favorable award resulted in the investor's deciding to drop

17 *Eastern Sugar,* para. 126; *Eureko jurisdiction,* paras. 183-185.

18 The Czech Republic, one of the Central and Eastern European states that faced the largest number of investment claims brought by investors from EU Member States, initiated the termination of its 23 intra-EU BITs in 2008; *see* UNCTAD, 'Recent developments in International Investment Agreements (2008-June 2009)', *IIA Monitor,* No. 3, 2009, International Investment Agreements, p. 5. In 2012, Ireland ended all of its intra-EU BITs, followed by Italy in 2013. In 2016, Denmark initiated the termination of intra-EU BITs. In 2017, Romania formally terminated all of its intra-EU BITs, and in 2018, Poland announced the termination of its intra-EU BITs.

19 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 8 January 2008, para. 17. *See also* Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 14 December 2010, para. 23.

20 Press release, *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties,* 18 June 2015.

21 While in the early cases the Commission had accepted that intra-EU BITs remained valid and would not have to be terminated by its signatories in accordance with the provisions of the treaties, it subsequently argued for the automatic supremacy of EU law, meaning that potentially conflicting provisions in BITs cease to be applicable even if the BITs have not been terminated by the signatories; *see Eastern Sugar,* para. 119; *Eureko jurisdiction,* para. 187. Similarly, in its *amicus* intervention in the *Micula* arbitration, the Commission accepted that the Sweden-Romania BIT was valid and fully in force. A few years later in the *Micula* annulment proceeding, however, the Commission argued that the Sweden-Romania BIT had been automatically superseded and terminated by operation of EU law and that the tribunal therefore lacked jurisdiction to hear the parties' dispute; *Ioan Micula et al. v. Romania,* ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, paras. 330-335.

doi: 10.5553/HYIEL/266627012020008001004

its claim under the Netherlands-Slovakia BIT.[22] In the *Micula* case conducted pursuant to the Sweden-Romania BIT, the Commission in fact delivered on its threat to block the claimants' efforts to collect under their award. In May 2014, it issued an injunction decision prohibiting Romania from executing or implementing the award,[23] and in a final decision in March 2015 it found that the award constituted illegal aid and was thus unenforceable.[24] It intervened in the enforcement proceedings commenced by the claimants in Romania, UK, Belgium, Sweden, Luxembourg and the US in order to block the enforcement of the award. Since *Micula*, the Commission has tried to block the enforcement of a number of other awards to discourage EU investors from relying on the intra-EU BITs to initiate arbitration proceedings when redress is required.

The real blow to intra-EU BIT arbitration came from the CJEU, however, *via* a request for a preliminary ruling issued by the *Bundesgerichtshof*, in *Achmea*.

3. The CJEU's Achmea Judgment

In this section, the factual and procedural background of the case is briefly presented (Section 3.1.). The findings of the CJEU are then discussed (Section 3.2.) and briefly assessed (Section 3.3.).

3.1. The Factual and Procedural Background of Achmea

Slovakia reformed its health system in 2004, opening the market to private health insurance providers. In 2006, Achmea, a Dutch health insurance provider, set up a wholly owned subsidiary in Slovakia to offer private health insurance services.[25] The liberalization of the health insurance market was then partially reversed by a new government, which imposed various adverse measures and

22 *See* Luke Eric Peterson, 'Investigation: Intervention by EU Commission – and Expression of Doubts on Enforceability – Preceded Investor's Decision to Drop Intra-EU BIT Claim', *IAReporter,* 21 October 2014.

23 Commission Decision C(2014) 3192 of 26 May 2014. The Miculas commenced an action for the annulment of the Commission injunction decision in the General Court of the EU (GCEU) on 2 September 2014, which was subsequently withdrawn; *see Case T-646/14 Micula and others v. Commission*, ECLI:EU:T:2016:135.

24 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula *v.* Romania of 11 December 2013. The Miculas commenced three separate actions for annulment against the Commission Final Decision in the GCEU in the second half of 2015, which were subsequently joined together; *see Joined Cases T-624/15, T-694/15, T-704/15, Micula and others v. Commission*, ECLI:EU:T:2019:423. The GCEU sitting in extended composition rendered its judgment in the joined cases on 18 June 2019, agreeing with the Miculas that the Commission lacked competence to issue the Decision and annulling it. Further to the Commission's appeal against the GCEU judgment, the matter is now pending before the CJEU; *see Case C-638/19 P – Commission v. European Food and others*.

25 *Eureko jurisdiction,* paras. 51-53.

restrictions on private insurers, including a ban on distributing profits, which negatively impacted Achmea's operations on the Slovak market.[26]

To challenge Slovakia's measures, Achmea filed a complaint with the Commission in 2008, which led to the opening of an infringement procedure against Slovakia.[27] Achmea also initiated arbitration proceedings against Slovakia before an arbitral tribunal seated in Frankfurt, Germany, to seek compensation for damages suffered as a result of Slovakia's violation of the Netherlands-Slovakia BIT.

In the arbitration, Slovakia challenged the tribunal's jurisdiction on the basis of international law, EU law and German law and argued that Slovakia's accession to the EU had terminated the Netherlands-Slovakia BIT or in any event rendered its arbitration clause inapplicable.[28] The Commission, intervening in the arbitration as *amicus curiae*, supported Slovakia on the inapplicability of the Netherlands-Slovakia BIT due to its incompatibility with EU law.[29]

In the award on jurisdiction, arbitrability and suspension issued in 2010, the tribunal rejected the challenges to its jurisdiction.[30] In the final award issued in 2012, it ordered Slovakia to pay Achmea 22 million EUR in compensation for the damages suffered as a result of Slovakia's violation of the BIT.[31] Slovakia challenged both awards before the German courts on the grounds that the arbitration clause of the Netherlands-Slovakia BIT was incompatible with EU law and the tribunal therefore lacked jurisdiction.[32] Hearing Slovakia's set-aside request, the *Bundesgerichtshof* eventually agreed to refer three preliminary questions to the CJEU on the compatibility of the arbitration clauses contained in intra-EU BITs with Articles 18, 267 and 344 TFEU.[33]

26 Slovakia's measures gave rise to two further intra-EU BIT claims, but both were dismissed on jurisdiction: *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, and *EURAM*.

27 *Eureko jurisdiction,* para. 55. *See* Infringement No. 2008/4268, in which the Commission sent Slovakia a letter of formal notice observing that the prohibition against health insurance companies' freely disposing of their profits constituted an unjustified restriction on the freedom of capital movements guaranteed by TFEU. On 26 January 2011, the Slovak Constitutional Court declared the ban on profit distribution incompatible with the Slovak Constitution. Slovakia subsequently amended its domestic legislation to allow health insurers to distribute profits. As a result of these legislative changes, the infringement procedure concerning the restriction on the disbursement of profit was closed by the Commission in December 2011.

28 *Eureko jurisdiction,* paras. 9, 57-77, 86-96, 109-119, 127-128, 132-138, 143-145.

29 Id. paras. 175-196.

30 Id. paras. 231-267, 268-277, 278-283, 284-285, 286-290, 291, 293.

31 *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award, 7 December 2012, para. 352.

32 OLG Frankfurt am Main, Case No. 26 SchH 11/10, Judgment dated 10 May 2012; BGH, Case No. III ZB 37/12, Judgment dated 19 September 2013; OLG Frankfurt am Main, Case No. 26 Sch 3/13, Judgment dated 18 December 2014.

33 BGH, Case No. SchiedsVZ 2016/328, Decision dated 3 March 2016.

doi: 10.5553/HYIEL/266627012020008001004

3.2. The CJEU's Findings in Achmea

On 6 March 2018, the CJEU, sitting in Grand Chamber formation, rendered its judgment in *Achmea*.[34] It departed from the conclusions of Advocate General Wathelet, who had recommended that the CJEU answer the *Bundesgerichtshof's* questions by confirming that EU law does not conflict with the investor-state dispute settlement mechanisms contained in intra-EU BITs.[35] Instead, the CJEU reached the opposite conclusion, namely that investor-State arbitration provisions contained in intra-EU BITs, which provide for the resolution of investment disputes between an EU investor and an EU Member State by way of international arbitration, are precluded by EU law.[36]

The reasoning adopted by the CJEU was based on the principle of the autonomy of the EU legal system and on the system of judicial protection instituted by Article 19 TEU and Articles 267 and 344 TFEU to preserve this autonomy by ensuring consistency and unity in the interpretation of EU law. The CJEU applied a three-step analysis to ascertain whether the investor-State dispute settlement mechanisms contained in international treaties concluded between Member States were compatible with EU law. *(i)* First, the CJEU reiterated the dual nature of EU law, which forms part of international law and the national law of the Member States, and found that a tribunal constituted pursuant to the arbitration clause of an intra-EU BIT may be called upon to interpret or apply EU law (whether as international law or national law) to rule on possible violations of the BIT.[37] *(ii)* Second, it found that an intra-EU BIT tribunal could not be regarded as a "court or tribunal of a Member State" within the meaning of Article 267 TFEU and that it was therefore not entitled to make a reference to the Court for a preliminary ruling to ensure the full effectiveness of EU law.[38] *(iii)* Third, the CJEU noted that the resulting intra-EU BIT award was subject to limited judicial review by the competent national courts, which was insufficient to ensure that questions of EU law which the tribunal had to address could be submitted to the Court by means of a preliminary ruling. In this regard, the CJEU distinguished between investment arbitration, which is derived from a treaty in which the Member States agree to remove disputes concerning the application or interpretation of EU law from the jurisdiction of their own courts, and commercial arbitration, which originates in the freely expressed wishes of the parties. It found that with the latter, the limited review of awards by the courts of the Member States is justified.[39]

34 It is a testament to the importance of the fate of intra-EU BIT arbitration that an unusually high number of EU Member States have asked to be heard in the preliminary ruling procedure, including Hungary.

35 Opinion of Advocate General Wathelet delivered on 19 September 2017, *Case C-284/16, Achmea*, ECLI:EU:C:2017:699.

36 The CJEU did not answer the *Bundesgerichtshof* 's third question, which sought to ascertain whether the "first paragraph of Article 18 TFEU preclude[s] the application" of the arbitration clause of intra-EU BITs; *see* Judgment of 6 March 2018, *Case C-284/16, Achmea*, ECLI:EU:C:2018:158, paras. 23, 61.

37 *Case C-284/16, Achmea,* paras. 39-42.

38 Id. paras. 43-49.

39 Id. paras. 50-57.

On the basis of the above, the CJEU concluded that the investor-State dispute settlement mechanism contained in intra-EU BITs has an adverse effect on the autonomy of EU law and calls into question not only the principle of mutual trust but also the principle of sincere cooperation and the preservation of the particular nature of EU law. It therefore found that it is not compatible with Articles 267 and 344 TFEU.[40]

3.3. A Brief Assessment of the CJEU's Findings

The CJEU's judgment sent shockwaves through the international arbitration community. It hardly came as a surprise, however, since it was in line with the case-law of the Court on Articles 267 and 344 TFEU and on the autonomy of EU law, even if the Court adopted a broader reading of these provisions in *Achmea* than it had previously.[41] In addition, given the fierce political struggle over the compatibility of intra-EU BIT arbitration with the TFEU, it was to be expected that the CJEU's ruling would confirm the supremacy of EU law over intra-EU BITs once and for all.

Indeed, the CJEU's ruling is restricted neither to the Netherlands-Slovakia BIT, which was the applicable intra-EU BIT in the *Achmea* case, nor to the specific arbitration clause contained in Article 8 of that treaty. Rather, it applies to any

> "provision in an international agreement concluded between Member States, such as Article 8 of the [Netherlands-Slovakia] BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal."[42]

Furthermore, the *Achmea* ruling is not limited to those cases in which an intra-EU BIT tribunal in fact applies EU law to rule on the alleged violations of the BIT. Indeed, in *Achmea* itself, the tribunal held that it did not need to interpret or apply EU law to decide the parties' dispute.[43] According to the CJEU, the mere possibility that a tribunal could be called upon to interpret or apply EU law without the CJEU's supervision is sufficient to preclude the application of the treaty's arbitration clause.

Furthermore, it is noteworthy that the *Achmea* ruling has retroactive effect in the sense that the arbitration clause's incompatibility with EU law, as identified by the CJEU, is deemed to have existed since the EU accession of the second State signatory to the BIT. This follows from the nature of preliminary rulings, which do not create new rules but rather clarify the meaning of pre-existing EU law as it

40 Id. paras. 58-60.

41 Opinion of 14 December 1991, *Opinion 1/91 pursuant to Article 228 EEC*, ECLI:EU:C:1991:490; Opinion of 8 March 2011, *Opinion 1/09 pursuant to Article 300(6) EC*, ECLI:EU:C:2011:123; Opinion of 18 December 2014, *Opinion 2/13 pursuant to Article 218(11) TFEU*, ECLI:EU:C:2014:2454. In *Achmea*, for example, the CJEU interpreted Article 344 TFEU for the first time as applying to investor-State disputes and not only to disputes between Member States.

42 *Case C-284/16, Achmea,* para. 60.

43 *Eureko jurisdiction,* paras. 275-276.

doi: 10.5553/HYIEL/266627012020008001004

must be or ought to have been understood and applied from the time of its coming into force.[44]

Had the CJEU wanted to save intra-EU BIT arbitration, it could have allowed for the classification of tribunals set up pursuant to such treaties as "courts or tribunals of a Member State" within the meaning of Article 267 TFEU. This could have opened up the possibility of referring questions on the interpretation and application of EU law to the CJEU for a preliminary ruling, thereby preserving the autonomy of EU law. Indeed, this is what had been suggested by Advocate General Wathelet and several legal scholars.[45]

That the Court's ruling was motivated by political pressure to end intra-EU BIT arbitration once and for all might also explain some of its regrettable inconsistencies. Perhaps the least convincing (and therefore most heavily criticized) aspect of *Achmea* was the distinction it sought to draw between commercial arbitration, which it deemed compatible with EU law, and investment arbitration, which it deemed incompatible.[46] Contrary to the CJEU's finding, not only does the source of both commercial and investment arbitration lie in the parties' free consent to arbitration, but the availability and scope of review of the resulting arbitral award by the Member States' national courts is also identical in both cases – as long as the investment arbitration is not governed by the ICSID Convention and the tribunal has its seat in a Member State, as was the case in *Achmea*. In fact, it was precisely because the *Achmea* award was subject to review by the German courts that the preliminary ruling request regarding the compatibility with EU law of the arbitration clause contained in the Netherlands-Slovakia BIT could be put to the CJEU. Therefore, in light of the specificities of *Achmea*, the CJEU's finding of a lack of sufficient control over intra-EU investment arbitration awards is unfounded. It may be that, without explicitly saying so, the Court's ruling was targeting intra-EU BIT awards rendered pursuant to the ICSID Convention, which are indeed not subject to the control of domestic courts. These awards can only be challenged in annulment proceedings under the ICSID Convention, which provides for a more limited review and

44 Judgment of 17 October 1996, *Joined Cases C-283/94, C-291/94 and C-292/94, Denkavit*, ECLI:EU:C:1996:387, para. 17.

45 Opinion of Advocate General Wathelet delivered on 19 September 2017, *Case C-284/16, Achmea* paras. 84-131. Paschalis Paschalidis, 'Arbitral Tribunals and Preliminary References to the EU Court of Justice', *Arbitration International,* Vol. 33, 2016, p. 663; Jurgen Basedow, 'The Transformation of the European Court of Justice and Arbitration Referrals', *in* Franco Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, JURIS 2017, p. 135. Had intra-EU BIT tribunals addressed preliminary ruling requests to the CJEU directly, as respondent States had repeatedly requested, the CJEU might have taken a different position on the issue; *see e.g. Eastern Sugar,* paras. 130-139; *Oostergetel v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, para. 68.

46 Andrea Pinna, 'The Incompatibility of Intra-EU BITs With European Union Law, Annotation Following ECJ, 6 March 2018, Case C 284/16, Slovak Republic *v.* Achmea BV', *Paris Journal of International Arbitration*, 2018; Emmanuel Gaillard, 'L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16)', *Revue critique de droit international privé*, 2018, p. 630; Mehdi Yann Lahouazi, 'L'arrêt Achmea ou les dissonances entre l'arbitrage d'investissement et le droit de l'Union européenne', *Revue du droit de l'Union européenne* 2/2018, pp. 217, 220-222.

cannot guarantee the full effectiveness of EU law as the CJEU understands it. Indeed, the *Micula* award, which the Commission had been – mistakenly – holding up as a prime example of an intra-EU BIT arbitration that resulted in awards in violation of EU law, was an ICSID award. By wanting to reach too far, however, the CJEU in fact undermined the soundness and weakened the effect of its ruling, which has therefore had a far more limited practical impact on intra-EU BIT arbitration than initially feared, as the following sections will show.

4. The Impact of Achmea on Pending Intra-EU BIT Proceedings

The actual impact of the CJEU's *Achmea* judgment on pending proceedings related to intra-EU BIT awards has been far more limited than initially expected. As shown below, in the past two years since *Achmea*, intra-EU BIT tribunals have systematically rejected all *Achmea* objections to their jurisdiction (Section 4.1.). Challenges brought against intra-EU BIT awards by reference to *Achmea* have had equally meagre success (Section 4.2.). The impact of the *Achmea* ruling may ultimately be felt at the level of the enforcement of intra-EU BIT awards, although it is still too early to tell (Section 4.3.).

4.1. The Achmea Objection to Jurisdiction in Pending Intra-EU BIT Arbitral Proceedings

The Achmea judgment has been invoked as part of the intra-EU objection to jurisdiction by Member State respondents in all intra-EU BIT arbitration proceedings.[47] The Commission – whose *amicus curiae* efforts in the years prior to *Achmea* had focused, with the exception of a few emblematic intra-EU BIT cases, on intra-EU investment arbitrations conducted pursuant to the Energy Charter Treaty – switched gears and applied for leave to intervene in all pending intra-EU BIT cases to advocate for the dismissal of the claims on grounds of jurisdiction.

The essence of this jurisdictional objection is that, due to the incompatibility with EU law of the offer to arbitrate contained in the arbitration clauses of intra-EU BITs, finally confirmed by the CJEU in *Achmea*, no valid consent to arbitrate that could serve as the basis of the tribunals' jurisdiction arises.

When deciding on its jurisdiction, an intra-EU BIT tribunal must apply the law governing the parties' consent to arbitration. It must apply the instrument in which the parties' consent is contained, namely the arbitration clause in the intra-EU BIT, interpreted in accordance with the VCLT, and, depending on the type of proceeding and the applicable arbitration rules, the ICSID Convention or the law of the seat of the tribunal, the *lex loci arbitri*.[48]

When interpreting the consent to arbitrate contained in the BIT, Article 31(3)(c) VCLT directs the tribunal to take into account the "relevant rules of

47 *See e.g. Ioan Micula and others v. Romania [II]*, ICSID Case No. ARB/14/29; *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24.

48 Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', *McGill Journal of Dispute Resolution*, 2014/1, pp. 2-4.

doi: 10.5553/HYIEL/266627012020008001004

international law applicable between the parties." Such relevant rules of international law include the EU treaties, namely the TEU and the TFEU, which are rooted in international law.[49] Article 30(3) VCLT provides further that the provisions of the earlier treaty applicable between the parties, here the intra-EU BIT, are applicable only so far as they are compatible with the provisions of the later treaty relating to the same subject matter, here the EU Treaties. In *Achmea*, the CJEU confirmed that the arbitration clause contained in an intra-EU BIT is incompatible with Articles 267 and 344 TFEU. It should therefore follow that the arbitration clause of the intra-EU BIT does not apply and cannot form the basis of the tribunal's jurisdiction.

In addition, in the case of intra-EU BIT arbitrations conducted otherwise than under the ICSID Convention with a seat in an EU Member State, the tribunal must also apply EU law as part of the *lex loci arbitri*, *i.e.* as part of the national law of the State in which the tribunal has its seat.[50] When so doing, the tribunal should apply the CJEU's *Achmea* ruling and arguably also find that it lacks jurisdiction.

Whereas certain tribunals had previously accepted that they would be deprived of jurisdiction if intra-EU BITs or their arbitration clauses were found to be incompatible with EU law – as a matter of both international law and EU law[51] – in the face of a CJEU ruling confirming just that, tribunals have sought to distinguish and isolate *Achmea* as being specific to the applicable Netherlands-Slovakia BIT in order to get around it and maintain intra-EU BIT arbitration. Consequently, despite the surge in *Achmea*-based intra-EU objections to jurisdiction and the Commission's *amicus curiae* interventions, tribunals sitting in intra-EU BIT cases have thus far refused to give effect to *Achmea*.[52]

Although traditionally opposed to the intra-EU objection to jurisdiction – likely because it did not want to send the wrong message to the international investor community with regard to honoring its international obligations – Hungary was quick to respond to the Court's *Achmea* ruling and to adapt its defense strategy in its pending intra-EU BIT arbitrations.[53] In *UP and C.D Holding*

49 *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 4.120; *Eureko jurisdiction,* para. 225; *Eastern Sugar,* para. 159; *Vattenfall AB and others v. Federal Republic of Germany,* ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 146.

50 *Eureko jurisdiction,* para. 225; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, para. 7.6.6.

51 *Eureko jurisdiction,* paras. 273, 280; *WNC Factoring,* para. 311.

52 *See e.g. UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on Jurisdiction and Admissibility, 24 March 2020; *Ioan Micula et al. v. Romania [II]*, ICSID Case No. ARB/14/29, Award, 5 March 2020; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27. To date, only one case is publicly known in which a member of an intra-EU BIT tribunal found that the tribunal lacked jurisdiction as a result of *Achmea*, *see Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen, 7 February 2020.

53 The Commission asked for permission to intervene in Hungary's pending proceedings but was allowed to do so only in the *Sodexo Pass International SAS v. Hungary,* ICSID Case No. ARB/14/20 *(Sodexo)*.

Internationale v. Hungary, for example, which arose from measures enacted to grant the government a monopoly on the prepaid corporate vouchers industry and was conducted pursuant to the France-Hungary BIT, Hungary informed the tribunal of the *Achmea* judgment on the very day of its publication, urging it to decline jurisdiction.[54]

The *UP and C.D Holding Internationale* tribunal was the first ICSID tribunal to make public its award on the *Achmea* objection. Dismissing the objection, the tribunal noted that *Achmea* was silent on the ICSID Convention and therefore could not be interpreted as retroactively withdrawing Hungary's consent to ICSID arbitration.[55] The tribunal added in passing that even if the France-Hungary BIT were to be regarded as terminated as a result of *Achmea*, the tribunal would still have jurisdiction by virtue of the BIT's survival clause.[56]

The tribunal's reasoning in *UP and C.D Holding Internationale* is not entirely convincing, however. Hungary's consent to arbitrate disputes with French investors is contained in the France-Hungary BIT rather than the ICSID Convention itself. If that consent has been invalid since Hungary's accession to the EU, as the tribunal seems to accept, no valid agreement to arbitrate can have been formed in 2013, when the French investor submitted the dispute to arbitration pursuant to the BIT. Moreover, Hungary's consent to arbitrate based on the treaty's survival clause would be equally incompatible with Articles 267 and 344 TFEU and therefore could not serve as a basis for the tribunal's jurisdiction.

It would seem that, just like the other intra-EU BIT decisions rendered since *Achmea*, the *UP and C.D Holding Internationale* tribunal's decision was a politically motivated conclusion, the main objective of which was to uphold intra-EU BIT arbitration at any cost. In this sense, the tribunal did no better than the CJEU. Nevertheless, or perhaps precisely for that reason, the international arbitration community commended the *UP and C.D Holding Internationale* award as the most important decision of the year, giving it the 2019 Global Arbitration Review Award.[57]

4.2. Challenges to Intra-EU BIT Awards on the Basis of Achmea

Not only have arbitral tribunals refused to give effect to *Achmea*, but the efforts of the respondent Member States to challenge intra-EU BIT awards by reference to the Court's judgment have been equally unsuccessful thus far. With the exception of the *Bundesgerichtshof*, which set aside the *Achmea* award finding that the arbitration clause in the Netherlands-Slovakia BIT was incompatible with EU

54 *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 *(UP and C.D Holding)*, paras. 89-91. *See also Sodexo*, in which Hungary filed an application for leave to file a new jurisdictional objection based on *Achmea* on the very day of the Court's judgment, even though the parties had already filed their post-hearing briefs on the merits and were awaiting the award of the tribunal.

55 *UP and C.D Holding*, paras. 252-264.

56 Id. para. 265.

57 Tom Jones, 'Paris Hosts Largest Ever GAR Awards', *GAR*, 5 April 2019; GAR Awards 2019 shortlists – most important decision, GAR, 28 February 2019.

doi: 10.5553/HYIEL/266627012020008001004

law and therefore could not give rise to the jurisdiction of the tribunal, as confirmed by the CJEU,[58] ICSID *ad hoc* committees and domestic courts have refused to entertain any challenges against intra-EU BIT awards.

Hungary was one of the first respondent states to challenge its five unfavorable intra-EU BIT awards by reference to the Court's *Achmea* judgment. So far, the Commission has asked to intervene as *amicus curiae* in support of Hungary in three of these proceedings.[59] The awards challenged by Hungary were issued under the ICSID Convention and are thus subject to the very narrow remedy of annulment. To obtain their annulment, Hungary must show that the tribunal committed a 'manifest excess of power' when it declared itself competent on the basis of the applicable intra-EU BIT [Article 52(1)(b) ICSID Convention].

The *ad hoc* committee constituted to hear Hungary's annulment application in the *Edenred* case was the first committee to render an annulment decision on the basis of *Achmea*.[60] In March 2020, it rejected Hungary's request to annul the 23 million EUR award issued in compensation to the French investor for legislative changes affecting the prepaid corporate vouchers industry. It held that in ICSID proceedings, jurisdictional objections must be raised as early as possible, failing which they are considered waived, and that Hungary, which had not raised any intra-EU objection to jurisdiction in the arbitration, was therefore precluded from pursuing such a line of argumentation at the annulment stage.[61] Hungary's other four annulment proceedings are still pending.[62] It remains to be seen whether Hungary's *Achmea*-based annulment requests will be successful in those cases in which Hungary raised a timely intra-EU objection to jurisdiction in the underlying arbitration proceedings.

In addition to filing annulment applications, Hungary has also pursued – thus far unsuccessfully – the revision of its unfavorable awards. Both the reconstituted *Edenred* and the *Dan Cake* tribunals dismissed Hungary's request for revision in light of the *Achmea* ruling, however. The tribunals found that the request was manifestly lacking in legal merit because the application of *Achmea* was a question of law, not fact, and was therefore an inappropriate matter for the ICSID's revision mechanism.[63]

Non-ICSID awards rendered in intra-EU BIT proceedings are open to challenge before the domestic courts of the State in which the seat of the tribunal was located. Domestic courts of EU Member States hearing set-aside requests are

58 German Federal Court of Justice, Decision, Case I ZB 2/15 (31 October 2018).

59 *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9 *(Dan Cake)*; *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21 *(Edenred)*; *UP and CD Holding.*

60 The Edenred *ad hoc* committee had to be reconstituted three times as its members kept resigning over conflict issues relating to the intra-EU annulment argument and *Achmea*; *see* Alison Ross, 'Three Crowns Partners Resign From Panels Considering Achmea', *GAR,* 9 August 2018; 'Another Resignation From Panel Weighing Achmea', *GAR,* 5 September 2018.

61 Sebastian Perry & Jack Ballantyne, 'Hungary Fails to Reopen Intra-EU BIT Awards', *GAR,* 18 March 2020.

62 *Dan Cake; Edenred; UP and CD Holding; Sodexo; Magyar Farming Company Ltd, Kintyre Kft. and Inícia Zrt. v. Hungary*, ICSID Case No. ARB/17/27.

63 Tom Jones, 'ICSID Panel Declines to Revisit Intra-EU Award', *GAR,* 13 February 2019; Tom Jones, 'Hungary Wants Intra-EU Award Annulled', *GAR,* 4 June 2019; Perry & Ballantyne 2020.

bound to apply EU law as interpreted in the CJEU's *Achmea* decision and (arguably) to set aside awards on two grounds in particular: the violation of public policy and the invalidity of the arbitration agreement. The Swedish Court of Appeal was the first Member State court to be seized of a set-aside application by reference to *Achmea*. Poland applied to set aside the *PL Holdings v. Poland* award, which had been rendered under the Luxembourg-Poland BIT and awarded close to 180 million USD in compensation for the forced sale of the investor's shareholding in a Polish bank. The Swedish Court of Appeal accepted that *Achmea* rendered Poland's consent to arbitration contained in the BIT invalid, but it nevertheless refused to set aside the challenged award. In what can be seen as an unusually creative solution to keeping the challenged award in force, the Swedish Court found, *inter alia*, that a new and valid consent to arbitrate had been formed as a result of PL Holdings' commencing arbitration proceedings and Poland's belated objection to the jurisdiction of the tribunal in the arbitration proceeding, which it understood as an implicit acceptance of the tribunal's jurisdiction.[64] Poland appealed the Swedish Court's decision to the Supreme Court of Sweden, which in February 2020 requested a preliminary ruling from the CJEU on whether the *Achmea* ruling requires it to set aside the award even where Poland was found to have consented to the arbitration through its conduct, due to its belated objection to jurisdiction.[65]

It remains to be seen whether subsequent *ad hoc* committees or national courts called upon to decide *Achmea*-based challenges against intra-EU BIT awards will be willing to set aside awards, and if so, on what grounds.

4.3. Achmea and the Enforcement of Intra-EU BIT Awards

Given the unwillingness of intra-EU BIT tribunals to decline to hear intra-EU BIT disputes, along with ICSID *ad hoc* committees' and domestic courts' refusal to annul or set aside intra-EU BIT awards on the basis of *Achmea*, the battle has moved to a new front – namely the enforcement of intra-EU BIT awards.

ICSID awards are directly enforceable as final domestic judgments in the territory of the 163 contracting states of the ICSID Convention – including all EU Member States, with the exception of Poland – and their enforcement cannot be refused or subjected to conditions by the state court seized with enforcement. Nevertheless, there have been examples of refusal to enforce intra-EU BIT awards issued pursuant to the ICSID Convention (*e.g.* the *Micula* award) due to their alleged incompatibility with EU law.[66] Investors have therefore increasingly

64 Judgment of Svea Court of Appeal on Set-aside Application, Cases T 8538-17 and T 12033-17, 22 February 2019; 'Why the Swedish Court Decision in PL Holdings Is Consistent With Achmea', *GAR,* 24 April 2019.

65 Decision of the Supreme Court of Sweden – Request for a preliminary ruling, Case No. T 1569-19, 4 February 2020. *See also* Tom Jones, 'Swedish Court Consults ECJ Over Poland Award', *GAR,* 26 February 2020. The preliminary ruling request was lodged with the CJEU on 27 February 2020 as *Case C-109/20, PL Holdings*.

66 *See e.g.* Tribunal de première instance francophone de Bruxelles, Section civile – chambre des saisies affaires civiles, Case nos. 15/7241/A and 15/7242/A, 25 January 2016; *Micula & Ors v. Romania & Anor* [2017] EWHC 31 (Comm), Judgment, 20 January 2017.

doi: 10.5553/HYIEL/266627012020008001004

chosen to pursue the enforcement of intra-EU BIT awards outside the EU, most notably in the US, where it is thought that considerations of EU law should have less or no impact on the enforcement of awards.[67]

In the case of non-ICSID awards, EU Member States might be able to successfully resist enforcement pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards if enforcement is sought in a Member State court. The courts of Member States are bound to apply EU law as interpreted in the CJEU's *Achmea* ruling. They could therefore refuse enforcement on the grounds that the consent to arbitrate contained in the intra-EU BIT was invalid or that the recognition or enforcement of the award would be in breach of EU law and therefore contrary to public policy.

There may be a further avenue by way of which Member States could avoid having to pay their intra-EU BIT awards. Indeed, States may be able to escape the adverse financial consequences of their awards on the grounds that they constitute incompatible State aid. It could be argued that, as a result of *Achmea*, compensation payments arising under intra-EU BIT awards no longer have a valid legal basis, at least from the perspective of EU law, and therefore fall outside the scope of compensation payments, which are considered distinct from State aid and compatible with EU law. As the Commission noted, a compensation payment awarded to investors on the basis of an intra-EU BIT whose arbitration clause has been found to be invalid is not based on a 'general rule of compensation'.[68] As a result, it will be considered an undue economic advantage, in breach of Article 107(1) TFEU. A compensation payment that constitutes incompatible State aid cannot be lawfully paid out by the Member State concerned. In order to obtain such a finding of incompatibility, respondent States would be well advised to notify their adverse intra-EU BIT awards to the Commission as state aid. In such a case, the Commission would have to conduct a state aid investigation and, unless it decides to depart from its earlier position, can be expected to issue a decision declaring that the award constituted incompatible – and therefore unenforceable – State aid.

Whether and to what extent States will decide to resist enforcement pursuant to the New York Convention, EU state aid rules or otherwise, remains to be seen. Up until *Achmea*, Hungary, for example, had carefully built a reputation of always paying its investment awards voluntarily.[69] With *Achmea*, however, EU Member States may finally have a legitimate basis on which to successfully oppose

67 *See e.g. Ioan Micula et al. v. Government of Romania,* U.S. Court of Appeals for the District of Columbia Circuit, Civil Action No. 17-CV-2332.

68 According to the Commission, compensation awarded to investors on the basis of an intra-EU BIT whose arbitration clause is incompatible with EU law is not based on a 'general rule of compensation'. As a result, it falls outside the *Asteris* exemption and will be considered an undue economic advantage; *see* Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) – Arbitral award Micula v. Romania of 11 December 2013 (Commission Final Decision), para. 102.

69 *See e.g.* 'Fizet az állam az ADC-nek', *Menedzsment Fórum,* 30 October 2006; 'Átutalták a ferihegyi perben megítélt kártérítést', *Népszabadság,* 31 October 2006; 'Gigakártérítést fizetett a Magyar állam a kiebrudalt cafeteria-cégnek', *Zoom.hu,* 18 September 2017; Perry & Ballantyne 2020.

enforcement without the reputational harm that non-payment normally attracts. Indeed, the multilateral treaty for the termination of intra-EU BITs discussed in the next section directs Member States to oppose the enforcement of all intra-EU BIT awards rendered against them following *Achmea*.

5. The Impact of Achmea on the Fate of Intra-EU BITs

While *Achmea* has not proven to be a 'death sentence' for intra-EU investment arbitration, the termination of all intra-EU BITs announced by the Member States in order to give effect to *Achmea* will irrevocably change the intra-EU treaty landscape.

The *Achmea* ruling is directly binding on all EU Member States, and, pursuant to the supremacy of EU law, Member States are obliged to terminate intra-EU BITs (or at least to cancel their arbitration clauses) in order to eliminate the EU law incompatibility identified by the CJEU.[70] Shortly following the publication of the *Achmea* judgment, the Commission therefore intensified the dialogue with the Member States with a view to terminating all intra-EU BITs. Despite being a longstanding supporter of intra-EU BITs, the Netherlands was the first Member State to announce that it would seek to terminate its intra- BITs and proposed the coordinated termination of all intra-EU BITs by means of a multilateral treaty.[71] The idea of such a multilateral termination treaty had first been raised by Austria, France, Finland, Germany and the Netherlands in their 2016 Non-Paper, which recommended not only that Member States terminate their existing treaties, but also that they replace them with a new and appropriate level of substantive and procedural protection for all EU investors at the intra-EU level.[72]

Following the *Achmea* judgment, in December 2018, the Prime Minister of Hungary issued a decision approving the commencement of negotiations on an agreement for the termination of Hungary's intra-EU BITs.[73] This was the first sign that the Member States were working behind the scenes on a common endgame for intra-EU BITs and that important developments were to be expected in due course.[74] Shortly thereafter, on 15 and 16 January 2019, the EU Member States adopted three Declarations on the legal consequences of the *Achmea*

70 Judgment of 8 September 2009, *Case C-478/07, Budějovický Budvar*, ECLI:EU:C:2009:521.

71 Dutch Minister for Foreign Trade and Development Cooperation, Letter addressed to the Chairperson of the Dutch House of Representatives, 26 April 2018; Marie Davoise & Markus Burgstaller, 'Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?', *Kluwer Arbitration Blog,* 11 August 2018.

72 Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands, 7 April 2016.

73 *See* in Hungarian: A Miniszterelnök 148/2018. (XII. 17.) ME határozata az Európai Unió egyes tagállamainak kormányai közötti beruházások ösztönzéséről és kölcsönös védelméről szóló kétoldalú megállapodások felmondásáról szóló megállapodás létrehozására adott felhatalmazásról.

74 Veronika Korom & Lénárd Sándor, 'Hungary Gives the Green Light for the Conclusion of a Termination Agreement for Intra-EU BITs', *Kluwer Arbitration Blog,* 14 January 2019.

doi: 10.5553/HYIEL/266627012020008001004

judgment. The first declaration was signed by 22 Member States,[75] the second was jointly signed by Finland, Luxembourg, Malta, Slovenia and Sweden,[76] and the third was issued by Hungary alone.[77] The three declarations differed with respect to the effects of the *Achmea* judgment on the Energy Charter Treaty[78] but were unanimous in finding that "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable"[79] and that an

> "arbitral tribunal established on the basis of investor–State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment treaty."[80]

The Member States consequently undertook to terminate all intra-EU BITs by 6 December 2019.[81]

The long-awaited multilateral treaty for the termination of intra-EU BITs was finally signed on 5 May 2020 by 22 Member States, including Hungary

75 Declaration of the Member States on the legal consequences of the Achmea judgment and on investment protection, 15 January 2019 (Declaration).

76 Declaration of the Representatives of the Government of the Member States on the legal consequences of the Achmea judgment and on investment protection, 16 January 2019.

77 Declaration of the Representative of the Hungarian Government on the legal consequences of the Achmea judgment and on investment protection, 16 January 2019.

78 With the exception of Italy, which withdrew from the Energy Charter Treaty in 2016, all EU Member States are parties to the Treaty. The declaration signed by 22 Member States maintains that *Achmea* applies to the Energy Charter Treaty and renders its arbitration provision in intra-EU disputes incompatible with EU law. The second declaration signed by 5 Member States maintains that *Achmea* is silent on the Energy Charter Treaty and that a future ruling of the CJEU is needed on the compatibility of the Energy Charter Treaty's arbitration provision with EU law. This future ruling is awaited in the setting aside action pending in the Swedish courts against the award rendered in the case *Novenergia v. Kingdom of Spain*, SCC Case No. 063/2015. The Swedish Svea Court of Appeal rejected the application and refused to turn to the CJEU for a preliminary ruling; *see Kingdom of Sweden v. Novenergia II – Energy & Environment (SCA)*, Case No. T 4658-18, Judgment of 15 April 2019. The case is now pending before the Supreme Court of Sweden. The third declaration submitted by Hungary states that *Achmea* applies only to intra-EU BITs and not to the Energy Charter Treaty and does not concern any pending or prospective intra-EU arbitration proceedings initiated under the Energy Charter Treaty. Hungary has been increasingly aware of its dual role as both an investment-importing host State and a home State to foreign investment flowing into neighboring EU countries, which requires international legal protection. MOL (the Hungarian Oil and Gas Company), is currently pursuing a highly politicized Energy Charter Treaty claim against Croatia over the treatment of its investment in Croatia's national oil and gas company, INA. It is no doubt with this arbitration in mind (*MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32) that Hungary has taken a different path from the other 27 Member States as regards the continued applicability of the Energy Charter Treaty in intra-EU disputes.

79 Declaration, p. 1.

80 Id.

81 Id. pp. 3-4.

(Termination Treaty).[82] It states that arbitration clauses in intra-EU BITs are contrary to EU law and therefore cannot be applied and provides for the termination of some 130 intra-EU BITs, including their survival clauses. It also provides for 'transitional provisions' for pending intra-EU BIT arbitrations on the condition that the investors withdraw their pending claims:[83] it distinguishes between pending intra-EU BIT proceedings initiated after *Achmea*, which lack a legal basis according to the Termination Treaty, and pending proceedings initiated before *Achmea*, which may be submitted to national courts or to a 'structured dialogue', a new and voluntary settlement procedure provided for by the Termination Treaty.[84] These transitional provisions are problematic for a number of reasons, and their practical impact, remains unclear.[85]

The Termination Treaty also leaves open whether intra-EU BITs, once terminated, will be replaced by another, EU-level investment protection and dispute resolution mechanism.[86] Given that no pan-European investment protection regime (as recommended in the May 2016 'Non-Paper') was put in place before *Achmea*, it will be difficult if not impossible for Member States to agree on the adoption of such a legal instrument now. At the same time, EU investor community and arbitration practitioners have repeatedly warned that, without an appropriate substitute, the loss of protection offered by intra-EU BITs will not only adversely impact intra-EU investment flows but also give rise to a certain competitive disadvantage for EU companies compared to investors from third countries, who continue to be able to rely on BITs concluded for the protection of their investments in the EU.[87]

The Commission has repeatedly acknowledged these concerns. In a 2018 Communication, it sought to reassure EU investors by listing the protection rights available under EU law for cross-border investments and presented itself

82 Austria, Finland, Ireland, Sweden and the UK did not sign the Termination Treaty; *see* Cosmo Sanderson, 'New Treaty Spells End of Intra-EU BITs', *GAR,* 6 May 2020. In response to Finland's and the UK's refusal to sign the Termination Treaty, the Commission has sent letters of formal notice to these states; *see* Intra-EU BITs: Commission urges Finland and the United Kingdom to terminate their Bilateral Investment Treaties with other EU Member States, 14 May 2020. Ireland no longer has any intra-EU BITs in force, and the infringement proceedings launched by the Commission against Austria and Sweden in 2015 are still pending.

83 The Termination Treaty specifically states that it does not deal with intra-EU Energy Charter Treaty proceedings, which is a matter to be addressed at a later stage; *see* Termination Treaty, Preamble.

84 Articles 5 and 7 to 10 of the Termination Treaty.

85 Nikos Lavranos, 'The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One', *Kluwer Arbitration Blog,* 1 December 2019; Cosmo Sanderson, 'New Treaty Spells End of Intra-EU BITs', *GAR,* 6 May 2020.

86 Termination Treaty, Preamble.

87 Emmanuel Gaillard, 'Union européenne et la régression de la règle de droit', *La Semaine Juridique*, Édition générale, n° 13, 28 March 2011; Emmanuel Gaillard, 'L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16)', *Revue critique de droit international privé*, 616 (2018); Paschalis Paschalidis, 'The Pressing Need for a European Investment Court', *GAR,* 10 February 2020.

doi: 10.5553/HYIEL/266627012020008001004

and the national courts of the Member States as the guarantors of these rights.[88] Nevertheless, it would seem that investment protection under EU law is not able to replicate the protections offered by intra-EU BITs. Suffice it to recall that the Commission closed the infringement proceedings against Slovakia over the restrictions it had imposed on the Slovak health insurance industry without finding a violation of EU law – while on the basis of the same facts the *Achmea* tribunal found a violation of the BIT and issued a 22 million EUR compensation award in favor of the Dutch investor. In addition, concerns over the independence, quality and efficiency of civil justice systems in certain EU Member States[89] have reinforced doubts about the efficiency of the means of redress available to EU investors who have lost their intra-EU BITs. It is perhaps for these reasons that on 26 May 2020, the Commission decided to launch a public consultation on the investment protection and facilitation framework within the EU. Depending on the outcome of the consultation, the Commission plans to assess different regulatory and non-regulatory options ranging from a recommendation, directive, or regulation to an international treaty with the aim of boosting investor confidence and increasing intra-EU investments.[90]

6. Conclusion

The CJEU's *Achmea* ruling was merely the precursor to the end of intra-EU BIT arbitration. It is the very recent adoption of the Termination Treaty by a majority of Member States that, if and when ratified, will finally put an end to the more than a decade-long controversy over the validity and applicability of intra-EU BITs and their arbitration clauses. From Hungary's perspective, this outcome is certainly a win, at least in the short term, as its intra-EU BITs can no longer be relied on by EU investors to challenge government measures and obtain compensation. At the same time, it is unclear whether Hungary will be able to avoid its payment obligations under its most recent intra-EU BIT awards amounting to a total of 108 million EUR plus interest.[91] Indeed, it is likely that the battle for the enforcement of the intra-EU BIT awards will continue to occupy the scene for years to come.

88 Financial Stability, Financial Services and Capital Markets Union, Communication from the Commission to the European Parliament and the Council – Protection of intra-EU investment, 19 July 2018.

89 *See* EU Justice Scoreboard 2018, 27 May 2018; EU Justice Scoreboard 2019, 20 May 2019. There have also been concerns about the respect for the rule of law and the independence of the judiciary in certain Member States; *see e.g.* European Commission, Press Release, Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court, 2 July 2018; Wojchiech Sadowski, 'Protection of the Rule of Law in the European Union Through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?', *Common Market Law Review,* Vol. 55, Issue 4, 2018, pp. 1025-1060.

90 European Commission, Inception Impact Assessment, Investment protection and facilitation framework, Ref. Ares(2020)2716046, 26 May 2020.

91 Hungary is said to have already paid the 23 million EUR award in favor of Edenred; *see* Perry & Ballantyne 2020.

In the long term, however, the end of intra-EU BIT arbitration without an adequate replacement regime may disadvantage Hungarian companies who invest in EU Member States and who require legal protection for their investments. Hungary's BIT program has been active in recent years, which is a concrete indication of the Hungarian government's stance on the importance of international investment protection by way of BITs for Hungarian interests abroad.[92] The end of intra-EU BITs, which are traditionally regarded as an important means of attracting foreign investment, might even adversely impact Hungary's standing as an attractive place for EU investment. It is therefore to be hoped that the outcome of the Commission's recently launched public consultation on the investment protection and facilitation framework within the EU will lay the groundwork for an adequate and effective future intra-EU investment protection regime.

92 Between 2016 and 2019, Hungary signed BITs with Cambodia, Tajikistan, Iran, Belarus and Cabo Verde; *see* UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, Hungary at https://investmentpolicy.unctad.org/international-investment-agreements/countries/94/hungary?type=bits.

doi: 10.5553/HYIEL/266627012020008001004