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Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence to Permanent Conflict.

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Once upon a time, not so long ago, the two legal orders of on the one hand, international investment law (i.e., International Investment Agreements (IIAs) and investor-State arbitration provisions (ISDS)), and on the other hand, EU law, were peacefully co-existing next to each other with only occasional contact.

Indeed, it was the time when the EU Member States were responsible for the conclusion of roughly half of the 3,000+ IIAs worldwide. It was also the time when the EU and its Member States unconditionally signed up to the Energy Charter Treaty (ECT) and its ISDS provisions. It was also the time when the EU was actively encouraging its candidate members to sign IIAs in order to provide additional legal stability and thereby attracting desperately needed foreign investments before acceding to the EU.

So, while the number of concluded IIAs steadily continued and as a consequence, also the number of ISDS disputes to more than 1,100 according to the UNCTAD investment policy hub, significant changes took place within the EU legal order, which rather abruptly ended the harmonious time by ushering in the current status of permanent conflict between those two legal orders.

The Journey of Creating and Escalating a Conflict that did not Exist Before

The first signs of a potential conflict between these two legal orders emerged in the *Eastern Sugar* case decided in 2007. In that case, the Czech Republic had raised several EU law objections against the jurisdiction of the arbitral tribunal, which, however, were all rejected.

It was the 2018 *Achmea* judgment by the Court of Justice of the EU (CJEU), which provided the justification of the EU Member States to sign the Termination Agreement in 2020 aimed at terminating almost all intra-EU BITs. It should be noted that not all 27 EU Member States have signed the Termination Agreement.

In parallel, the European Commission continued to escalate the conflict by intervening in practically all intra-EU disputes (both based on intra-EU BITs and the ECT) as *amicus curiae* before arbitral tribunals as well as before domestic courts. However, so far, the European Commission has not been successful in convincing arbitral tribunals of its position that EU law prevents them from exercising their jurisdiction.

In contrast, domestic courts of EU Member States are applying the *Achmea* judgment, as the Frankfurt Court and the German Federal Supreme Court have done in the *Austria's Raiffeisen Bank v. Croatia* case.

Moreover, in an unprecedented act, the European Commission prohibited Romania to fulfil its international obligations by paying out the *Micula* award because that would supposedly constitute new, illegal state-aid. The Micula brothers have successfully brought an action against the European Commission before the General Court of Justice of the EU. However, the European Commission has appealed, which means a final decision is still pending. Meanwhile, Advocate General Szpunar has opined that the General Court's judgment should be set aside.

Most recently, the European Commission has launched infringement proceedings against several EU Member States (Austria, Sweden, Belgium, Luxembourg, Portugal, Romania and Italy) for their failure to terminate their intra-EU BITs.

The Spill-Over Effect onto the ECT

Whereas until the CJEU's *Komstroy* judgment one could confidently argue that the impact and fallout of the *Achmea* judgment and the post *Achmea* actions taken by the EU Member States remained limited to intra-EU BIT situations, it has now been confirmed by the *Komstroy judgment* that the fallout of *Achmea* equally applies to ECT disputes having a connection in the EU.

I am deliberately referring to cases *"having a connection in the EU"* since *Komstroy* did not involve an EU investor nor an EU Member State. Also, no EU law question was at issue. The only connecting factor was the fact that Paris was the seat of arbitration. Consequently, *Komstroy* is not an intra-EU ECT dispute, and therefore it cannot be equalized with *Achmea*, despite the fact that this is what the CJEU did. Instead, *Komstroy* was an extra-EU ECT dispute, and the *Komstroy* judgment of the CJEU has effectively extra-territorial impact onto the rights and obligations of non-EU ECT Contracting Parties, and by extension, their investors.

Obviously, the CJEU is not competent to diminish the rights and obligations of non-EU ECT Contracting Parties and/or their investors. Therefore, the *Komstroy* judgment is an example of an extraterritorial overreach of the CJEU's powers.

In any event, the message of the CJEU is clear: ISDS arbitration based on the ECT is banned within the EU – irrespective of whether it concerns intra-EU disputes or not.

This sweeping approach is unsurprisingly congruent with the Political Declaration that was signed by the majority of the EU Member States in 2019, which also extended the *Achmea* judgment to ECT disputes (see Points 1 and 9). However, the Political Declaration was a legally non-binding statement, whereas the legally binding Termination Agreement signed in 2020 explicitly states in the Preamble that it does *not* apply to the ECT. [1)] This is because currently the ECT is being renegotiated, so the EU Member States decided not to deal with the ECT in the Termination Agreement itself.

Hence, the *Komstroy* judgment even overreached the intentions of the EU Member States, if one agrees with this author, that *Komstroy* was in fact an extra-EU ECT dispute.

The Autonomy, Uniformity and Supremacy of EU Law are Alien Principles to Public International Law

After having described on a very high level the journey of the creation and escalation of the conflict between international investment law and EU law, it is equally important to take a step back and identify the root cause of this dilemma.

Essentially, it all boils down to the protection of the principles of autonomy, consistency, uniformity, full application and supremacy of EU law, and by extension, the ultimate interpretative authority of the CJEU as the highest court of the continent – at all times and in all cases. The CJEU referred to these principles in *Achmea*, *Komstroy* and *PL Holdings* as the main reasons for banning ISDS.

This is not the first time that the CJEU considered it necessary to rely on the most fundamental principles of EU law in order to protect its final authority against public international law influences. Indeed, a decade earlier in the seminal *Kadi* case concerning the alleged supremacy of UN Security Council Resolutions based on Article 103 of the UN Charter, the CJEU clearly stated that the autonomy and supremacy of the EU legal order cannot be affected by *any* international treaty. In fact, the CJEU has displayed a similar attitude towards the European Court of Human Rights (ECHR) and the WTO Appellate Body.

Coming back to investment law, the question that needs to be asked is: Can an international arbitral tribunal that is deciding a specific case be able to endanger the autonomy, consistency, uniformity, full application or supremacy of the EU legal order to any discernible level? A legal order developed over the past 50 years with such a solid constitutional foundation and a supreme court that is more powerful than any other (international or constitutional) court in the world. Could the *Achmea* or *Komstroy* arbitral tribunals seriously have been ever in a position to be the slightest threat to these fundamental principles of EU law?

Even if, for the sake of argument, we would assume that this would have been theoretically possible, Advocate General Wathelet proposed in his Opinion in *Achmea* the simple solution for avoiding this permanent conflict: namely, to allow or even require arbitral tribunals to request preliminary rulings from the CJEU in case EU law issues are at stake.

In fact, this is precisely the solution that the Andean Community Court of Justice, the equivalent of the CJEU, adopted. Accordingly, this conflict between EU law and international investment law could have easily been avoided.

The simple point is that all these EU law principles work very well internally but are alien at the public international law level where all international treaties are treated equally (with the exception of Article 103 UN Charter). In other words, the horizontal nature of public international law simply clashes with the vertical, supremacy, and autonomy-loaded, EU legal order.

The Frantic Search for Alternatives

Obviously, the CJEU, the European Commission and the Member States will not change their

quest to significantly modify or even completely eradicate ISDS arbitration. That quest is already ongoing at the UNCITRAL Working Group III on ISDS reforms with the proposal of replacing ISDS with a permanent multilateral investment court (MIC).

As Gary Born warned years ago, winter has come for investors and the arbitration community. At the same time, the Rule of Law level is backsliding – not only in Europe. Thus, investors remain in need of investment protection and effective dispute settlement tools.

So, What are the Alternatives?

First, the main advice is to stay out of the EU – for both – structuring investments and using European IIAs. Instead, commercial arbitration could theoretically provide an alternative for some investors and for certain investments based on contracts with State entities. However, the *PL Holdings* judgment may have already crushed any such hopes in this regard.

Second, the seat of arbitration should preferably be outside of the EU to avoid the interference of the CJEU and the European Commission.

Third, and for the same reasons, enforcement and recognition of awards should be sought outside the EU.

Thus, while the EU is rapidly becoming an arbitration-hostile jurisdiction, other more arbitration-friendly jurisdictions such as the UK, Switzerland, Singapore, and the US are increasingly benefitting from these developments.

Nonetheless, despite these potential alternatives, the fact remains that those may only be available for a select group of large investors, while for the vast majority of the investors, investment protection and access to arbitration have been effectively and permanently curtailed by the very same EU, which –ironically – as per Article 21 (1) of the TEU:

> […]seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

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References

?1 CONSIDERING that this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage; […] Available at:https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN

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