Intra-European Union Investment Protection: *What Now?*

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Introduction

At the time of the Court of Justice of the European Union's ('CJEU') ruling in the *Achmea* case,[1] 196 intra-EU Bilateral Investment Treaties ('BITs') were in force. Subsequently, in January 2019, the EU Member States[2] issued a declaration[3] agreeing to terminate existing BITs between them ('the Declaration') by means of an agreement ('the Agreement').[4] The resulting Agreement, signed by 23 Member States in May 2020, ultimately entered into

1 CJEU, Case C284/16, *Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158 (*Achmea* case).
2 Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia and Slovenia.
3 'Declaration of the representatives of the governments of the Member States, of 15 January 2019 on the legal consequences of the judgment of the court of justice in Achmea and on investment protection in the European Union' (Brussels 2019) <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf> accessed 3 September 2021.
4 'Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union' *Official Journal of the European Union* (29 May 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22020A0529(01)&from=EN> accessed 3 September 2021.

force on 29 August 2020. This has prompted concerns from EU investors (and even Member States)[5] as to what legal safeguards are left for their intra-EU investments now that the BITs are being terminated. These concerns have done nothing but increase, especially after the very recent publication of the CJEU's judgment in Case C-741/19, *Republic of Moldova v Komstroy LLC*[6], on which the Court rules that that ECT intra-EU arbitrations are contrary to EU law.

This article provides a blueprint of the legal scheme for investment protections inside the EU and highlights structural differences *vis-à-vis* the BITs regime, which in the light of the current state of affairs in the intra-EU investment arbitration arena the EU Institutions seem willing to assess and tackle in order to alleviate the concerns of relevant stakeholders.

5 For example, 'Declaration of Luxembourg' on the 'Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union' *European Council of the European Union* <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2019049&partyid=LU&doclanguage=en> accessed 3 September 2021: Luxembourg reiterates the need to intensify discussions without undue delay with the aim of ensuring complete, strong and effective protection of investments within the EU in line with its legal framework and compatible with the right to regulate as incorporated in the Declarations of Member States of 15 and 16 January 2019 and in recital XVI of this agreement. We call upon the European Commission and all Member States to start, without any delay, a process with the aim to ensure complete, strong and effective protection of investments within the EU and adequate instruments in this regard. We request the European Commission to put forward a concrete plan for such a process.

6 CJEU, Case C-741/19, *Republic of Moldova v Komstroy LLC* (2 September 2021) ECLI:EU:C:2021:655 (*Komstroy* case).

Although the concept of "EU investment law" is not recognised and investors are not granted a special legal status under EU law, the rights of investors, as individuals, entrepreneurs or legal persons are protected under EU rules. However, as opposed to international investment law, these safeguards are codified in various sources of law

The Fundamental Elements of Investor Protection Under Bilateral Investment Treaties

A comparative analysis of the EU system of investment protection after the Agreement (and the *Komstroy* decision) may well be preceded by a brief reflection on the former intra-EU BITs substantive and procedural tools under which investors could claim against specific state measures.

The most frequently invoked investment treaty standard is the fair and equitable treatment ('FET') of foreign investments. Sometimes seen as a catch-all clause which covers the gap left by other more specific standards, FET aims to ensure a consistent, stable and predictable legal framework for foreign investments in the host State.[7] However, a State regulatory measure will most likely not constitute a breach of the FET if it pursues a public purpose (e.g., public health, safety, morals, welfare), complies with investors' legitimate expectations and is proportional, non-arbitrary and non-discriminatory.[8]

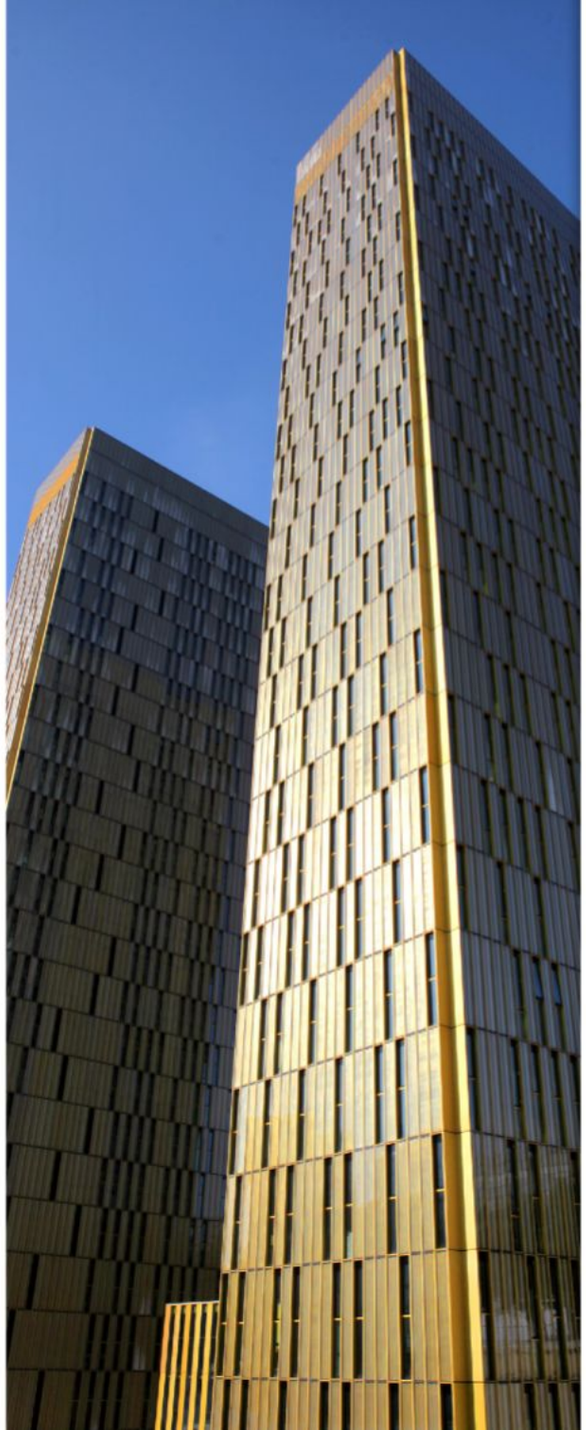
Furthermore, a typical substantive right in BITs is the right to full protection and security, which safeguards against physical and (according to some views) legal infringements of the host State directed at foreign investors. Relatedly, included in either the principle of full protection and security or FET,[9] protection from denial of justice -understood as any serious misadministration of justice by the courts of the host country-[10] is also

7 According to the tribunal in *Tecmed v. Mexico*, from the concept of legitimate expectations it follows that the State, in its relations with the foreign investor, must behave in 'a consistent manner, free from ambiguity and totally transparently' (see *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (23 May 2003), para 154). Therefore, a State might be found liable for breaching the FET principle if an act of the State goes against or reverses the assurances made by the State to the foreign investor, regardless of whether they were made in contracts, in non-contractual documents or in verbal communications of senior officials of the State.

8 As to the non-discrimination principle comprised in the FET standard, it is not the same as the BIT obligation to accord the most favorable treatment or national treatment to the investor and its investment. While the latter deals with discrimination based on nationality, the former is also about targeting a specific foreign investor based on additional criteria such as gender, religion or race.

9 Some FET clauses expressly include (as part of the principle and apart from other elements also included in the FET principle) protection from denial of justice.

10 This standard can be pleaded by the claimant when the domestic courts refuse to initiate legal proceedings (i.e., deny access to justice), when they incur undue delays, when they administer justice in a grossly improper way



enshrined in many treaties. Additionally, although not included in every BIT, for investors who carry out their investments by virtue of a contract signed with the host State (or any State entity), the so-called umbrella clauses may provide for a valid claim since they serve to elevate a breach of a contractual obligation by the State to a breach of the applicable treaty. Lastly, another characteristic safeguard in investment treaties is protection against illegal expropriation, which from the perspective of international investment law may occur directly or indirectly.[11]

From a procedural perspective, when faced with a State breach of any of the abovementioned substantive rights, investors are entitled to seek redress before a neutral and independent international tribunal, sometimes backed by worldwide recognised international investment institutions such as ICSID[12]. The States' offer to arbitrate is enshrined in the treaty, and there is mutual consent when the investor submits its request for arbitration to the corresponding arbitration court (or otherwise accepts the offer to arbitrate), provided that the investor and its investment qualify as a protected 'investor' (*ratione personae*)[13] and a protected 'investment' (*ratione materiae*)[14] under the applicable BIT on the critical dates (*ratione temporis*).

An award in favour of the investor will allow the investor to obtain reparation (at least to some degree) through restitution or, more commonly, compensation. Concerning the enforcement of investor-State awards, the pecuniary obligations in ICSID awards may be recognised and enforced in any contracting state to the ICSID Convention as final judgments of a court in the State in question.[15] Other investor-State awards are typically enforceable under the New York Convention,[16] in the territory of any contracting State in which enforcement is sought.

Investment Protection Under EU Law and its Enforcement

Although the concept of "EU investment law" is not recognised and investors are not granted a special legal status under EU law, the rights of investors, as individuals, entrepreneurs or legal persons are protected under EU rules. However, as opposed to international investment law, these safeguards are codified in various sources of law, both primary[17] and secondary[18].

Firstly, as economic operators, investors are protected when investing and operating in other Member States by the prohibition against discrimination established in Article 18 of the Treaty on the Functioning of the European Union ('TFEU'). They are also protected through the fundamental freedoms[19] within the EU, particularly the freedom of movement of goods (article 28 TFEU *et seq*), the freedom of movement of capital (article 63 TFEU) and the freedom of establishment (article 49 TFEU), which allow them to operate on a cross-border basis with the same protections as nationals of their host Member State. Investors may also invoke the EU competition rules against national measures (articles 101 to 109 TFEU).

Likewise, investors enjoy fundamental rights as EU citizens. Both articles 16 and 17 of the Charter of Fundamental Rights of the European Union ('CFREU'), which has the same legal value as the Treaties[20] and is applicable to Member States when they implement EU law,[21] guarantee any EU investor the freedom to conduct a business[22] and the right to

(lack of due process, including failure to notify proceedings and denial of the opportunity to be heard), or when there is 'a clear and malicious misapplication of the law' (see *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No ARB (AF)/97/2, Award (1 November 1999), paras. 102-103). There are however other situations where the arbitral tribunal will likely find that a denial of justice exists, such as a refusal to decide, discrimination against the foreign litigant, lack of independence of the judiciary from the legislature and executive, failure to enforce judgments or awards and corruption of the judge.

11 While a direct expropriation involves deprivation of specific rights acquired by a foreign investor by the host State where there is a transfer of the legal title of the owner (the foreign investor) to the host State or a physical appropriation of the asset, in an indirect expropriation the legal title of the rights acquired by the foreign investor is, in principle, not directly affected.

12 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'),

13 Although the definition of investor varies from one treaty to another, legal entities are traditionally protected when they are constituted or have an effective seat in one of the contracting states. Local investors may also be protected if controlled by an investor of a contracting party.

14 "Investments", conversely, benefit from a broad, non-exhaustive definition, including shares and other forms of participation in companies.

15 ICSID Convention, Art. 54.

16 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 ('New York Convention').

17 The Treaties, the Charter of Fundamental Rights of the EU and the general principles of EU law.

18 Sources of law emanating from the EU Institutions, most importantly legislative acts such as directives or regulations, but also other forms of binding acts such as decisions.

19 Added to these, the freedom of movement of workers may also protect a given investor's workforce (TFEU, Art. 45).

20 Treaty on European Union (signed 1992) Art. 6.1 (now: Consolidated Version of the Treaty on European Union, *Official Journal of the European Union* (26 October 2012)) ('TEU').

21 Charter of Fundamental Rights of the European Union (7 December 2000, replaced by the version of 26 October 2012 when the Treaty of Lisbon entered into force, signed 13 December 2007) Art. 51.1.

22 As recently explained by the CJEU in its judgment of 15 April 2021 in Joined Cases C-798/18 and C-799/18, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others, Athesia Energy Srl and Others v Ministero dello Sviluppo Economico, Gestore dei*

property (including a specific provision against expropriation in article 17.1 CFREU).[23] Investors also enjoy a right to good administration (article 41 CFREU) and their right to an effective judicial remedy (article 47 of the CFREU), to be considered jointly with article 19 TEU establishing that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

These market freedoms and fundamental rights are not absolute, as they must be balanced against overriding reasons relating to the public interest such as consumer or environmental protection.[24] Nevertheless, any restriction on market freedoms and fundamental rights by a Member State must necessarily[25] be implemented in compliance with the general principles of EU law.[26] Namely, the principle of proportionality,[27] the principle of legal certainty[28] and the principle of protection of legitimate expectations.[29]

Lastly, intra-EU investments also benefit from numerous legislative acts, such as the Services Directive,[30] which aims to eliminate barriers created by Member States to the development of service activities, and the Public Procurement Directive, which allows access to public procurement to cross-border investors in the EU and establishes rules that govern specific types of tenders.[31] Moreover, investors also benefit from the EU's tax rules.[32]

The enforcement of all of these rights takes various forms; it may be preventive,[33] which remains exceptional,

EU Institutions owe investors as important stakeholders —at the very least— a thorough analysis of the improvements that may be implemented within the EU to enhance investor protection after *Achmea*

reserved to specific areas of EU law; or *ex post facto*. Investors' rights are protected by the Commission, which acts as the guardian of Treaties pursuant to article 17(1) TFEU as well as by the Member States, which are at all times bound by a duty of sincere cooperation and must ensure fulfilment of the obligations resulting from the Treaties or acts of Institutions of the EU.[34]

In terms of judicial protection, the enforcement of an investor's right occurs at the EU and Member-State level. Investors may seek interim relief[35] in national courts and file for State liability as a consequence of a violation of EU law,[36] i.e., *Francovich* damages. This is the sole mechanism available in the EU law framework that is akin to compensation under BITs. The requisites to succeed in a *Francovich* damages claim are[37] the existence of (1) a sufficiently serious breach of a rule of EU law that is intended to confer rights on individuals; (2) a direct causal link between the breach attributable to the institution concerned and the damage sustained by the injured party; and (3) actual damage.[38]

Other rules, long established by CJEU case-law, ensure the effectiveness and the primacy of EU law. National judges must interpret national provisions consistently with EU law,[39] set aside *ex officio* every act that conflicts with EU law[40] and eliminate the consequences resulting from a violation of EU law.[41]

At the EU level, enforcement measures may be direct or indirect. In the course of national proceedings, the national court may seek a preliminary ruling on the interpretation or validity of EU Law pursuant to article 267 TFEU. But it is the courts, not the parties, that make the request. Preliminary rulings on the

servizi energetici (GSE) SpA [2020] ECLI:EU:C:2020:876, the protection afforded by article 16 of the CFREU covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition.

23 'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.' With reference to CJEU, Case C-235/17, *European Commission v Hungary* [2018] ECLI:EU:C:2018:971, the CJEU has pointed out that the protection conferred by that provision must meet two cumulative conditions: (i) that the rights relied on have an asset value (i.e., legitimate expectations of future property claims, including contractual rights and debt) and (ii) that an established legal position is created from those rights which enables the holder to exercise them autonomously and for his benefit (the CJEU has held that future income cannot be considered to constitute "possessions" that may enjoy the protection of that article unless it has already been earned, it is definitely payable or there are specific circumstances that can cause the person concerned to entertain a legitimate expectation of obtaining an asset). See judgment of 15 April 2021 in CJEU, Joined Cases C-798/18 and C-799/18 (n 18), paras 33-42.

24 e.g., Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), art 4 (8).

25 Some restrictions shall never be justified, such as a general presumption of fraud against foreigners (CJEU, C-577/10, *Commission v Belgium* [2012] ECLI:EU:C:2012:814, para 53).

26 Panagiotis Takis Tridimas, 'The General Principles of Law: Who Needs Them?' (2015) Les Cahiers de Droit, 52(1), 419-441.

27 CJEU, Case C602/19, *Kohlpharma* [2020] Judgment (8 October 2020) ECLI:EU:C:2020:804, para 41.

28 CJEU, Case C677/19, *Valoris* [2020] Judgment (14 October 2020) ECLI:EU:C:2020:825, para 25.

29 CJEU, Case C124/18, *Red Bull* [2019] Judgment (29 July 2019) ECLI:EU:C:2019:641, para 79.

30 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

31 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

32 e.g., Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

33 As in the case of prior notification to the European Commission of State-aid measures pursuant to article 108 TFEU or the obligation of Member States to notify the Commission of specific administrative or legislative measures prior to their adoption. The Commission, under certain rules, may issue recommendations to the Member State concerned and, in some cases, may even issue binding decisions (TFEU art 288).

34 TEU, Art. 4.3.

35 CJEU, Case C-213/89, *Factortame* [1990] Judgement (19 June 1990) ECLI:EU:C:1990:257; and CJEU, Joined Cases C-143/88 and C-92/89, *Zuckerfabrik* [1991] Judgment (21 February 1991), ECLI:EU:C:1991:65.

36 CJEU, Joined Cases C-6/90 and C-9/90, *Francovich* Judgment (19 November 1991) ECLI:EU:C:1991:428.

37 Unlike the EU institutions' liability, which is enshrined in Art. 340 TFEU, Member-State liability (i.e. '*Francovich* damages') is not established in the Treaties and has been developed through case law.

38 CJEU, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* Judgment (5 March 1996) ECLI:EU:C:1996:79.

39 CJEU, Case C-106/89, *Marleasing* Judgment (13 November 1990) ECLI:EU:C:1990:395; and CJEU, Case C-91/92, *Facini Dori* Judgment (14 July 1994) ECLI:EU:C:1994:292.

40 CJEU, Joined Cases C-188/10 and C-189/10, *Melki and Abdeli* Judgment (22 June 2010) ECLI:EU:C:2010:363.

41 CJEU, Case C-503/04, *Commission v Germany* Judgment (18 July 2007) ECLI:EU:C:2007:432.

interpretation of EU law, although ancillary to the national proceedings as an indirect remedy, are nevertheless extremely important indirect instruments through which the CJEU *de facto* controls national measures' compliance with EU law.

At the EU level, an action for infringement exists as a direct remedy. When Member States infringe EU law, the Commission or other Member States may pursue infringement proceedings before the CJEU, as set forth in articles 258 *et seq.* TFEU.[42] Investors, like any other individual or institution other than the Commission and the Member States, lack legal standing in these proceedings.

What Have Investors Lost or Won, if Anything, with the Termination of (Most) Intra-EU Bilateral investment Treaties?

The termination of most intra-EU BITs has caused investors to look toward the EU legal system and ask: *what now?*, contrasting the EU investment protection with the BIT system. The most obvious differences between the two systems can be classified into three categories: systemic, substantive and procedural.

With regard to **systemic differences**, the main distinction is that the investment law system is specifically conceived for the investor to enjoy international protection that is over and above the law of the host State through a compact set of rules that would apply in a dispute against the State. In contrast, EU law does not provide, as indicated, a uniform body of rules granting the investor a special legal status. However, this circumstance does not render the EU's system ineffective: other relevant economic operators are governed by the same heterogeneous set of instruments that make up the EU's legal system and their protection under EU law is beyond doubt.

Likewise, the conceptual basis of each system varies significantly. The main reason why State parties under the BIT system rely on the adjudication of a supranational depoliticised arbitral tribunal is because, at its inception, the BIT system was devised on the basis that investors do not trust the impartiality of domestic courts to settle a dispute with the host State. Conversely, the EU legal system is structured on the fundamental premise that Member States share a set of common values, as stated in Article 2 TEU, and that relations between Member States are based on mutual trust.[43] This premise implies and justifies the existence of mutual trust among Member States that those values will be recognised and that, therefore, the law of the EU implementing the same will be respected.[44]

In this sense, these systemic differences may not tip the balance in favour of either protection regime. In fact, the very existence of mutual trust within the Union could call into question the need for BITs. We must not forget that the main object and purpose of BITs, as established in most of their preambles, is to create an investment-friendly environment in order to enhance the flow of capital and attract foreign investment for the economic benefit of both contracting parties. Thus, the premise of this BIT framework is that the investment-friendly environment it creates to boost the economy of the signatory countries is arguably missing in the territory of any of the contracting States. The question then arises as to whether that premise no longer applies in intra-EU investments given the protection that exists in the territory of the EU.

Interestingly, the intra-EU BITs that have been terminated by the Agreement (as well as those that remain in force) were between countries of the European Community (as it was at the time they entered into force) and countries that were not Member States at that time (but currently are).[45] The background and legal framework between investors

42 Judgments are declaratory in nature and, therefore, do not result in the annulment of infringing national acts, nor do they result in awards of pecuniary compensation by the CJEU in favour of claimants. Nevertheless, when the CJEU declares an infringement, that circumstance provides the claimant with a strong basis for requesting '*Francovich* damages' from the infringing Member State in national proceedings.

43 See a detailed explanation of this "structural principle of EU Law" in S. Prechal, 'Mutual trust before the Court of Justice of the European Union' (2017) European Papers, Vol. 2, NO1, 75-92.

44 *Achmea* Judgment (n 2) , para. 34. Moreover, Art. 19 TFEU and Art. 47 CFREU set forth the standards of independence further developed under both the case law of the CJEU and the European Court of Human Rights.

45 The BITs were signed between 1988 and 1999, all of them before one of the contracting parties was a Member State of the EU (Bulgaria, Poland, Hungary, Croatia, Malta, Latvia, Lithuania, Cyprus, Estonia, Czech Republic, etc.).

from each contracting party since their accession to the EU can be said to have radically changed in favour of investors. The EU's legal framework is particularly robust and effectively enforced by the CJEU. Therefore, if BITs in Europe were concluded mainly to protect investors when performing their economic activities in then-non-EU countries due to the inexistence of the guarantees that the internal market rules do afford, it could be argued that intra-EU BITs no longer respond to a systemic need.

In relation to **substantive differences**, it can be argued that substantive protections under BITs have been largely developed by tribunals and scholars. The situation is not the same in EU law, simply because to date the CJEU has had very few opportunities to rule on matters relevant to investors.[46] The actual reach of some (though not all) statutory provisions remains undefined regarding investors and investments. The lack of CJEU's precedents in this area limits the ability of investors to predict the potential outcome of a dispute, which may be perceived as entailing a lack of legal certainty. But these concerns are relative, as legal certainty never equates to the total predictability of a judicial outcome. In any case, this would only be a temporary issue, since EU law affords EU investors protection as described above, to which EU investors will likely resort more now that the intra-EU BIT system has *almost* disappeared.

In this regard, even though they may need further development through CJEU rulings, the substantive standards of EU law are useful to adequately tackle investment protection. Does FET provide better protection than the internal market's fundamental freedoms and the fundamental rights enshrined in primary law instruments? Is the protection from denial of justice preferable to the right to an effective remedy and the right to good administration? Does the scope of application of the CFREU really limit the protection investors would enjoy compared to what the BIT system offers? It seems reasonable to think that this would not be the case as even though the EU may lack experience, it has more tools than the BITs to bring redress to a distressed investor.[47]

Lastly, we briefly address **enforcement differences**. The procedural rules are where we find the most significant dissimilarities between these two worlds. While international arbitrators may adjudicate the claim of an investor and impose compensation for losses incurred as a consequence of a breach of investment-protection standards, the only similar remedy investors are left with in the EU are *Francovich* damages.

Although *Francovich* damages may be considered a perfectly valid instrument, some legal scholars have raised doubts about their effectiveness.[48] It is undeniable that investors have lost quite a bit of comfort and now face 27 different legal systems (and, therefore, 27 different procedural standards) in which they may potentially claim damages. It could also be argued that investors are now forced to comply with a higher standard when claiming damages: the BITs' safeguards seek to give investors rights (which is not always the case in the EU legal system) and in order to claim compensation "a sufficiently serious breach" of its standards is not required, as opposed to under the *Francovich* damages rule, as explained above. Furthermore, direct actions are only available against the EU institutions, and judicial review by the CJEU does not result in reparation for investors. This notwithstanding, the procedural autonomy of Member States must be balanced against the principles of effectiveness and equivalence.[49] Likewise, the CJEU and the Commission[50] continue to monitor that Member States comply with *Francovich*.[51]

As long as there are still BITs between Member States and third countries EU investors may start to consider investment treaty planning when structuring their investments within the EU to continue enjoying BIT protections

A Look to the Future

While there was still some debate over the reach of *Achmea* and the Agreement was still taking place, the Commission started a public consultation process in 2020 'to assess the current system of investment protection and facilitation within the EU' and work 'towards a comprehensive policy on intra-EU investments with the view of better protecting and facilitating cross-border investments,'[52] in a clear attempt to honour the Agreement's preamble commitment in this line.[53] And before

46 The level of protection of investors provided by some instruments under EU law remains unknown. The existing case law can be characterised as concerning an investment protection dispute *vis à vis* the activity of a Member State. For example, the CJEU has only dealt with one case on indirect expropriation, as seen in CJEU, Case C-52/16, *Segro* Judgment (6 March 2018) ECLI:EU:C:2018:157.

47 In some cases, the EU substantive tools are more numerous and versatile. The BIT system does not have specific rules on tax or competition nor mechanisms on preventive enforcement.

48 See, for example, Tobias Lock, 'Is private enforcement of EU law through State liability a myth? An assessment 20 years after Francovich' (2012) 49 Common Market Law Review, 6.

49 Law, S. and Nowak, J.T. 'Procedural Harmonisation by the European Court of Justice' in Gascón Inchausti, F. and Hess, B. (eds.), *The Future of the European Law of Civil Procedure* (Intersentia 2020) 31 et seq.

50 Other issues may arise from the fact that the Commission has discretion to initiate infringement proceedings.

51 e.g., CJEU, Case C-379/10, *Commission v Italy* Judgment (24 November 2011) ECLI:EU:C:2011:775.

52 European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, 'Public consultation document. An intra-EU Investment Protection and Facilitation Initiative' <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2020-investment-protection-consultation-document_en.pdf> accessed 3 September 2021.

53 'Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union', Official Journal of the European Union (29 May 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22020A0529(01)&from=EN> accessed 9 December 2020:

the consultation has even finished the *Komstroy* decision has jumped into the field as recently as 2 September 2021[54], adding to the uncertainties that already lingered[55].

On the one hand, in February 2020 the Supreme Court of Sweden requested a preliminary ruling from the CJEU on whether the *Achmea* ruling would require it to set aside two intra-EU BIT[56] awards against Poland, even if Poland accepted the request for arbitration and did not object to the tribunal's jurisdiction.[57] Or in other words, whether the absence of an objection to the validity of an arbitration agreement as such may also cause a binding arbitration agreement to be formed on contractual grounds. In April 2021, Advocate General Kokott argued that individual arbitration agreements between Member States and investors from other Member States concerning the application of EU law are compatible with the duty of sincere cooperation and the autonomy of EU law 'only if courts of the Member States can comprehensively review the arbitration award for its compatibility with EU law, if necessary after requesting a preliminary ruling under Article 267 TFEU.'[58] The CJEU's final say on this matter is of great interest, especially if it pronounces on the level of merits review of the award that Member States' courts must carry out in annulment proceedings in order for the abovementioned 'comprehensive review' standard to be satisfied.

Further, although in February 2021 Italy convinced Swedish courts to seek for the first time a preliminary ruling by the CJEU on whether *Achmea* bars intra-EU investment disputes under the Energy Charter Treaty ('ECT')[59], it has paradoxically been in the context of an non-EU arbitration[60] that the CJEU has finally addressed the question of the applicability of *Achmea* to the investor-state arbitration clause set forth in article 26 of the ECT (as submitted by Italy, Germany, Spain, France, the Netherlands and the Commission at the oral hearing of Case C-741/19 before the Court on 17 November 2020).[61] Following, the stand taken by Advocate General Spuznar in his (non-binding) Opinion of 3 March 2021[62], the CJEU has concluded in its judgment of 2 September 2021 ('the

Member States and the Commission will intensify discussions without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the EU. Those discussions include the assessment of existing processes and mechanisms of dispute resolution as well as the need and, if the need is ascertained, the means to create new or improve relevant existing tools and mechanisms under Union law.

54 CJEU, Case C-741/19, *Republic of Moldova v Komstroy LLC* Judgment (2 September 2021) ECLI:EU:C:2021:655.

55 Even more so if we consider the uncertainties posed by the post-Brexit scenario. Ahmed Mazlom, 'Investor Protection in Europe: What does the Future Hold?' Kluwer Arbitration Blog (7 July 2021), <http://arbitrationblog.kluwerarbitration.com/2021/07/07/investor-protection-in-europe-what-does-the-future-hold/> accessed 3 September 2021.

56 *Accord entre le Gouvernement du Royaume de Belgique et le Gouvernement du Grand Duche de Luxembourg, d'une part, et le Gouvernement de la Republique Populaire de Pologne, d'autre part, concernant l'encouragement et la protection reciproques des investissements* (signed 19 May 1987, entered into force 2 August 1991) (BLEU-Poland BIT), which at that time was still in force <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/403/download> accessed 3 September 2021.

57 <https://files.lbr.cloud/public/2020-02-04---Swedish-Supreme-Court---Order-of-reference-to-the-ECJ.pdf?QYWqXZ6P0.ADSQYYf_KSdt9gpTFMKBak> accessed 3 September 2021. Poland belatedly raised a jurisdictional objection in its rejoinder on the basis that its Accession Treaty to the EU superseded the BIT 'after the period for stating its defenses had passed' (*PL Holdings S.à.r.l. v Republic of Poland*, SCC Case No V 2014/163, Partial Award (28 Jun 2017) para 307). PL Holdings had argued before the Supreme Court that, even if the arbitration clause in the BIT is invalid in light of *Achmea*, it is the request for arbitration that constitutes an offer to arbitrate by the investor, in relation to which the state would then, as a result of its freely expressed wishes, expressly or tacitly, be able to accept the jurisdiction of the arbitral tribunal, in accordance with the principles explained by the CJEU with regard to commercial arbitration. The Supreme Court did not consider it to be clear, or clarified, how EU law should be interpreted with regard to the issues that arise in this case and requested the CJEU to answer 'whether Articles 267 and 344 TFEU, as interpreted in *Achmea*, mean that an arbitration agreement is invalid if it has been entered into by a Member State and an investor –when there is an arbitration clause in an investment treaty which is invalid because the treaty was entered into between two member states– by means of the Member State, after the investor has requested arbitration, as a result of its freely expressed wishes, refraining from objecting against the jurisdiction [of the tribunal]'.

58 Case C 109/20, *Republic of Poland v PL Holdings Sàrl* Opinion of Advocate General (22 April 2021) ECLI:EU:C:2021:321.

59 Also, Belgium had asked the CJEU to opine on 'the compatibility of the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty with the European Treaties' (Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, 'Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty' (*Newsroom*, 3 December 2020) <https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions> accessed 3 September 2021. Although the preliminary ruling was requested on 3 December 2020, it was not officially published on the CJEU's website until February 2021.

60 A Ukrainian investor against Moldova, claiming under both the ECT and the Ukraine-Moldova BIT. *Energoalians TOB v Republic of Moldova*, ad hoc Arbitration, UNCITRAL.

61 CJEU, Case C-741/19, 'Request for a preliminary ruling from the Cour d'Appel de Paris' France (8 October 2019) *Republic of Moldova v Komstroy* (successor of Energoalians).

62 CJEU, Case C-741/19, *Republic of Moldova v Komstroy,* Opinion of Advocate General (3 March 2021) ECLI:EU:C:2021:164.

Komstroy decision') that article 26 in the ECT is incompatible with EU law, in so far as it allows an arbitral tribunal, outside the EU judicial system, to interpret or apply EU law, jeopardising the principle of mutual trust between Member States and the preservation of the specific nature of the law established by the Treaties, while at the same time infringing the autonomy of EU law.[63]

Interestingly, a *ratione personae* jurisdictional question pertaining to the concept of 'investment' under the ECT was also posed in the preliminary ruling of the *Komstroy* decision. The CJEU has found that the acquisition 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' under the ECT.[64]

63 CJEU, Case C-741/19, *Republic of Moldova v Komstroy* LLC Judgment (2 September 2021) ECLI:EU:C:2021:655.
64 Paras 67-85.

On a related note, on 15 April 2021 the CJEU rendered what was the first judgment on –among other issues–, the applicability of Article 10(1) of the ECT (the FET standard clause) between Member States, and concluded that it was inapplicable since 'the conditions defined in that article must be ensured in respect of investors of other contracting parties' and the case at hand did not concern 'investors of other contracting parties within the meaning of Article 10 of the Energy Charter.'[65] Although, the CJEU did not consider necessary to examine the compatibility of the national legislation with article 10 of the ECT, Advocate General Saugmandsgaard Øe had already performed that substantive analysis, concluding that the ECT's FET standard cannot be considered as annulling the Member States' right to regulate.[66]

65 Joined Cases C798/18 and C799/18, *Anie and Others, Athesia Energy Srl and Others v Ministero dello Sviluppo economico, Gestore dei servizi energetici (GSE) SpA*,, Judgement (15 April 2021) ECLI:EU:C:2021:280 paras 67-70.
66 Advocate General Saugmandsgaard Øe's Opinion in CJEU, Joined Cases C-798/18 and C-799/18 (n 19) paras 92-96.

The *Komstroy* decision and Saugmandsgaard Øe's foregoing opinion come to further prove the CJEU's capacity to provide answers to typical investment law issues that may arise in intra-EU investment disputes. Whether these answers are as satisfactory to the investors as those that in principle could be obtained from investment tribunals is a different matter.

On another front, in July 2021 the European Commission opened an in-depth investigation to assess whether an ECT arbitration award ordering Spain to compensate a EU investor for the foregone support following the modification of a 2007 renewable electricity support measure is in line with EU rules on State aid[67] and complies with the principles of mutual trust and autonomy of EU law[68]. While the question on the compliance with EU Law has already been answered by the CJEU in the *Komstroy* decision, the assessment of the Commission with regards to State aid may have an important impact on the enforceability within the EU of the awards of the concluded intra-EU ECT arbitrations.

67 The Commission will consider whether the additional support granted by the arbitration award is necessary for the development of an economic activity, has an incentive effect and is proportionate and whether granting such support only to the investor could unduly distort competition.

On the other hand, it is still an open question how parties, arbitral tribunals and institutions will react to the Agreement, especially with regard to pending and new arbitrations, as defined therein[69]. For the arbitrations that were pending by that date of the *Achmea* decision (which today may have already concluded), the Agreement sets out a "structured dialogue" that paves the way for their settlement and entitles the investor to access the judicial remedies under national law against the measure contested in the pending arbitration. We still need to wait and see how this procedure unfolds. Conversely, new arbitrations (i.e. those initiated after *Achmea*) are precluded according to the Agreement, but a number of intra-EU BIT arbitrations were indeed initiated after *Achmea* and some are still ongoing or even concluded. The success of the winning parties when

68 European Commission, Press Corner, State aid: arbitration award in favour of Antin, 'State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain' <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3783> accessed 3 September 2021.
69 The Agreement in principle does not affect the arbitrations (and the resulting awards) that were already concluded by the date of the *Achmea* decision.

seeking enforcement of the resulting awards shall not be taken for granted.[70]

Moreover, apart from the UK, some EU countries such as Austria,[71] Finland and Sweden still need to decide how to phase out its intra-EU BITs.[72]

Also, some kind of institutional response to the intra-EU non-applicability of article 26 of the ECT is to be expected from the Member states now that the CJEU's ultimate *Komstroy* decision has arrived and the ECT cannot be invoked between them. Since the Agreement does not apply to the ECT, between February and May of 2021 alone three new ICSID arbitrations have been initiated by EU investors against the Netherlands and Germany under the ECT[73], and many more ECT proceedings are pending as of today. The possible solution for the implementation of the *Komstroy* judgment (whether it comes as an agreement similar to the Agreement or as an amendment of article 26 of the ECT) and its effects with regards to concluded, new and pending arbitrations remains uncertain to this date.

Conclusion

In any case, it is clear that the EU Institutions owe investors as important stakeholders —at the very least— a thorough analysis of the improvements that may be implemented within the EU to enhance investor protection after *Achmea*. It is still to be discussed by the EU legislature whether it is desirable to enact specific rules for investors and whether they deserve a specific legal status. Likewise, the *Francovich* damages system could be further harmonised if deemed necessary in order to increase legal certainty and its perception among investors, which will not be an easy task, given the constitutional issues that surround the procedural autonomy of Member States. For the moment, the CJEU will have to rely on the reach of the principle and fundamental right to an effective judicial remedy and of the principles of equivalence and effectiveness. Meanwhile, the (hypothetical) future role of the European Court of Human Rights in this regard remains quite unknown and the foreseeability of its increased protagonism thereupon still casts many doubts[74].

Other possibilities, which might better fit with a more federal EU, still seem far away, although some are already on the Commission's table. These options include the CJEU ruling on the pecuniary compensation paid by Member States to investors, the creation of an Ombudsman-like EU administrative body where investors could bring their investment complaints or the creation of a specialised investment court[75].

In any case, as long as there are still BITs between Member States and third countries EU investors may start to consider investment treaty planning when structuring their investments within the EU to continue enjoying BIT protections. In that scenario, a very thorough monitoring by the European Commission and, ultimately, by the CJEU is expected. Meanwhile, investment protection at the EU will continue to take us back to the future.

70 So far, it has been reported that the parties to the intra-EU BIT arbitration *Donatas Aleksandravicius v. Kingdom of Denmark* (ICSID Case No. ARB/20/30) currently are in negotiations to reach an agreement in line with the provisions of the Agreement <https://www.iareporter.com/articles/tribunal-chair-resigns-over-role-as-counsel-in-another-intra-eu-case-parties-seek-negotiated-settlement-under-termination-agreement/> accessed 30 August 2021. Also, last July came to light that in February 2021 Croatia settled an ICSID arbitration initiated by a Hungarian investor last October 2020 (*OTP Bank Plc v Republic of Croatia*, ICSID Case No ARB/20/43), together with two other intra-EU BIT arbitrations (*UniCredit Bank Austria AG and Zagrebačka Banka d.d. v Republic of Croatia*, ICSID Case No ARB/16/31; *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, ICSID Case No. ARB/17/37) (<https://globalarbitrationreview.com/croatia-settles-francogeddon-cases> accessed 3 September 2021).

71 From the EU Commission's 2015 infringement package addressees, Austria and Sweden still have to terminate their intra-EU BITs.

72 Ireland, the other Member State that did not sign the Agreement, bilaterally terminated its only intra-EU BIT with the Czech Republic in 2011.

73 *Mainstream Renewable Power Ltd and others v Federal Republic of Germany* (ICSID Case No ARB/21/26); *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands* (ICSID Case No ARB/21/22), *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands* (ICSID Case No ARB/21/4).

74 Nevertheless, some stakeholders seems to be waiting for the ECtHR to step up. *E.g.* in Asmed Mazlom, 'Investor Protection in Europe: What does the Future Hold?' Kluwer Arbitration Blog (7 July 2021), <http://arbitrationblog.kluwerarbitration.com/2021/07/07/investor-protection-in-europe-what-does-the-future-hold/> accessed 3 September 2021.

75 See European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, 'Inception Impact Assessment on Investment protection and facilitation framework' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Cross-border-investment-within-the-EU-clarifying-and-supplementing-EU-rules_en> accessed 7 September 2019.