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# EU attacks on investor rights

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## ABSTRACT

The European Commission, with the cooperation of the Court of Justice of the European Union (CJEU), continues a crusade against investors' rights. This is done by reducing the rights of access by investors to an independent arbitral tribunal to resolve disputes and by making arbitral awards impossible to enforce. The CJEU judgments which are discussed in this article are arbitrary, lack logical argument, and ignore international law (in particular, the 1969 Vienna Convention on the Law of Treaties). Recent judgments by states that are not EU Member States have restored the validity of arbitral awards that were annulled by EU courts. The judgments show that they do not believe in the CJEU judgments, which have led to the cancellation of inter-EU Bilateral Investment Treaties and the annulment of Energy Charter Treaty awards.

## INTRODUCTION

The 2022 International Centre for Settlement of Investment Disputes (ICSID) arbitral decision in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*<sup>1</sup> concerned Italy's alleged violations of the Energy Charter Treaty in respect of Rockhopper's investments in the putative Ombrina Mare oil and gas field located in the Adriatic Sea. In 2015, the Italian Parliament re-introduced a ban on oil and gas exploration within 12 miles of the Italian coastline. The ban had previously been introduced in 2010 but revoked in 2012. The field did not proceed to production. The tribunal found that Italy had committed an unlawful expropriation and awarded Rockhopper damages of EUR 184 million, plus an amount in respect of decommissioning costs, and interest. This could prove to be the high watermark of energy sector investment protection in the European Union (EU).

Energy investors in the EU need to know how the regulatory landscape has changed to undermine the intended protection of their investments. This follows from two key judgments from the Court of Justice of the European Union (CJEU): *Slovak Republic v Achmea BV* (2018), which held that arbitration provisions found in bilateral investment treaties (BITs) between EU Member States would be incompatible with EU law (but where the CJEU did not declare whether the principle would apply equally to multilateral investment treaties); and *Republic of Moldova v Komstoy* (2021), which addressed that issue in respect of the application of the Energy Charter Treaty in the EU.<sup>2</sup>

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<sup>1</sup> ICSID Case No ARB/17/14, see <[https://italaw.com/sites/default/files/case-documents/italaw180930\\_0.pdf](https://italaw.com/sites/default/files/case-documents/italaw180930_0.pdf)> accessed 28 May 2024.

<sup>2</sup> Also relevant is *Poland v PL Holdings SARL* (2021), where the CJEU ruled that ad hoc agreements to arbitrate between investors in the EU and EU Member States would be invalid under EU law.

## INTRA-EU BITs

### Slovak Republic v Achmea BV

On 1 October 1992, the Netherlands–Slovak Republic Bilateral Investment Treaty (BIT) came into force.<sup>3</sup> Slovakia acceded to the EU on 1 May 2004. Slovakia reformed its public healthcare system in 2004 and wanted to attract private companies to provide health insurance services. As part of those reforms, a new law said that private health insurance companies could make profits and there was no cap on the administration costs of health insurance companies.

A Dutch company, Achmea (then called Eureka) established a new company in March 2006 to provide healthcare insurance, investing initially SKK<sup>4</sup> 110,000,000, then a further SKK 2,180,300,000 (about €72 m at the time in total) by October 2006.

A change of government took place in Slovakia in June 2006. The new Prime Minister, Robert Fico, changed the 2004 reforms and in particular introduced a cap on the administrative costs of insurance providers at 4 per cent of premium. This took effect on 1 January 2007 and was reduced to 3.5 per cent in October 2007. A ban on using brokers to sell health insurance was also introduced in December 2006. There were further reforms that banned the generation of profit from health insurance and prevented insurers from freely contracting with healthcare providers.

These reforms destroyed the investments made by Achmea as it could neither profit from its investment nor could the business be sold. An arbitration seated in Germany under Article 8 of the Netherlands–Slovak Republic BIT<sup>5</sup> was commenced by Achmea on 1 October 2008. The final award was given on 7 December 2012 and awarded €22.1m plus interest to Achmea, finding that Slovakia had breached several of its BIT obligations. Costs incurred in the merits phase of €2,905,350.94 were awarded to Achmea.<sup>6</sup>

Meanwhile, the Constitutional Court of the Slovak Republic found on 26 January 2011 that the prohibition on profits was unconstitutional and a revised law allowed the distribution of profits from 1 August 2011.

Slovakia appealed to the courts in Frankfurt to set aside the award. This was denied and an appeal to the German Federal Court of Justice (GFCJ) also failed. However, the GFCJ stayed the proceedings and requested a preliminary ruling on three questions from the CJEU on 23 May 2016.

The Advocate General Melchior Wathelet gave his written opinion on the referral on 19 September 2017.<sup>7</sup> He concluded that:

*Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal.*

The CJEU Judgment was given on 6 March 2018.<sup>8</sup> The CJEU's ruling was the reverse of the Advocate General's opinion:

*Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and*

<sup>3</sup> <<https://jusmundi.com/en/document/treaty/en-agreement-on-encouragement-and-reciprocal-protection-of-investments-between-the-kingdom-of-the-netherlands-and-the-czech-and-slovak-federal-republic-czech-and-slovak-republic-netherlands-bit-1991-monday-29th-april-1991>> accessed 28 May 2024.

<sup>4</sup> Slovak Koruna, When Slovakia went to the Euro, the exchange rate was €1 = SKK 30.28.

<sup>5</sup> <<https://edit.wti.org/document/show/dfc53434-1013-413d-a01e-1a9b6131be02>> accessed 1 June 2024.

<sup>6</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf>> accessed 1 June 2024.

<sup>7</sup> <<https://curia.europa.eu/juris/document/document.jsf?jsessionid=77FFD086E153B51DEA5210F5A87DC7DC?text=&docid=194583&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2787407>> accessed 1 June 2024.

<sup>8</sup> <<https://curia.europa.eu/juris/document/document.jsf?jsessionid=77FFD086E153B51DEA5210F5A87DC7DC?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2787407>> accessed 29 May 2024.

*Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.* (emphasis in both quotes added by author).

Paragraph 17 of the CJEU judgment noted that:

*The Treaties make no provision for any judicial procedure in which an investor such as Achmea can bring a claim, before the EU judicature, for compensation from a Member State under a bilateral investment treaty such as the BIT.*

Achmea was left unable to resolve its dispute by arbitration under the BIT and without any alternative mechanism through the EU courts.

The Achmea case led to the EU terminating all BITs between EU Member States. This leaves intra-EU investors having to rely on another Member State's national courts—that is, the court of the state against which they have a dispute—to protect their rights. Existing investors are exposed to unfair treatment. New investors will be seriously discouraged when they cannot call on an independent arbitral tribunal. The CJEU has not dispensed justice; rather it has allowed Achmea and other investors to be seriously disadvantaged to give a perceived financial advantage to Member States, thereby infringing investors' interests. If the ultimate legal authority can change the rules with retrospective effect, negating freely signed legal agreements, trust is destroyed.

### **WHY DID THE CJEU DECIDE AGAINST ACHMEA?**

There are interesting tensions between the opinion of Advocate General Wathelet and the CJEU judgment. They came to completely opposite findings, but why? Trying to make sense of this requires careful reading of the Award, the Opinion, and the Judgment.

The tribunal and parties agreed that the arbitration would be seated in Germany under UNCITRAL arbitration rules. Slovakia raised several objections to the tribunal's jurisdiction: that the investment was not a *bona fide* investment under Article 1a of the BIT, that the investment was not made in accordance with Slovak law, and that BIT Articles 3, 4, and 5 are not applicable due to the supremacy of EU law, and the Tribunal does not have jurisdiction to rule on alleged breaches of EU law. The Tribunal rejected all of the Respondent's objections. The final award was in favour of the Claimant, Achmea.

Slovakia then appealed to the courts in Frankfurt to set aside the award on the grounds of the BIT being incompatible with EU law, which failed. A further appeal was made to the GFCJ on the grounds that the award was contrary to public policy. Supporting arguments included that the tribunal could not request the CJEU to give preliminary rulings as it was not a court or tribunal of a Member State. Also argued was that the BIT arbitration clause was null and void and that the agreement contravenes Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) and the principle of non-discrimination in Article 18 TFEU.

The GFCJ did not agree with the Slovakia arguments but stayed the proceedings and referred to the CJEU for a preliminary judgment, as there was no EU case law on point. Three questions were referred to the CJEU:

- 1) Does Article 344 TFEU preclude proceedings under a BIT agreed before one of the parties acceded to the EU but where proceedings were brought after accession?
- 2) If the answer to question 1 is no, does Article 267 TFEU preclude proceedings?
- 3) If the answers to questions 1 and 2 are no, does Article 18 TFEU preclude proceedings?

The Advocate General gave a reasoned opinion that the BIT was compatible with EU law. Legal authorities over many decades up to and including the EU Attorney General's determination had not found the alleged incompatibility between the BIT and EU law.

The European Commission had previously intervened as *amicus curiae* in many arbitrations to argue that intra-EU BITs were incompatible with the TFEU. These interventions were rejected by tribunals. AG Wathelet noted that there were 196 intra-EU BITs in force at the time of his opinion. Also intervening in the case (by written and oral observations at the hearing on 19 June 2016) were various Member States and the European Commission. AG Wathelet noted that the Member States could be divided into two groups: those that were usually countries of origin of investors and were never or rarely respondents in BIT arbitrations; and those that have regularly been respondents in such arbitrations. The second group and the European Commission intervened in support of Slovakia.

Paragraphs 40 and 41 of AG Wathelet's opinion in respect of the European Commission's argument are instructive:

*For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe. The Association Agreements between the Union and candidate countries also contained provisions for the conclusion of BITs between Member States and candidate countries.*

*At the hearing, the Commission attempted to explain that change in its position on the incompatibility of BITs with the EU and FEU Treaties, maintaining that the agreements in question were necessary in order to prepare for the accession of the candidate countries. However, if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which has lasted more than 30 years in the case of some Member States and 13 years in the case of many others?*

The European Commission has completely revised its position from one of BITs being necessary for preparing for accession to the EU and were compatible with the treaties, to one where intra-EU BITs were not compatible. AG Wathelet also noted that only 10 out of 62 intra-EU BIT arbitrations were investors successful and that '... the fear expressed by certain Member States and the Commission of a systemic risk created by intra-EU BITs is greatly exaggerated'.<sup>9</sup>

AG Wathelet opined on the three questions, finding that:

- 1) Recourse to international arbitration in the conditions prescribed in Article 8 of the Netherlands–Slovak Republic BIT cannot undermine either Article 344 TFEU or the allocation of powers determined by the EU and TFEU Treaties and, accordingly, the autonomy of the EU legal system. The dispute settlement mechanism established by Article 8 of the BIT is compatible with Article 344 TFEU and with the allocation of powers fixed by the EU and FEU Treaties and the autonomy of the EU legal system.<sup>10</sup>
- 2) The arbitral tribunals established by Article 8 of the BIT are 'courts or tribunals' within the meaning of Article 267 TFEU. They are also courts or tribunals 'of one of the Member States' within the meaning of that provision.<sup>11</sup> The CJEU has declared admissible questions for a preliminary ruling referred to by arbitral tribunals.<sup>12</sup>

<sup>9</sup> para 45 of AG Wathelet's opinion.

<sup>10</sup> paras 132–272 of AG Wathelet's opinion.

<sup>11</sup> paras 84–131 of AG Wathelet's opinion.

<sup>12</sup> *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:383) and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754) and *Merck Canada* (C-555/13, EU:C:2014:92).

- 3) There was no discrimination prohibited by EU law under Article 18 TFEU.<sup>13</sup>

The opinion was extensively reasoned and consisted of 273 paragraphs and 209 footnotes. The CJEU judgment consisted of 62 paragraphs and no footnotes. Sixteen Member States, Achmea, and the European Commission submitted observations.

The CJEU gave the following findings:

- 1) Disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation of both that agreement and EU law, and the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by the Member States. Article 8 of the BIT calls into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation. Article 8 of the BIT has an adverse effect on the autonomy of EU law.<sup>14</sup>
- 2) The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU. In the case of the main proceedings, the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia. It follows that a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.<sup>15</sup>
- 3) There was no need to answer the question on discrimination under Article 18 TFEU.<sup>16</sup>

The reasoning of AG Wathelet in his opinion is persuasive and the reasoning of the CJEU judgment is somewhat tortured. The BIT required the tribunal to decide on the basis of the law and that necessarily encompassed EU law and the treaties. The German Arbitration Act<sup>17</sup> section 1050 allows a Tribunal to request court assistance in ‘*performance of other judicial acts which the arbitral tribunal is not empowered to carry out*’. Even if the tribunal was not a court or tribunal of a Member State, it can ask for assistance from the court of the seat to obtain a preliminary ruling from CJEU. The CJEU had decided to rule that BITs were incompatible with EU law and made the reasoning fit that judgment. The evidence suggests that this is a political decision driven by the European Commission, disguised as a judicial decision of the CJEU.

Also relevant to consider at this point is the case of Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L., and S.C. Multipack S.R.L. v Romania.<sup>18</sup>

Romania set up special tax incentives to encourage investment in economically disadvantaged regions under its Emergency Government Ordinance 24/1998. In March 1999, the mining region of Ștei-Nucet, Bihor County was designated as a Disadvantaged Region for 10 years, from 1 April 1999. This gave exemptions from customs duties, VAT for machinery, and profit tax during that 10-year period. A BIT between Sweden and Romania was signed on 29 May 2002.<sup>19</sup>

The Micula brothers, Ioan and Viorel, were Swedish citizens living in Romania. They made investments in this region through three companies that they owned. The brothers and their companies are referred to as Claimants below, and the State of Romania is referred to as the Respondent.

On 2 August 2005, the Claimants filed a Request for Arbitration with ICSID under the Swedish–Romanian BIT. They claimed €450,000,000 losses plus lost profits suffered as a consequence of the Respondent’s actions. The tribunal decided that it had jurisdiction over the dispute and that the claims

<sup>13</sup> paras 49–83 of AG Wathelet’s opinion.

<sup>14</sup> paras 58–59 of the CJEU judgment.

<sup>15</sup> paras 43–49 of the CJEU judgment.

<sup>16</sup> para 61 of the CJEU judgment.

<sup>17</sup> <[https://arbitrationlaw.com/sites/default/files/free\\_pdfs/German%20Arbitration%20Act.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/German%20Arbitration%20Act.pdf)> accessed 30 May 2024.

<sup>18</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* [1], ICSID Case No ARB/05/20.

<sup>19</sup> <<https://edit.wti.org/document/show/9f96a42c-184b-45b9-836a-b9b6bc7446ec>> accessed 30 May 2024.

were admissible in an award dated 24 September 2008.<sup>20</sup> The final Award was made on 11 December 2013,<sup>21</sup> awarding the Claimants RON 376,433,229 (€84,517,198) as damages plus interest.

Meanwhile, Romania had joined the EU on 1 January 2007.

The European Commission issued the Respondent with an injunction suspending execution of the award on 26 May 2014 pending its decision on the compatibility of state aid with the internal market. The Claimants appealed to the CJEU to annul that decision on 2 September 2014.<sup>22</sup> The European Commission published its decision that the arbitration award constituted state aid and must not be paid on 30 March 2015.<sup>23</sup>

In a judgment by the United Kingdom Supreme Court (UKSC) given on 19 February 2023, the Court found that the stay of payment of the award should be lifted:

118. For these reasons the duty of sincere co-operation is not applicable in this case and there is no impediment to the lifting of the stay, which is an unlawful measure in international law and unjustified and unlawful in domestic law. We would therefore allow the cross-appeal of the Claimants and lift the stay on enforcement of the award.

The CJEU objected to that UKSC judgment and issued its response on 14 March 2024:

On those grounds, the Court (Fifth Chamber) hereby:

1. **Declares that, by the judgment of the Supreme Court of the United Kingdom of 19 February 2020 in *Micula v Romania*, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 4(3) TEU, Article 108(3), the first and third paragraphs of Article 267 and the first paragraph of Article 351 TFEU, read in conjunction with Article 127(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, adopted on 17 October 2019;**
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

On 14 May 2024, the US Court of Appeals for the District of Columbia gave a judgment in an appeal by Romania to seek relief from the Micula award.<sup>24</sup> The Appeals Court affirmed the district court's denial of Romania's motion for relief from judgment.

## ACHMEA—THE BEGINNING, NOT THE END OF EU RETROSPECTIVE LAWS

The Member States signed a Declaration on 15 January 2019 with the title 'On the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union',<sup>25</sup>

On the first page, the following statement is made:

*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.*

There is no 'lack of a valid offer to arbitrate'. The unconditional offer to arbitrate is right there in the BITs that have been signed by the Member States. The next paragraph takes aim at the Energy Charter Treaty,<sup>26</sup> to which the EU is not only a signatory but was instrumental in its creation:

<sup>20</sup> <<https://www.italaw.com/sites/default/files/case-documents/ita0530.pdf>> accessed 30 May 2024.

<sup>21</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf>> accessed 30 May 2024.

<sup>22</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw4074.pdf>> accessed 30 May 2024.

<sup>23</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw9152.pdf>> accessed 30 May 2024.

<sup>24</sup> <[https://files.lbr.cloud/public/2024-05/23-7008-2054271.pdf?VersionId=cyRGwiRqqiSkmv3gVSDLn3\\_Ga8bLeaw5](https://files.lbr.cloud/public/2024-05/23-7008-2054271.pdf?VersionId=cyRGwiRqqiSkmv3gVSDLn3_Ga8bLeaw5)> accessed 30 May 2024.

<sup>25</sup> <[https://finance.ec.europa.eu/document/download/901c4f5e-9c4e-4559-92a1-dc946e174ac5\\_en?filename=190117-bilateral-investment-treaties\\_en.pdf](https://finance.ec.europa.eu/document/download/901c4f5e-9c4e-4559-92a1-dc946e174ac5_en?filename=190117-bilateral-investment-treaties_en.pdf)> accessed 30 May 2024.

<sup>26</sup> <<https://www.energychartertreaty.org/Flipbook/38/>> accessed 30 May 2024.

*Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.*

The footnote referenced at the end of this paragraph leads to pages 3–4 of ‘Protection of Intra-EU Investment’<sup>27</sup> which is noted as a ‘Communication from the Commission to the European Parliament and the Council’. The introduction includes the statements:

*The Commission is committed to preserving and improving both a predictable, stable and clear regulatory environment and the effective enforcement of investors’ rights.*

and

*EU law protects all forms of EU cross-border investments throughout their entire life cycle.*

The evidence suggests otherwise. Later in the document, this statement is made:

*In addition, by setting up an alternative system of dispute resolution, intra-EU BITs take away from the national judiciary litigation concerning national measures and involving EU law. They entrust this litigation to private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice.*

The UK has wisely encouraged alternative dispute resolution as a way to keep pressure off the courts, through mediation, expert determination, and arbitration. Arbitration is not litigation; it is a means of resolving disputes between parties who have consented to arbitration, and the parties crucially get to choose their arbitrators, who have a duty to be impartial. There is no reason why arbitrators, with the assistance of the courts of the seat of the arbitration, cannot ‘properly apply EU law’ or have a ‘judicial dialogue’ with the CJEU. As noted above, the CJEU has previously accepted references from arbitrators and GFCJ referred questions to the CJEU on the Achmea case. The existing mechanism to refer to the CJEU is for the top court at the arbitral seat to consider references then request a preliminary CJEU ruling, as the GFCJ did in Achmea.

A key feature of BITs is to protect the legitimate expectations of the investor. That is, based on the law at the time of the investment, the investor should be able to rely on those laws in planning its investment. The document gives an interesting example, which shows that apparently such investors need a crystal ball so they can second-guess what retrospective changes might be made after making their investment:

#### Example 5 – The protection of legitimate expectations

C-201/08 – Plantanol GmbH & Co

German tax law provided for a tax exemption for a certain type of blended biofuel until the end of 2009. The tax exemption was withdrawn on 18 December 2006, with effect from 1 January 2007, i.e. 2 full years before the expiry date.

The Court of Justice recalled the content of the principles of legal certainty and the protection of legitimate expectations. However, it also underlined that, where a prudent and circumspect investor could have foreseen that the adoption of a measure was likely to affect his interests, he cannot plead that principle if the measure is adopted. The Court of Justice concluded that this is a factual appreciation to be made by the national court, but it confirmed that legal certainty and the protection of legitimate expectations do not in principle preclude a Member State from withdrawing a tax exemption scheme before the expiry date.

<sup>27</sup> <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52018DC0547>> accessed 30 May 2024.

How can any investor, prudent or not, foresee what future measures might be adopted that affect their interests? Does this only apply when a measure not yet adopted has been suggested before it made its investment?

## THE ENERGY CHARTER TREATY

The **Protection of Intra EU Investment** document also includes a statement that the Energy Charter Treaty (ECT) is a ‘*plurilateral investment treaty initiated by the EU to stimulate investments in the energy sector*’. If the ECT was initiated by the EU, how is it possible that the arbitration clause in the treaty suddenly becomes incompatible with the TFEU? It makes no sense. Article 26 covers the settlement of disputes between an investor and a treaty signatory (‘contracting party’). Article 26(3)(a) says that:

*Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.*

The ECT was signed on 17 December 1994. The 53 signatories include the EU and, separately, the EU Member States, plus non-EU Member States.<sup>28</sup>

The *Komstoy v Republic of Moldova* arbitration,<sup>29</sup> which related to the purchase and resale of electricity, was brought under the provisions of the Ukraine–Moldova BIT<sup>30</sup> (signed on 29 August 1995) and the ECT (signed by Moldova on 16 April 1998 and by Ukraine on 27 January 1999), between two parties who were not EU Member States. Unfortunately, for the claimant, Komstroy, the seat of the arbitration was Paris (proposed by Komstroy and accepted by Moldova). UNCITRAL arbitration rules applied and the agreed language was Russian.

The tribunal examined its jurisdiction under both the BIT and the ECT. They found that they had no jurisdiction to hear the claims under the BIT<sup>31</sup> and that they had jurisdiction to hear the first claim for US\$18,132,898.94 but not the second claim for US\$4,000,496.35<sup>32</sup> under the ECT. The award given on 23 October 2013 awarded the claimant 592,880,395 Moldovan Leus including interest for the claim (almost US\$46.5 million in total) and US\$200,000 in costs. As the respondent had refused to pay any advance costs for the arbitration, the respondent was ordered to reimburse the claimant the US\$340,000 that they had paid in advances.

On 25 November 2013, Moldova appealed to the Paris Court of Appeal to set aside the award.

On 15 April 2014, Komstroy wrote to Moldova seeking compliance with the award, which Moldova rejected on 5 August 2014.

On 14 November 2014, Komstroy petitioned the US District Court in Columbia to confirm the award<sup>33</sup> pursuant to the New York Convention.

On 12 April 2016, the Paris Court of Appeal delivered its judgment in the 2013 Moldova appeal<sup>34</sup> after a delay of 29 months. It annulled the arbitral award finding that the debt owed to Komstroy was not an investment under the ECT, that the tribunal therefore lacked jurisdiction, and it demanded that Komstroy pay Moldova €100,000.

On 11 April 2018, the Paris Court of Cassation issued a judgment<sup>35</sup> which annulled and cancelled the Paris Court of Appeal judgment of 12 April 2016 and restored the parties to the position they were in before that judgment. Moldova was to pay Komstroy €3000. The Court found

<sup>28</sup> <<https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/>> accessed 30 May 2024.

<sup>29</sup> Unofficial English translation of the Award <<https://www.italaw.com/sites/default/files/case-documents/italaw10494.pdf>> accessed 30 May 2024.

<sup>30</sup> <<https://edit.wti.org/document/show/6dcd8afb-bf8e-4d30-9fb5-016902695fc8>> accessed 30 May 2024.

<sup>31</sup> See para 292 of the Award.

<sup>32</sup> See para 294 of the Award.

<sup>33</sup> <[https://www.italaw.com/sites/default/files/case-documents/italaw4321\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw4321_0.pdf)> accessed 30 May 2024.

<sup>34</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw7237.pdf>> accessed 30 May 2024.

<sup>35</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw9617.pdf>> accessed 30 May 2024.

that the argument that the tribunal lacked jurisdiction was without merit and remanded the matter back to the Paris Court of Appeal to reconsider under a different panel.

On 13 November 2018, the US District Court of Columbia issued its Opinion and Order,<sup>36</sup> which lifted the previous order to stay the award pending the Paris appeal.

On 24 September 2019, the Paris Court of Appeal under a different panel issued a judgment<sup>37</sup> under which they requested the CJEU to advise on interpretation of the ECT which would be decisive to the dispute and in particular:

- Whether a debt arising from an electricity sales contract involving no investor contribution can constitute an investment under Article 1(6) or Article 1(6)(c) of the ECT?
- Whether a claim from an electricity sales contract can constitute an investment under Article 26(1) of the ECT?
- Whether a claim from a contract for the sale of electricity supplied at the border of the host state can be an investment when the investor does not carry out any economic activity in the receiving state under Article 26(1) of the ECT?

The Court stayed the proceedings pending a response from the CJEU.

Eighteen months later on 3 March 2021, the EU Advocate General Mr Maciej Szpunar issued his opinion.<sup>38</sup> He noted in Paragraph 9 that under Article 1520 of the French Code of Civil Procedure, an action for annulment of an arbitral award is ‘available only, *inter alia*, where the arbitral tribunal wrongly declared itself to have or not to have jurisdiction’. The Paris Court of Cassation had already found that the Tribunal did have jurisdiction.

After noting that the Claimant was not an enterprise within a Member State and the Respondent was not an EU Member State, he went on to find that the CJEU had jurisdiction to interpret the ECT as it was an integral part of the EU legal system. He went on to elaborate in Paragraphs 29–100 as to why the CJEU had jurisdiction and invoked the Achmea judgment, concluding that:

#### 4. Conclusion on the jurisdiction of the Court

<sup>98.</sup> Article 26 of the ECT is, in my view, not compatible with EU law in that it provides for recourse to an arbitral tribunal, with the result that such a dispute settlement mechanism cannot apply within the EU legal order.

He then answered the questions referred by the Paris Court of Appeal:

<sup>129.</sup> Accordingly, I propose that the answer to the first question referred should be that Article 1(6) of the ECT must be interpreted as meaning that a claim arising from an electricity supply contract which did not involve any contribution is not an investment within the meaning of that provision.

<sup>144.</sup> Therefore, in the event that the Court does not agree with my analysis of the first question referred, I propose that the answer to the second question referred should be that Article 26(1) of the ECT must be interpreted as meaning that the acquisition of a claim established by an investor from a third State not party to the ECT is an investment within the meaning of that provision, unless the sole purpose of such an acquisition was to benefit from the protection afforded by the provisions of the ECT and, in particular, to enable an action to be brought before an arbitral tribunal against a Contracting Party, which it will be for the referring court to ascertain.

<sup>36</sup> <[https://www.italaw.com/sites/default/files/case-documents/italaw10096\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw10096_0.pdf)> accessed 30 May 2024.

<sup>37</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw10856.pdf>> accessed 30 May 2024.

<sup>38</sup> <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CC0741>> accessed 30 May 2024.

<sup>154</sup>. Therefore, in the event that the Court does not agree with my analysis of the first and second questions referred, I propose that the answer to the third question referred should be that Article 26(1) of the ECT must be interpreted as meaning that a claim held by an investor of one Contracting Party against an operator of another Contracting Party is an investment of the former in the area of the latter.

#### V. Conclusion

<sup>155</sup>. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the cour d'appel de Paris (Court of Appeal, Paris, France):

Article 1(6) of the Energy Charter Treaty, signed in Lisbon on 17 December 1994 and approved on behalf of the European Union by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, must be interpreted as meaning that a claim arising from an electricity supply contract which did not involve any contribution is not an investment within the meaning of that provision.

On 2 September 2021, almost 2 years after the Paris Court of Appeal referred its questions, the CJEU gave its judgment<sup>39</sup>:

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 1(6) and Article 26(1) of the Energy Charter Treaty, signed at Lisbon on 17 December 1994, approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997, must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment' within the meaning of those provisions.**

On 10 January 2023, the Paris Court of Appeal gave its judgment.<sup>40</sup> It annulled the arbitral award given nearly 10 years previously on the grounds that the tribunal lacked jurisdiction and awarded Moldova €250,000.

## TERMINATION OF EU INTRA-INVESTOR PROTECTIONS

On 5 May 2020, the 23 EU Member States signed the retrospective **Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union**.<sup>41</sup>

This Agreement stated that '*Arbitration clauses are contrary to the EU treaties and thus inapplicable*'. While the awards of any concluded arbitrations are not affected, any arbitrations in progress will not have any subsequent award recognized or enforced. This affected the award made in favour of the Micula brothers against Romania (see above). While Romania's breach of the BIT occurred before Romania's accession to the EU, the award was given by the tribunal after Romania's accession to the EU. Somehow these damages were considered by the European Commission to be 'state aid' and illegal under EU law.

The EU defines state aid as<sup>42</sup>:

*State aid means action by a (national, regional or local) public authority, using public resources, to favour certain undertakings or the production of certain goods. A business that benefits from such aid thus enjoys an advantage over its competitors.*

<sup>39</sup> <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5428246>> accessed 30 May 2024.

<sup>40</sup> <<https://www.italaw.com/sites/default/files/case-documents/italaw170881.pdf>> accessed 30 May 2024.

<sup>41</sup> <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01))> accessed 30 May 2024.

<sup>42</sup> <<https://eur-lex.europa.eu/EN/legal-content/glossary/state-aid.html>> accessed 30 May 2024.

*Aid granted selectively by EU countries or through state resources and which may affect trade between EU countries or distort competition is prohibited under Article 107 of the Treaty on the Functioning of the European Union (TFEU).*

It is not clear how this tribunal's award meets the EU legal definition of State Aid. The award cannot affect trade or distort competition; the award was compensation for the destruction of the value of the Miculas' investment.

To replace a pending arbitration as the dispute resolution mechanism, Article 9 of the Agreement sets out a settlement procedure. This requires the investor to suspend the arbitration and initiate the procedure within 6 months of the termination of the BIT. The procedure is managed by an 'impartial facilitator'. Each party bears its own costs and half of the facilitators' fees. If one party refuses to agree to a settlement, there is no mechanism to produce an enforceable award.

The investor has lost a significant sum of money by the unfair and inequitable treatment by a Member State. It has incurred costs over a long time to start an arbitration, and all are lost. Then it has to further bear its own costs and half of the facilitators' costs, with no guarantee of a settlement.

### EU–CANADA CETA ARBITRATION

The Comprehensive Economic and Trade Agreement (CETA) is an agreement between Canada and the EU.<sup>43</sup> It was signed on 30 October 2016.

Articles 29-6 to 29-19 set out rules for resolving disputes by arbitration. Article 29-17 states that a tribunal will interpret CETA provisions in accordance with the customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties.

An EU trade concept paper, **Investment in TTIP and beyond—the path for reform**<sup>44</sup> states that:

*Under CETA, the EU and Canada can issue binding interpretations on how the provisions should be interpreted, and the ISDS Tribunal is obliged to respect those interpretations.*

There is no reference within CETA that sets out a procedure for a tribunal established under CETA to make a reference to the courts of Canada or the EU. It is silent on the choice of seat of the arbitration, only specifying that one hearing will take place in person, in Brussels, if the requesting party is Canadian or in Ottawa if the requesting party is European.<sup>45</sup>

The EU trade concept paper also states:

*We are making investors who bring a case and lose, pay for all the costs of the legal proceedings. This "loser pays principle", introduced for the first time ever in CETA, will not only discourage frivolous or unfounded claims but will also mean that the investor must pay the litigation costs of the state he has challenged (at present, even if a government successfully defends itself, it often has to bear its litigation costs). Given the financial risk, an investor will think twice before bringing any ISDS claim.*

The 'loser pays principle' has operated for decades and is not a CETA innovation. There is no reference to apportioning arbitration costs in CETA,<sup>46</sup> only to mediation costs. For mediations, each party bears its own costs and half the cost of the mediator. The writer refers to Litigation when it should be Arbitration, confusing these two very different procedures.

<sup>43</sup> <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> accessed 30 May 2024.

<sup>44</sup> <<https://www.tweedekamer.nl/downloads/document?id=2015D17383>> accessed 30 May 2024., see p 2, 5th bullet point. The paper is undated, but the url indicates it was uploaded in 2015.

<sup>45</sup> See Annex 29A <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/29-A.aspx?lang=eng#a>> accessed 30 May 2024.

<sup>46</sup> There is one passing reference in Annex 29, para 51 that translation costs shall be borne equally by the Parties.

Page 7 of the concept paper sets out that the EU should require ‘*certain qualifications of the arbitrators, in particular that they are qualified to hold judicial office in their home jurisdiction or a similar qualification*’. In other words, arbitrators should be judges and there should be a closed list of such arbitrators. In deciding commercial disputes, there are usually commercial and technical as well as legal aspects. It makes no sense that a three-person tribunal should comprise three judges unless the only matters in dispute are based on legal interpretation. Even then, having three eminent lawyers, all experienced arbitrators (including two QCs) on a tribunal does not guarantee that an arbitration award made solely on legal interpretation cannot be successfully contested: see *Herculito Maritime Ltd and others v Gunvor International BV and others* [2020] EWHC 3318 (Comm).<sup>47</sup>

A version of the text in the concept paper can be found in Article 741(2) on page 943 of the **Trade and Cooperation Agreement between UK and EU**<sup>48</sup>:

*All arbitrators shall be persons whose independence is beyond doubt, who possess the qualifications required for appointment to high judicial office in their respective countries or who are jurisconsults of recognised competence.*

If a panel comprises three judges, the ability of this panel to provide optimum judgments of disputed issues would be lower than if the panel is more functionally diverse. In the example of a dispute involving matters which are commercial and technical in nature, there is a significant benefit to the functioning of the tribunal if some of the arbitrators have specialist knowledge of the commercial and technical field. This is why historically arbitration developed to resolve disputes within a particular field with practitioners in the field and did not usually involve lawyers at all. Within a mixed tribunal there is then a group ability to understand the issues and evidence, identify expert opinion that is impartial or not, and draft a just award.

Both **CETA** and the **Trade and Cooperation Agreement between the UK and the EU** provide for arbitrators to be chosen from pre-determined lists.

### AVOIDING THE EU’S REACH

On 3 April 2024, the Swiss Federal Supreme Court upheld an ECT award seated in Switzerland which had been made between France’s EDF and Spain.<sup>49</sup> The tribunal had interpreted the ECT (Article 26) in accordance with the Vienna Convention on the Law of Treaties (Article 31) and concluded that the ECT does not show any incompatibility with EU law and that EU law does not take precedence over the ECT. They also noted that the CJEU’s Komstroy judgment is not binding on an arbitral tribunal constituted under a multilateral treaty which is foreign to the EU treaties. The judgments in Achmea and Komstroy have not received the assent of all parties to the ECT and are not enforceable against states that are not EU Member States. The Swiss court agreed that the ECT must be interpreted in accordance with Article 31 of the Vienna Convention.

The judgment also notes in 7.6.5 that ‘*For several years, EU bodies have, in fact, been leading a crusade against such international arbitrations*’ and referred to Achmea. The CJEU’s Komstroy judgment did not take into account international law or the rules on treaty interpretation. The appeal by Spain against the award was dismissed and costs were awarded against them.

An arbitration between two parties who were not subject to EU law had their award annulled by the CJEU because their chosen arbitral seat was Paris and therefore the Lex Fori was French law, which is subordinate to CJEU decisions. The clear conclusion for non-EU parties is to choose a seat outside of the EU in arbitration agreements. Switzerland comes to mind as a superior seat, as does England and Wales (both of which are positively supportive of arbitration to resolve disputes).

<sup>47</sup> <<https://www.bailii.org/ew/cases/EWHC/Comm/2020/3318.html>> accessed 30 May 2024.

<sup>48</sup> <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/982648/TS\\_8.2021\\_UK\\_EU\\_EAEC\\_Trade\\_and\\_Cooperation\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf)> accessed 30 May 2024. signed on 30 December 2020.

<sup>49</sup> <[https://italaw.com/sites/default/files/case-documents/italaw180930\\_0.pdf](https://italaw.com/sites/default/files/case-documents/italaw180930_0.pdf)> accessed 30 May 2024.

## CONCLUSION

The treatment of investors by the EU has become increasingly arbitrary and subordinate to the desires of the Member States and the European Commission.<sup>50</sup> Investors have been subjected to the introduction of changes in law that undermine their interests with retrospective effect. The EU expects investors to be able to foresee future unfair and inequitable treatment at the whim of the Member State hosting their investments. This is not the rule of law, it is the rule of arbitrary power. Breaches of agreement by a Member State are permissible, whereas breaches by the investor could lead to sanctions.

In *Achmea*, the CJEU based its judgment on a supposed inability of a tribunal to correctly apply EU law or to refer to the EU courts for a preliminary ruling. It is apparent that this is not true. CETA does not set out any mechanism for a tribunal to refer to the courts, yet the EU recently signed this free trade agreement and so presumably agrees with it in the absence of such a referral mechanism.

Having closed lists of arbitrators who are judges which the parties must choose from is highly undesirable. One of the main benefits of arbitration is that the parties get to choose the arbitrators, and that choice must be a free one. Allowing the lists to be carefully cultivated could be seriously detrimental to the parties in dispute. The UK has wisely enshrined the right of parties to choose their tribunal in law.<sup>51</sup> The EU wishes to hand-pick arbitrators and to exclude those with independence (of the EU legal structure) and relevant non-legal expertise. Closed lists reduce the number of arbitrators available and damage the usefulness of the arbitral process.

The evidence suggests that the EU courts are not independent of the executive, and the executive is willing to act against the legitimate interests and legal rights of investors when it suits whatever plan or prejudices that they have in mind. The evidence shows that the European Commission, with the cooperation of the CJEU, has declared war on investors, and on arbitration as an alternative dispute resolution method where it cannot at least influence the outcome with closed arbitrator lists.

The lessons for investors are clear. Avoid investment in EU Member States. Specify a non-EU seat (and with both the *Lex Arbitra* and *Lex Fora* being the same<sup>52</sup>) in arbitration agreements, and do not leave the choice of seat to a future tribunal.

<sup>50</sup> See also <[https://www.gibsondunn.com/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards/#\\_ftn6](https://www.gibsondunn.com/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards/#_ftn6)> accessed 30 May 2024.

<sup>51</sup> See s 16, Arbitration Act 1996. <<https://www.legislation.gov.uk/ukpga/1996/23/section/16>> accessed 30 May 2024.

<sup>52</sup> See <[https://youtu.be/5Kq-DG\\_Od1s](https://youtu.be/5Kq-DG_Od1s)>.