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The new challenges raised by  
investment arbitration for the EU  
legal order

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# Abstract

The five contributions in this legal working paper discuss various aspects of investment arbitration. They were originally presented at the ECB legal colloquium on ‘The new challenges raised by investment arbitration for the EU legal order’ which took place in Frankfurt am Main in 2019.

The first contribution addresses the use of investment arbitration as a dispute settlement mechanism in the light of criticism of the mechanism, which has focused on: its cost and duration; the lack of consistency in awards made by investment arbitration tribunals; and a lack of diversity, impartiality and independence among arbitrators. This criticism, as well as rulings from the Court of Justice of the European Union (CJEU), have led the Union - which is responsible for negotiating treaties on protecting direct investment - to reflect on how best to reform the current legal framework. Such discussions have relevance for the ECB because certain arbitration cases involve decisions taken by EU institutions and Member States during the financial crisis, or have an impact on the ECB’s banking supervision tasks.

The focus of the second contribution is the *Achmea* ruling and Opinion 1/17 of the CJEU, both of which highlight the Union’s strained relations with investor-state dispute settlement (ISDS) mechanisms - notably as regards the compatibility of bilateral investment treaties (BITs) with the Treaty and with the autonomy of the Union legal order. The contribution examines the principles of mutual trust and reciprocity and also considers whether the competence of investment tribunals should be limited if it interferes with the Union legal order. Finally, the contribution looks at how the role of domestic courts in the Union may be affected by ISDS mechanisms.

The third contribution examines the legal implications of the *Achmea* ruling and Opinion 1/17 on the following types of investment agreements: Member States’ intra-EU BITs; agreements to which the Union is party; and Member States’ extra-EU BITs. In considering whether EU law is the applicable law before an international court or tribunal, the CJEU in its *Achmea* ruling confirmed, in essence, that an intra-EU ISDS is compatible with the Treaty, while Opinion 1/17 confirmed that an extra-EU ISDS is compatible with the Treaty, subject to certain conditions.

The fourth contribution looks at the history of banking and financial investment arbitration and considers possible future developments. It highlights the increase in the use of investment arbitration following the financial crisis and reviews the types of investment arbitration disputes that have arisen to date, as well as the outcomes of concluded cases. It also reviews the types of objections raised by states to the jurisdiction of arbitration tribunals and the types of defences on the merits that states rely on. The contribution examines the future of extra-EU banking and financial investment arbitration, and in particular the Comprehensive Economic and Trade Agreement (CETA) tribunal and investment protection for financial services under CETA, as well as debt restructuring and future directions.

Bank resolution from the perspective of investment treaty arbitration is examined in the fifth contribution. The focus is on a case involving the liquidation of a Peruvian bank - Banco Nuevo Mundo (BNM) - where it was found that investment treaties cannot guarantee investment success when the investor makes bad business decisions. This conclusion has since been mirrored in similar cases brought against Member States for alleged misuse by a national central bank of regulatory powers or misuse by a national resolution authority of its resolution powers.

**Keywords:** European Central Bank; investment arbitration; bilateral investment treaties (BITs); dispute settlement mechanism; Achmea; Opinion 1/17; arbitration tribunals; division of competence; investor-state arbitration clauses; with investor-state dispute settlement mechanisms (ISDS); Court of Justice of the European Union (CJEU); Comprehensive Economic and Trade Agreement (CETA) tribunal

**JEL codes:** K (law and economics)

# The new challenges raised by investment arbitration for the EU legal order

By Yves Mersch<sup>1</sup>

Investment arbitration is currently attracting considerable public attention, a fact that was underlined a few weeks ago when 'The Economist' ran a series of articles on the subject.<sup>2</sup> The debate about the future of this dispute settlement mechanism is no longer taking place solely among specialist investment lawyers but also involves a range of different organisations, both public and private.

Originally, the main purpose of bilateral investment treaties (BITs) was to ensure the protection of investments (mainly from western or advanced economies) in emerging economies, as a means to boost international trade and foreign direct investment in these countries and thus support their economies.<sup>3</sup> Yet the first BITs did not include arbitration clauses, and it would take a number of years for the use of such clauses to be standardised, often with reference to the ICSID Convention<sup>4</sup>. In the intervening 30 years, there has been a sharp rise in the use of BITs that include an arbitration clause, and there are now more than 2,500 such treaties currently in force.<sup>5</sup>

However, investment arbitration now stands at a crossroads. After two decades<sup>6</sup> in which recourse to this type of dispute settlement mechanism has dramatically increased, investment arbitration is facing growing criticism and challenges.

In part, this criticism has focused on the way investment arbitration currently operates, pointing to the cost and duration of arbitration as well as the lack of consistency and correctness in the awards rendered by arbitration tribunals.

At the same time, studies such as that by the United Nations Commission on International Trade Law<sup>7</sup> have identified a need for the arbitrators themselves to be reformed, highlighting the lack of diversity, independence and impartiality among adjudicators.

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<sup>2</sup> The Economist, issue 8-14, June 2019.

<sup>3</sup> See, for example, the BIT between Germany and Pakistan, which recognises 'that an understanding between the two parties is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both States'.

<sup>4</sup> The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID).

<sup>5</sup> These figures are taken from the [Investment Policy Hub](#) of the United Nations Conference on Trade and Development (UNCTAD).

<sup>6</sup> In 2000, only ten new investment arbitration cases were initiated, while there 71 in 2018; see [Fact Sheet on Investor-State Dispute Settlement Cases in 2018](#).

<sup>7</sup> Reports of [Working Group III on Investor-State Dispute Settlement Reform](#).

These criticisms also represent a challenge for the European Union (EU), as the debate surrounding investment arbitration has been somewhat 'Europeanised' since the Lisbon Treaty entered into force. This is largely because competence to negotiate treaties dealing with the protection of direct investment has been transferred to the EU level.<sup>8</sup> This has had important consequences for Member States, which are now expected to gradually phase out their BITs as the European Commission negotiates new ones.<sup>9</sup> At the same time, the EU is given the possibility to act as a respondent in investment arbitration cases.<sup>10</sup>

This new competence for the EU has also had implications for the case-law of the Court of Justice of the European Union, which was asked to determine the division of competence between the EU and its Member States when negotiating and signing the new generation of free trade agreements that include provisions on the protection of investment.<sup>11</sup> A few weeks ago, the Court also delivered its long-awaited ruling<sup>12</sup> on the compatibility with the EU Treaties of the new investment court system provided for by the Comprehensive Economic and Trade Agreement (CETA) with Canada.<sup>13</sup>

Finally, in a further illustration of the Europeanisation of the debate surrounding investment arbitration, the Court ruled last year that all investor-state arbitration clauses contained in BITs concluded between Member States are contrary to EU law and thus inapplicable.<sup>14</sup>

These important rulings have been accompanied by extensive policy discussions within the EU<sup>15</sup> and beyond<sup>16</sup> to consider potential reforms to improve the current legal framework and address the criticisms and challenges I have mentioned. Most of

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<sup>8</sup> Article 207(1) of the Treaty on the Functioning of the European Union (TFEU) now provides that: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

<sup>9</sup> Recital 6 of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, 20.12.2012, p. 40) provides that: 'In the interest of Union investors and their investments in third countries, and of Member States hosting foreign investors and investments, bilateral investment agreements that specify and guarantee the conditions of investment should be maintained in force and progressively replaced by investment agreements of the Union, providing for high standards of investment protection'.

<sup>10</sup> Article 4(1) of Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party (OJ L 257, 28.8.2014, p. 121) provides that: 'The Union shall act as the respondent where the dispute concerns treatment afforded by the institutions, bodies, offices or agencies of the Union'.

<sup>11</sup> Opinion of the Court of 16 May 2017, C-2/15, *Free Trade Agreement with Singapore*, ECLI:EU:C:2017:376.

<sup>12</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI: EU:C:2019:341.

<sup>13</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23).

<sup>14</sup> *Achmea*, C-284/16, ECLI:EU:C:2018:158.

<sup>15</sup> Following the *Achmea* ruling, these debates between the Commission and the Member States resulted in the publication of a Communication from the Commission on the Protection of Intra-EU Investment, COM/2018/547; and the [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](#).

<sup>16</sup> See the current negotiations on a multilateral investment court conducted under the aegis of the United Nations Commission on International Trade Law.

these discussions are still ongoing, but their outcome will have far-reaching consequences for the future of investment arbitration.

For a number of reasons, the ECB is not immune from these debates.

A first obvious connection between the tasks performed by the ECB and investment arbitration is to be found in those arbitration cases, some of which are still pending, that involve decisions taken by EU institutions and Member States to deal with the financial crisis. For instance, in the *Poštová banka*<sup>17</sup> case, an arbitration tribunal had to rule on a case brought by a Slovak bank and its shareholders against the 2012 bond 'haircut' with private sector involvement in Greece via the activation of collective action clauses. As earlier rulings by ICSID tribunals with respect to sovereign debt restructuring in Argentina demonstrate, such cases are not entirely new. However, as Lee Buchheit – probably the most well-known lawyer dealing with sovereign debt restructuring – recently acknowledged,<sup>18</sup> the peculiarities of the legal framework underpinning Economic and Monetary Union represent additional challenges in such situations.

The second reason that the discussion on investment arbitration is relevant for the ECB relates to its banking supervision tasks, which it has performed since 2014. The creation of the banking union has, in practice, provided different EU entities with new powers and the possibility to adopt legally binding decisions (on bail-in or the withdrawal of a licence, for instance) which could affect investors' rights and be characterised as indirect expropriation. Following the resolution of Banco Popular, for example, a group of Mexican shareholders initiated an arbitration case against Spain, challenging the various decisions taken in the course of resolving the bank on the basis of the BIT between Spain and Mexico. The case is still pending, but it provides a good example of the challenges ahead for the banking union in terms of investment arbitration.

Finally, though the link might seem more indirect, the effect of Brexit on investment arbitration in the fields of banking and financial law is also a matter of interest for the ECB. Indeed, considering the importance of London as a venue for financial and banking arbitration and the close links between the City of London and the EU in these two areas, the EU should be ready to handle the effects of awards rendered in London to protect its core interests.

An initial solution to some of these problems may have been provided by CETA, where EU policymakers have enshrined the need to single out investment arbitration litigation dealing with financial services<sup>19</sup> while removing measures related to prudential supervision from the agreement's scope.<sup>20</sup> That said, it will be several years before we can assess the real practical implementation of such provisions.

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<sup>17</sup> *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8.

<sup>18</sup> See Crab, J. (2019), 'Q&A with sovereign debt legend Lee Buchheit', *International Financial Law Review*, 23 April.

<sup>19</sup> Article 13.21 of CETA.

<sup>20</sup> Article 13.16 of CETA.

# Achmea and Opinion 1/17: Why do intra and extra-EU bilateral investment treaties impact differently on the EU legal order?

By Cristina Contartese<sup>1</sup>

## 1 Introduction

*Achmea*<sup>2</sup> and Opinion 1/17<sup>3</sup> are the most recent rulings of the Court of Justice of the European Union (CJEU or ‘Court’) on the strained relations between the EU and investor-state dispute settlement (ISDS) mechanisms. As is well known, the CJEU delivered the *Achmea* ruling on 6 March 2018, following a request for a preliminary ruling from a German court in the context of a dispute between Achmea (a Netherlands insurance group that established a subsidiary in Slovakia) and Slovakia. The Court was asked to determine whether the ISDS provision under an intra-EU bilateral investment treaty (BIT), that is, the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic (‘Netherlands-Slovakia BIT’), was compatible with the EU Treaties. It concluded, specifically, that Articles 267 and 344 TFEU preclude the ISDS provision since the investment tribunal could be called on to interpret and apply EU law for the purpose of resolving the dispute before it and no other mechanisms existed that could safeguard the uniform and consistent interpretation and application of EU law in that context. In Opinion 1/17, which was delivered on 30 April 2019, following Belgium’s request under Article 218(11) TFEU, the Court concluded that the ISDS mechanism under the Comprehensive Economic and Trade Agreement<sup>4</sup> (CETA) between Canada and the EU and its Member States is compatible with the EU Treaties.

In assessing the compatibility of these two treaties with EU law, the principle of autonomy plays a key role.<sup>5</sup> What autonomy exactly entails does not yet emerge

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<sup>2</sup> Judgment of the Court of Justice of 6 March 2018, C-284/16, *Slovak Republic v Achmea*, ECLI:EU:C:2018:158.

<sup>3</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI:EU:C:2019:341.

<sup>4</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23).

<sup>5</sup> The CJEU was also asked to assess the compatibility of the CETA ISDS mechanism with the general principle of equal treatment, with the requirement of effectiveness and with the right of access to an independent tribunal. Such issues will not be discussed in this paper.



clearly from the CJEU's case-law.<sup>6</sup> A certain degree of ambiguity still permeates the Court's reasoning. It seems safe to state, nevertheless, that the notion of autonomy aims at safeguarding the 'essential characteristics' of the EU legal order in its *structural* dimension.<sup>7</sup> The uniform and consistent interpretation and application of EU law, the division of competences between the EU and its Member States, principles of unity, solidarity, mutual trust, and the judicial protection of fundamental rights are amongst the EU legal features that need to be protected as they constitute the 'very nature' of the Union.<sup>8</sup> The purpose of this paper is to provide an overview of the different impact of the treaties assessed in *Achmea* (intra-EU BITs) and Opinion 1/17 (extra-EU BITs) on the autonomy of the EU legal order.<sup>9</sup> First, this paper will refer to the two different principles that rule the relationship between the Contracting Parties of the treaties under consideration. Whereas the principle of mutual trust regulates the relationship between the EU Member States, the principle of reciprocity shapes the relationship between the EU and its Member States, on the one hand, and Canada, as a third party, on the other (Section 2). The paper will then examine whether the competence of investment tribunals under intra and extra-EU BITs, when dealing with EU law, should be limited if it interferes with the functioning of the EU legal order (Section 3). Finally, it will look at the relationship between ISDS mechanisms and domestic courts in the EU, and the extent to which those mechanisms may impact on the role of the latter (Section 4).

## 2 The nature of the international investment treaties: *inter se* agreements and mixed agreements with third parties

The nature of the treaty played a relevant role in the Court's assessment in *Achmea* and Opinion 1/17. An intra-EU BIT, as is well known, is an *inter se* agreement between

<sup>6</sup> See, in particular, van Rossem, J-W. (forthcoming), 'Pushing limits: The principle of autonomy in the external relations case law of the European Court of Justice', in Andenas, M., Pantaleo, L., Happold, M. and Contartese, C. (eds.), *The EU external action in international economic law. Recent trends and developments*, Asser Press/Springer; Govaere, I. (2018), '*Interconnecting legal systems and the autonomous EU legal order: A balloon dynamic*', *Research Papers in Law, College of Europe*, 02/2018, Bruges; Odermatt, J. (2018), 'The principle of autonomy: an adolescent disease of EU external relations law?', in Cremona (ed.), *Structural principles in EU external relations law*, Hart, Oxford, pp. 291-316; Klamert, M. (2017), 'The autonomy of the EU (and of EU law): Through the kaleidoscope', *European Law Review*, Vol. 42, pp. 815-830; and Molnár, T. (2016) 'Revisiting the external dimension of the autonomy of EU Law: Is there anything new under the sun?', *Hungarian Journal of Legal Studies*, Vol. 57, pp. 178-197.

<sup>7</sup> The structural dimension of the Union's legal order is composed of those principles that, according to Cremona, 'have been drawn from the Treaties and elaborated by the Court to establish this institutional space [within which policy may be formed, in which the different actors understand and work within their respective roles]'. Cremona further distinguishes between two types of structural principles: 'relational' principles, which 'govern the relationships between actors or legal subjects (not norms)', such as, Member State-Member State, Member State-institutions, inter-institutional relations, and EU institutions-individuals/third countries/international organisations – and 'systemic' principles, which are 'concerned with the operation of the system as a whole, with building the EU's identity as a coherent, effective and autonomous actor in the world'. See Cremona, M. (2018), 'Structural principles and their role in EU external relations law', in Cremona, M. (ed.), *Structural principles in EU external relations law*, Hart, Oxford, pp. 3-29, at pp. 5 and 17-29.

<sup>8</sup> Contartese, C. (2017), 'The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again', *Common Market Law Review*, Vol. 54, pp. 1627-1672.

<sup>9</sup> As for the implications of *Achmea* and Opinion 1/17 on multilateral treaties (such as the Energy Charter Treaty) and Member States' extra-EU BITs, see Vidal Puig J. R., 'Investment arbitration in the EU following *Achmea* and Opinion 1/17', *European Central Bank Working Paper*.

EU Member States. *Inter se* agreements, which are an important tool to enhance cooperation in those fields falling outside the scope of EU law, require careful assessment in those areas where the EU holds powers and may set constraints on EU Member States' action.<sup>10</sup> In *Achmea*, it emerged that the principle of mutual trust is one of these constraints,<sup>11</sup> together with the principle of loyal cooperation.<sup>12</sup> As for mutual trust, the CJEU explained that EU law is 'based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected.'<sup>13</sup> Furthermore, the Court expressly highlighted the relevance of the *inter se* dimension of the case under consideration by recalling that '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 Member States*'.<sup>14</sup>

Whereas the principles of mutual trust and loyal cooperation play a key role in *Achmea*, in the context of an extra-EU BIT – a relationship between the EU and its Member States, on the one hand, and Canada, on the other – these do not apply. The agreement rather relies on the principle of reciprocity under international law. The requirement of reciprocity is stressed by Advocate General Bot in his Opinion given in the context of Opinion 1/17,<sup>15</sup> who observed that 'reciprocity must be regarded as being one of the guiding principles of the EU's external relations. The application of the principle of reciprocity to the EU's external treaty relations is justified by the fact that, as a subject of international law, the European Union is subject to the rules of international law by which it has voluntarily agreed to be bound, of which the obligation of reciprocity is an integral part'.<sup>16</sup> By the creation of an ISDS mechanism in its bilateral relations, 'the European Union intends to satisfy a demand for neutrality and speciality in the resolution of disputes between investors and States, bearing in mind that it will also benefit European investors when they invest in a third State'.<sup>17</sup>

Another difference between intra and extra-EU BITs relies on the latter's mixity, where, in identifying the proper respondent of the dispute, an international court or tribunal could determine the division of competences between the EU and its Member States.

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<sup>10</sup> See Dimopoulos, A. (2015), 'Taming the conclusion of inter se agreements between EU Member States: The role of the duty of loyalty', *Yearbook of European Law*, Vol. 34, pp. 286-318; Schütze, R. (2007), 'EC law and international agreements of the Member States: An ambivalent relationship?', *Cambridge Yearbook of European Legal Studies*, Vol. 9, pp. 387-440; and de Witte, B. (2000), 'Old-fashioned flexibility: International agreements between Member States of the European Union', in de Búrca, G., and Scott, J. (eds.), *Constitutional change in the EU: From uniformity to flexibility*, Hart, Oxford, pp. 31-58.

<sup>11</sup> See, in particular, Centeno Huerta, S. and Kuplewatzky, N. (2019), 'On *Achmea*, the autonomy of Union Law, mutual trust and what lies ahead', *European Papers*, Vol. 4, No 1, pp. 61-78; and Hillebrand Pohl, J. (2018), 'Intra-EU investment arbitration after the *Achmea* case: legal autonomy bounded by mutual trust?', *European Constitutional Law Review*, Vol. 14, No 4, pp. 767-791.

<sup>12</sup> Judgment of the Court of Justice of 6 March 2018, C-284/16, *Achmea*, ECLI:EU:C:2018:158, paragraphs 34 and 58.

<sup>13</sup> *ibid.*, paragraph 34.

<sup>14</sup> *ibid.*, paragraph 58 (emphasis added).

<sup>15</sup> Opinion of Advocate General Bot in Opinion 1/17, *CETA*, ECLI:EU:C:2019:72, points 72-90.

<sup>16</sup> *ibid.*, point 77. In the same vein, see Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI:EU:C:2019:341, paragraphs 128-129.

<sup>17</sup> Opinion of Advocate General Bot in Opinion 1/17, *CETA*, ECLI:EU:C:2019:72, point 88.

This concern, as is well known, was raised in previous CJEU rulings where the Court protected the division of competences on the determination of the respondent by an international jurisdiction. In Opinion 1/91, concerning the European Economic Area (EEA) Agreement, the CJEU observed that the fact that a court ‘may be called upon to interpret the expression “Contracting Party”, within the meaning of ... the agreement, in order to determine whether, for the purposes of the provision at issue, [such an] expression ... means the Community, the Community and the Member States, or simply the Member States [implies that such a court] will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement’.<sup>18</sup> In Opinion 2/13, the CJEU ruled that the European Court of Human Rights, in reviewing whether the conditions to allow both the Union and its Member State to be parties to the proceedings – the co-respondent mechanism – are met, ‘would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU’.<sup>19</sup> The CJEU concluded that ‘such a review would be liable to interfere with the division of powers between the EU and its Member States’.<sup>20</sup>

In Opinion 1/17, the Court ruled that, under the CETA, this potential risk was precluded by the existence of what has been termed the ‘rule of proceduralisation’,<sup>21</sup> which allows the Union and its Member States to identify, *internally*, the proper respondent of the dispute before the investment tribunal.<sup>22</sup> Accordingly, the Court concluded that ‘the exclusive jurisdiction of the Court to give rulings on the division of powers between the Union and its Member States is thereby preserved’.<sup>23</sup> As the Court rightly observed, this case must be distinguished from Opinion 2/13,<sup>24</sup> where, as was mentioned above, the CJEU rejected the co-respondent mechanism since the draft accession agreement assigned the competence to decide on the status of co-respondent to the European Court of Human Rights. This latter could have authoritatively invited a High Contracting Party to become a co-respondent or accepted the request of the party in that regard.<sup>25</sup>

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<sup>18</sup> Opinion 1/91 of the Court of 14 December 1991, *European Economic Area (I)*, ECLI:EU:C:1991:490, paragraph 34.

<sup>19</sup> Opinion 2/13 of the Court of 18 December 2014, *Accession of the Union to the ECHR*, ECLI:EU:C:2014:2454, paragraph 224.

<sup>20</sup> *ibid.*, paragraph 225.

<sup>21</sup> Contartese, C. and Pantaleo, L. (2018), ‘Division of competences, EU autonomy and the determination of the respondent party: Proceduralisation as a possible way-out?’, in Neframi, E. and Gatti, M. (eds.), *Constitutional issues of EU external relations law*, Nomos, Baden-Baden, pp. 409-445.

<sup>22</sup> Opinion 1/17 of the Court of 30 April 2019, CETA, ECLI:EU:C:2019:341, paragraph 132.

<sup>23</sup> *ibid.*, paragraph 132.

<sup>24</sup> *ibid.*, paragraph 132.

<sup>25</sup> For an analysis of the co-respondent mechanism, see Contartese and Pantaleo (2018), *op. cit.*

## 3 The limits of investment tribunals in dealing with EU law

### 3.1 EU law as applicable law

In both *Achmea* and Opinion 1/17, the Court investigated whether EU law is the applicable law before an international court or tribunal. These are not the first cases where EU law as applicable law is a source of concern from a Union perspective.<sup>26</sup> What has emerged as problematic from the CJEU's case-law on autonomy is not the interpretation of EU law by the international court or tribunal *as such*. Rather, the key issue is whether certain conditions are met for EU autonomy to be satisfied. In the well-known rulings where the CJEU assessed whether EU law was the applicable law,<sup>27</sup> the Court set the following standards: (1) the monopoly of the CJEU on the final and authoritative interpretation of Union's law is not undermined by an international court or tribunal; (2) the interpretation of EU law by an international court or tribunal does not bind the EU institutions; and (3) an international court or tribunal does not interpret and apply EU law for the purpose of determining whether an EU Member State is responsible for an alleged breach.<sup>28</sup>

Therefore, the question is why, in *Achmea*, did the Court conclude that EU law was the applicable law before the investment tribunal under the Netherlands-Slovakia BIT, whereas under the CETA it is not? What are the implications of this finding?

Article 8(6) of the Netherlands-Slovakia BIT establishes that the applicable law is '*the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law*'.<sup>29</sup> Although it was argued that the arbitral tribunal would only rule on alleged infringements of the BIT, the ECJ disagreed.<sup>30</sup> According to the Court, 'given the nature and characteristics of EU law..., *that law* must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States'.<sup>31</sup> As a consequence, the Court explained that 'it follows that on *that twofold* basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital'.<sup>32</sup>

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<sup>26</sup> Contartese, C. (forthcoming), 'EU law as applicable law in international disputes and its procedural implications', in Andenas, M., Pantaleo, L., Happold, M. and Contartese, C. (eds.), *The EU external action in international economic law. Recent trends and developments*, Asser Press/Springer.

<sup>27</sup> See Contartese, C. and Andenas, M. (2019), 'EU autonomy and investor-state dispute settlement under *inter se* agreements between EU Member States: *Achmea*', *Common Market Law Review*, Vol. 56, pp. 157-192.

<sup>28</sup> *ibid.*

<sup>29</sup> Emphasis added.

<sup>30</sup> Judgment of the Court of Justice of 6 March 2018, C-284/16, *Achmea*, ECLI:EU:C:2018:158, paragraph 40.

<sup>31</sup> *ibid.*, paragraph 41 (emphasis added).

<sup>32</sup> *ibid.*, paragraph 42 (emphasis added).

In *Achmea*, what raises concerns is not the interpretation of EU law as such. The interpretation by the arbitral tribunal, in fact, would not impact on the monopoly of the CJEU on the final and authoritative interpretation of Union law, and would not bind the EU institutions' interpretation of EU law. Rather, the CJEU perceived as a threat that the investment tribunal may interpret and apply EU law to establish the liability of an EU Member State. According to the underlying reasoning of the CJEU, which focuses on the need to protect the *uniform* and *consistent* interpretation and application of EU law within the EU Member States, Article 8 of the BIT also calls into question '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'.<sup>33</sup> As a consequence, given that EU law formed part of the applicable law under the Netherlands-Slovakia BIT, the Court further assessed whether other mechanisms could exist to safeguard the uniform and consistent application of EU law within the EU Member States legal orders.<sup>34</sup>

Unlike Article 8(6) of the Netherlands-Slovakia BIT, the CETA, in Article 8.31.1, establishes that its investment tribunal 'shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties'. It sets out further that the domestic law of the Contracting Parties will be considered, 'as appropriate', 'as a matter of fact', and that the tribunal 'shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party', and its interpretation of domestic law 'shall not be binding upon the courts or the authorities of that Party'.<sup>35</sup> Notwithstanding the undetermined boundary between the expression 'matter of fact' and the *de facto* interpretation of the domestic law of the Contracting Parties, what matters, from the perspective of preserving EU autonomy, is that EU law will not be the applicable law. Accordingly, the EU, when acting as a respondent in a dispute, will not be bound by the interpretation of EU law provided by the international tribunal in question.<sup>36</sup> The scenario under the CETA is, therefore, different from the situation considered in *Achmea* and Opinion 1/09<sup>37</sup> on the creation of a unified patent system, as the CJEU rightly outlined.<sup>38</sup>

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<sup>33</sup> *ibid.*, paragraph 58.

<sup>34</sup> See below Section 4.

<sup>35</sup> Article 8.31.2 of the CETA reads: 'The Tribunal shall *not* have jurisdiction to determine the *legality of a measure*, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, *the domestic law of a Party as a matter of fact*. In doing so, the Tribunal shall *follow the prevailing interpretation* given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall *not be binding* upon the courts or the authorities of that Party.' (emphasis added).

<sup>36</sup> See Contartese (2017), *op. cit.*

<sup>37</sup> Opinion 1/09 of the Court of 8 March 2011, *European and Community Patents Court*, ECLI:EU:C:2011:123.

<sup>38</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI:EU:C:2019:341, paragraphs 123-126.

### 3.2 ‘No effect on the operation of the EU institutions in accordance with the EU constitutional framework’: Has the CJEU introduced a new criterion to assess EU autonomy?

Up to this stage of the analysis, the reasoning of the CJEU on the applicable law is consistent with its previous case-law. In essence, whereas Article 8 of the Netherlands-Slovakia BIT was not compatible with EU law following the line of reasoning of previous rulings, the CETA's provisions on ISDS appear to have been drafted keeping in mind the lessons learned from the Court and, therefore, passed the exam before the CJEU. However, in Opinion 1/17, a new criterion has emerged in relation to autonomy, according to which an investment tribunal may not question the Union's right to regulate.

In the section of Opinion 1/17 headed ‘No effect on the operation of the EU institutions in accordance with the EU constitutional framework’, the Court refers to some observations submitted by Belgium and other governments which expressed concerns in relation to the fact that the investment tribunal under the CETA could be called on to balance, in the course of its examination, the investor's interest in conducting business against public interests under EU law. Given that the findings of the tribunal would be binding on the Union, the question then was ‘whether such situations, which are likely to occur often, would adversely affect the exclusive jurisdiction of the Court over the definitive interpretation of EU law and, accordingly, the autonomy of the EU legal order’.<sup>39</sup>

The Court shared this concern holding that ‘the jurisdiction of those tribunals would *adversely affect the autonomy of the EU legal order* if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market, rather than confine itself to determining whether the treatment of an investor or a covered investment is vitiated by a defect mentioned in Section C or D of Chapter Eight of the CETA [that is, abusive treatment, manifest arbitrariness and targeted discrimination]’.<sup>40</sup> The Court explained that if the Union, or a Member State in the course of implementing EU law, had to amend or withdraw legislation as a consequence of a tribunal finding, ‘it would have to be concluded that such an agreement *undermines the capacity of the Union to operate autonomously within its unique constitutional framework*’.<sup>41</sup>

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<sup>39</sup> *ibid.*, paragraph 138.

<sup>40</sup> *ibid.*, paragraph 148 (emphasis added).

<sup>41</sup> *ibid.*, paragraph 150 (emphasis added).

As for the specific case of the CETA, the Court noted that EU autonomy is not undermined since, under Article 28.3.2 of the CETA, the tribunal 'has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures ... and, on that basis, to order the Union to pay damages'.<sup>42</sup> The joint reading of the CETA provisions,<sup>43</sup> which the Court interpreted narrowly, confirms, according to the CJEU, that the investment tribunal system under the CETA does not aim at assessing the compatibility of public interest measures of the contracting parties with the Treaty, its goal is limited to examining whether the measures at stake constituted abusive treatment, manifest arbitrariness or targeted discrimination.

Beyond the specific CETA provisions, which the CJEU declared to be compatible with EU law, the reasoning of the Court on safeguarding *the capacity of the Union to operate autonomously within its unique constitutional framework* could impact on the notion of EU autonomy, resulting in a further extension of its meaning. Therefore, the key question is why is it necessary that the EU's right to regulate cannot be undermined by the investment tribunal system under the CETA? The explanation offered by the Court is structured around three notions. First, the CJEU opens with a reminder of the EU democratic process: 'EU legislation is adopted by the EU legislature following the democratic process defined in the EU and FEU Treaties'.<sup>44</sup> Second, it refers to the principles that underpin the legislative procedure to achieve the Union's goals, namely, 'that that *legislation* is deemed, by virtue of the principles of conferral of powers, subsidiarity and proportionality laid down in Article 5 TEU, to be both *appropriate and necessary to achieve a legitimate objective of the Union*'.<sup>45</sup> Third, the Court's exclusive competences are also at stake: 'In accordance with Article 19 TEU, *it is the task of the Courts of the European Union to ensure review of the compatibility of the level of protection of public interests established by such legislation with, inter alia, the EU and FEU Treaties, the Charter and the general principles of EU law*'.<sup>46</sup>

This is a new criterion that already emerges in the introductory paragraphs of Opinion 1/17 under the heading 'principles'.<sup>47</sup> On the one hand, in that section, the CJEU acknowledges the relevance of the role of an international court or tribunal established under an international agreement as well as the role of the EU as an international actor. It stated that 'it is, moreover, precisely because of the *reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations* that it is open to the Union ... to enter into an agreement that confers on an international court or tribunal the jurisdiction to interpret that agreement without that court or tribunal being subject to the interpretations of that agreement given by the courts or tribunal of the Parties'.<sup>48</sup> On the other hand, however, the notion of autonomy is broader. The introductory section on autonomy opens up with the

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<sup>42</sup> *ibid.*, paragraph 153.

<sup>43</sup> See *ibid.*, paragraphs 152-160.

<sup>44</sup> *ibid.*, paragraph 151 (emphasis added).

<sup>45</sup> *ibid.*, paragraph 151 (emphasis added).

<sup>46</sup> *ibid.*, paragraph 151 (emphasis added).

<sup>47</sup> *ibid.*, paragraphs 106-119.

<sup>48</sup> *ibid.*, paragraph 117 (emphasis added).

well-known statement according to which an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law',<sup>49</sup> provided that 'the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order'.<sup>50</sup> It further refers to the 'essential characteristics' of the European Union and its law.<sup>51</sup> However, when it comes to the limits that EU autonomy imposes on the compatibility assessment in relation to the CETA, the Court states that 'since those Tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the *effect of preventing the EU institutions from operating in accordance with the EU constitutional framework*'.<sup>52</sup>

As Koutrakos observes, by stating that the investment tribunal under the CETA would have no jurisdiction in the ISDS mechanism to assess the Union's level of protection since the regulatory autonomy of the parties is to be protected, the CJEU introduces 'a substantive, rather than a jurisdictional/procedural, constraint on what autonomy dictates'.<sup>53</sup> As the present author already outlined in relation to Opinion 2/13,<sup>54</sup> the *substantive* dimension of autonomy is to be criticised since the CJEU, if called upon to assess whether EU law is undermined, should balance the primacy of substantive EU law with the Union's objectives at the international level. In the absence of this balancing exercise, the Union's participation in international dispute settlement mechanisms would become meaningless. As already emphasised, EU autonomy in its external dimension has a *structural* dimension that should not, however, prevent *substantive* norms from entering the EU legal order as long as the 'essential' functioning of the Union is still preserved.<sup>55</sup>

## 4 The relationship between the domestic courts of EU Member States and investment tribunals in intra and extra-EU BITs

In intra-EU and extra-EU BITs, the relationship between the domestic courts of EU Member States and investment tribunals is a key issue, which was addressed differently in *Achmea* and in Opinion 1/17. As was already mentioned in Section 3.1, in *Achmea*, given that EU law formed part of the applicable law under the Netherlands-Slovakia BIT, the Court further examined whether other mechanisms

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<sup>49</sup> *ibid.*, paragraph 106.

<sup>50</sup> *ibid.*, paragraph 107.

<sup>51</sup> *ibid.*, paragraph 109.

<sup>52</sup> *ibid.*, paragraph 118 (emphasis added).

<sup>53</sup> Koutrakos, P. (2019), 'More on autonomy – Opinion 1/17 (CETA)', *European Law Review*, No 3, pp. 2-3.

<sup>54</sup> In Opinion 2/13, the two substantive dimensions of autonomy are the relationship between the principle of mutual trust and fundamental rights and the request to coordinate Article 53 ECHR with Article 53 of the Charter of Fundamental Rights of the European Union. See, in particular, Eeckhout, P. (2015), 'Opinion 2/13 on EU accession to the ECHR and judicial dialogue: Autonomy or autarky', *Fordham International Law Journal*, Vol. 38, pp. 955-992; and Peers, S. (2015), 'The EU's accession to the ECHR: The dream becomes a nightmare', *German Law Journal*, Vol. 16, pp. 213-222.

<sup>55</sup> Contartese (2017), *op. cit.*



could exist to safeguard the uniform and consistent interpretation and application of EU law within the EU Member States. Such assessment concerned the question whether the investment tribunal enjoys the right to seek a preliminary ruling from the CJEU on relevant EU law issues (*ex ante* mechanism), and, if not, whether the investment tribunal's award can be reviewed by a domestic court in the EU (*ex post* control), allowing for a direct dialogue with the CJEU through the preliminary ruling procedure. The Court held that neither approach was satisfactory. As for the preliminary ruling procedure, the Court explained that the investment tribunal under the Netherlands-Slovakia BIT does not meet the requirements under Article 267 TFEU. As the present author observed elsewhere,<sup>56</sup> the Court not only referred to the literal meaning of Article 267 TFEU to conclude that the investment tribunal under consideration was not a 'court or tribunal of a Member State', it also paid attention to whether full effectiveness of EU law could be ensured under that ISDS mechanism.<sup>57</sup> On this basis, the Court concluded that the possibility and scope for judicial review of an arbitral tribunal's award by a court of an EU Member State is limited. Such review can be exercised to the extent that national law permits this and, in the circumstances applicable in *Achmea*, was limited to 'the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award'.<sup>58</sup>

Under the CETA, however, EU law does not form part of the applicable law. Therefore, in Opinion 1/17, the CJEU did not consider it necessary to assess whether the investment tribunal could seek a preliminary ruling from the CJEU.<sup>59</sup> In light of the CJEU's previous rulings, the issue at stake, under extra-EU BITs, is whether the role of the courts of the EU Member States should be safeguarded *vis-à-vis* international investment tribunals. In essence, the question is whether an international tribunal deprives the national courts of the EU Member States of their role, thus undermining the proper functioning of the EU judicial system.

The CJEU already expressed concerns with regard to the role of the domestic courts and tribunals of EU Member States in its earlier case-law. In Opinion 1/09, the CJEU strongly protected their role *vis-à-vis* the envisaged European and Community Patents Court.<sup>60</sup> Given that it was intended that the latter would also rule on EU law, the findings of the Court in this ruling do not apply to the CETA. Nevertheless, more specifically on ISDS, the Court observed, in Opinion 2/15, that such a mechanism under the EU FTA with Singapore is a regime that 'removes disputes from the jurisdiction of the courts of the Member States'.<sup>61</sup> In *Achmea* as well, even if the impact of investment tribunals on the role of the domestic courts of Member States was not expressly addressed, the CJEU noted in passing that 'the *exceptional nature* of the tribunal's jurisdiction compared with that of the courts of [the] two Member

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<sup>56</sup> Contartese and Andenas (2019), *op. cit.*

<sup>57</sup> Judgment of the Court of Justice of 6 March 2018, C-284/16, *Achmea*, ECLI:EU:C:2018:158, paragraphs 43-49.

<sup>58</sup> *ibid.*, paragraphs 50-56.

<sup>59</sup> In contrast, the establishment of a mechanism for the prior involvement of the Court was addressed by Advocate General Bot in his Opinion in Opinion 1/17, *CETA*, ECLI:EU:C:2019:72, points 179-184.

<sup>60</sup> Opinion 1/09 of the Court of 8 March 2011, *European and Community Patents Court*, ECLI:EU:C:2011:123, paragraphs 80 and 85.

<sup>61</sup> Opinion 2/15 of the Court of 16 May 2017, *EU-Singapore FTA*, ECLI:EU:C:2017:376, paragraph 292.

States [concerned] ... is one of the principal reasons for the existence of Article 8 of the BIT',<sup>62</sup> and observed that the arbitration proceedings in question 'derive from a treaty by which Member States agree to *remove from the jurisdiction of their own courts*, and hence *from the system of judicial remedies* which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law'.<sup>63</sup>

These short statements reinforce the perception that, according to the CJEU, investment tribunals are alternatives and rivals to the domestic courts of the Member States. Quite surprisingly, then, in Opinion 1/17, the Court is silent on the potential competition between the domestic courts of Member States and international investment tribunals. The Court simply observed that the awards of investment tribunals are definitive rulings on a dispute brought by an investor against the investment host State or against the Union. The investor is in fact not allowed 'to bring, during or on the conclusion of the procedure before those Tribunals, the same dispute before a court of that State or before the Court'.<sup>64</sup> The Court, in sum, suggests that the two categories of tribunals – the domestic courts and tribunals of the Member States at the national level, and the investment tribunals, at the international level – can 'peacefully' co-exist. This is in line with the view taken by Advocate General Bot, who observes that neither the domestic courts and tribunals of the Member States nor the CJEU are deprived of their role. The first set of bodies can still act as 'general law' courts within the EU legal order, including their role in making references for a preliminary ruling,<sup>65</sup> and 'the Court is not deprived of its power to reply, by preliminary ruling, to questions referred by those courts and tribunals'.<sup>66</sup> In sum, according to Advocate General Bot, 'there cannot therefore be held to be any alteration of the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States, powers which are indispensable to the preservation of the very nature of EU law'.<sup>67</sup> He observed further that 'the inability to bring an action before the courts or tribunals of the Parties at the same time as, or indeed after, the referral of the matter to the CETA Tribunal could have the effect of encouraging investors to bring proceedings first before those courts and tribunals. Even though it is not laid down as a prerequisite for referral of the matter to the CETA Tribunal, exhaustion of the domestic remedies is therefore encouraged by those provisions'.<sup>68</sup>

Is this scenario, as described by Advocate General Bot, convincing or controversial? One may argue that, given that, under the CETA, EU law does not form part of the applicable law, the jurisdiction of the domestic courts is not undermined. From this perspective, what matters is that the two tribunals – domestic and international – operate in separate legal systems. However, the co-existence of two parallel and alternative judicial bodies – the first at the domestic level, and the second at the

<sup>62</sup> Judgment of the Court of Justice of 6 March 2018, C-284/16, *Achmea*, ECLI:EU:C:2018:158 paragraph 45 (emphasis added).

<sup>63</sup> *ibid.*, paragraph 55 (emphasis added).

<sup>64</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI:EU:C:2019:341, paragraph 135.

<sup>65</sup> Opinion of Advocate General Bot in Opinion 1/17, *CETA*, ECLI:EU:C:2019:72, point 172.

<sup>66</sup> *ibid.*, point 172.

<sup>67</sup> *ibid.*, point 172.

<sup>68</sup> *ibid.*, point 171.

international level – both competent to hear investment claims<sup>69</sup> could affect the application of EU law to the extent that it may result in different rulings on similar investor claims that touch on EU law. At the domestic level, the national courts will hear claims based on the national law of the Member State in question,<sup>70</sup> will comply with EU law, and may rely on the preliminary ruling procedure under Article 267 TFEU. Conversely, the investment tribunal under the CETA will interpret and apply the international agreement in question, will not have any obligation whatsoever to comply with EU law, and will be precluded from entering a direct dialogue with the CJEU. In this scenario, where the domestic and international tribunals are parallel and alternative, and function in the absence of any form of cooperation between the two, the implications for forum shopping of investment claims and the risks of diverging rulings on similar cases are inevitably part of this debate.

## 5 Conclusions

Although in the academic debate attempts were made to assess the CETA in the light of the Court's findings in *Achmea*, the conclusion of the CJEU reached in Opinion 1/17 is not surprising. Opinion 1/17 strongly diverges from *Achmea* due to the difference between intra and extra-EU BITs, which lead to different conclusions on the compatibility with the EU Treaties of the two agreements under consideration.

It clearly emerged that whereas, under *inter se* agreements, EU Member States have to comply with the principle of mutual trust, this latter does not apply to extra-EU BITs, which are based on the principle of reciprocity between the contracting parties. Furthermore, in *Achmea*, the fact that EU law formed part of the applicable law raised the question as to which mechanisms could ensure the uniform and consistent interpretation of Union law. Accordingly, the Court was required to assess whether *ex ante* and *ex post* solutions, that is, the possibility for the investment tribunal to seek a preliminary ruling from the CJEU and the review of the tribunal's award by the domestic courts of Member States, could be appropriate, and answered this in the negative.

However, in this picture, where intra and extra-EU BITs must clearly be distinguished, some uncertainties still remain. As regards the Union's right to regulate, what is its implication for the meaning of the principle of autonomy? Has the Court broadened its application beyond what the structural dimension of EU autonomy requires?

Moreover, on the one hand, the fact that the EU and the CETA legal orders are not linked – unlike the EU and the EEA in Opinion 1/91 and EU and the ECHR in Opinion 2/13 – appears to suggest that maintaining the separation of the two legal orders enhances the protection of EU autonomy. On the other hand, however, the

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<sup>69</sup> On the practice of investors to submit their claims to the domestic courts of the host country before bringing them to investment tribunals, see the study by Gáspár-Szilágyi, S. (forthcoming), 'Why do or should foreign investors resort to the courts of the host country prior to investment treaty arbitration? A study of two transitional and two well-established judiciaries', in Fauchald, O., Behn, D. and Langford, M. (eds.), *The legitimacy of investment arbitration. Empirical perspectives*, Cambridge University Press.

<sup>70</sup> On the lack of direct effect under the CETA, see Pantaleo, L. (2019), *The participation of the EU in international dispute settlement*, Springer.

silence of the Court on the relationship between the domestic courts of the Member States and the international tribunal leaves a reading of Opinion 1/17 in the light of Opinion 2/15 ambiguous. From the Union's perspective, what are the implications of the co-existence of two parallel and alternative judicial bodies – the first at the domestic level, and the second at the international level? As both are competent to hear investment claims, is their co-existence controversial?

Finally, it is worth recalling that the ISDS puzzle does not end with intra and extra-EU BITs. As is well known, it also extends to multilateral agreements. The debate is therefore currently open under the Energy Charter Treaty (ECT) and in relation to the proposed multilateral investment court. Some investment tribunals, established under the ECT, have interpreted the findings of the CJEU in *Achmea* as not applicable to ECT disputes with an *inter se* dimension.<sup>71</sup> In addition, the proposal for the establishment of a multilateral investment court,<sup>72</sup> which is gaining extensive support, will also have to be assessed in light of the CJEU's standards on EU autonomy.

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<sup>71</sup> See *Vattenfall AB and Others v. Federal Republic of Germany*, ICSID Case No ARB/12/12, decision on the *Achmea* issue, 31 August 2018; *Masdar Solar & Wind Cooperatief U. A. v. Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018; *Belenergia S.A. v. Italy*, ICSID Case No ARB/15/40, Award, 6 August 2019; and *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v. Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on responsibility and on the principles of quantum, 30 November 2018.

<sup>72</sup> In March 2018, the Council of the European Union gave the Commission the mandate to open negotiations for the establishment of a multilateral investment court (Council Document 12981/17 Add 1).

# Investment arbitration in the EU following *Achmea* and Opinion 1/17

By Ramón Vidal Puig<sup>1</sup>

## 1 Introduction

I would like to explore the main legal implication of the landmark decisions of Opinion 1/17<sup>2</sup> and the *Achmea* judgment<sup>3</sup> for the development of the European Union's (EU's) investment protection policy.

At the outset, it may be useful to recall briefly the main conventional instruments for the protection of foreign investors in the EU.

Since the 1960s the Member States have concluded over 1300 bilateral investment treaties (BITs) with third countries ('extra-EU BITs').

In addition, the Member States are parties to nearly 200 BITs with other Member States ('intra-EU BITs').

Prior to the Treaty of Lisbon, investment protection was the preserve of the EU Member States. The EU was a party to just one agreement providing for investment protection: the Energy Charter Treaty (ECT).

The Treaty of Lisbon conferred upon the EU exclusive competence with regard to foreign direct investment by including it within the EU's common commercial policy.<sup>4</sup> In addition, the EU has shared competence with regard to portfolio investments.<sup>5</sup>

Following the Treaty of Lisbon, the EU has undertaken to replace progressively the Member States' extra-EU BITs with agreements at EU level. The Comprehensive Economic and Trade Agreement<sup>6</sup> (CETA) between Canada and the EU and its Member States was the first bilateral agreement signed by the EU that included provisions on investment protection. In October 2018 the EU and the Member States signed a self-standing investment protection agreement (IPA) with Singapore. In addition, the Commission has negotiated an IPA with Vietnam and an association agreement that includes investment protection with Mexico. Furthermore, it is conducting bilateral negotiations on investment protection with, inter alia, Japan, Malaysia, Philippines, Thailand, China and Myanmar. The Commission is also

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<sup>2</sup> Opinion 1/17 of the Court of 30 April 2019, CETA, ECLI: EU:C:2019:341.

<sup>3</sup> *Achmea*, C-284/16, ECLI:EU:C:2018:158.

<sup>4</sup> See Article 207(1) TFEU.

<sup>5</sup> Opinion of the Court of 16 May 2017, C-2/15, *Free Trade Agreement with Singapore*, ECLI:EU:C:2017:376, para. 243.

<sup>6</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23).

conducting negotiations on the establishment of a multilateral investment court within the framework of United Nations Commission on International Trade Law (UNCITRAL).

The Member States' existing extra-EU BITs with third countries impinge on the EU's exclusive competence with regard to foreign direct investment. As a transitional measure, Regulation (EC) No 1219/2012<sup>7</sup> (the 'Grandfathering Regulation') has empowered the Member States, in accordance with Article 2(1) of the Treaty on the Functioning of the European Union (TFEU), to maintain their existing extra-EU BITs.<sup>8</sup> In addition, the Commission may authorise the Member States to amend their existing extra-EU BITs or to conclude new ones.<sup>9</sup> As a condition of being authorised, Member States must ensure that their agreements are compatible with both EU law and investment policy.<sup>10</sup> This allows the Commission to require that the Member States progressively align their extra-EU BITs with the model developed by the Commission for agreements concluded at EU level.

Against this background, I outline below the main legal implications of *Achmea* and Opinion 1/17 for each of the three categories of investment agreements referred to above: the Member States' intra-EU BITs, agreements to which the EU is a party and the Member States' extra-EU BITs.

## 2 The intra-EU BITs

The Commission has consistently maintained that intra-EU BITs, including in particular the investor-to-state dispute settlement (ISDS) mechanism, are incompatible per se with the Treaties.

The ruling of the Court of Justice of the European Union in *Achmea* confirmed that the ISDS mechanism contained in the intra-EU BITs is incompatible with Articles 344 and 267 TFEU.

Following the *Achmea* judgment, some arbitration tribunals have sought to limit its consequences for other intra-EU BITs by pointing to alleged differences in the wording of the clause on applicable law or, even less convincingly, to the fact that the arbitration was conducted under different arbitration rules. Other arbitration tribunals have taken the view that until an intra-EU BIT is formally terminated by the parties it remains applicable as a matter of international law and the tribunal cannot decline jurisdiction over the dispute.

The Commission disagrees, and takes the view that *Achmea* has the clear implication that the ISDS provisions included in *any* intra-EU BIT are incompatible with the Treaties and inapplicable. This view is now shared by all the Member States.

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<sup>7</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, 20.12.2012, p. 40).

<sup>8</sup> *ibid.*, Article 3.

<sup>9</sup> *ibid.*, Article 7.

<sup>10</sup> *ibid.*, Article 9(1) and (2).

In January 2019, the Member States issued a series of declarations,<sup>11</sup> which state that:

- all investor-state arbitration clauses contained in BITs concluded between Member States are contrary to EU law and thus inapplicable;
- such clauses, including sunset clauses, do not produce legal effects; and
- arbitral tribunals established on the basis of such clauses lack jurisdiction, due to the lack of a valid offer to arbitrate by the defending Member State.

In the same declarations the Member States undertake, inter alia, to do the following:

- inform investment tribunals of the consequences of *Achmea* in all pending cases;
- terminate the intra-EU BITs, either by means of a multilateral treaty among the Member States or by means of bilateral treaties; and
- where the claimant is an undertaking controlled by a Member State, to take steps under national law to ensure that that undertaking withdraws the case.

The Member States, nevertheless, could not agree on the implications of *Achmea* for intra-EU disputes under the ECT. The Commission takes the view that the ECT does not apply, and has never applied, to such disputes. Indeed, were the ECT applicable to intra-EU disputes, it would be incompatible with the Treaties in the light of *Achmea*. This position is shared by a large majority of Member States. However, some Member States remain of the view that *Achmea* does not prejudice the question of the applicability of the ECT to disputes between Member States.

### 3 The EU agreements

In Opinion 1/17 the Court confirmed the compatibility with primary law of the investment protection chapter of CETA.

In reaching that conclusion, the Court distinguished *Achmea* by noting that: (1) EU law is not part of the law interpreted and applied by CETA's Investment Court System (ICS); and (2) the principle of mutual trust does not apply between the EU and third countries.<sup>12</sup>

The Court has expressed only two relatively minor concerns, based on the requirements imposed by Article 47 of the Charter of Fundamental Rights (the 'Charter'):

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<sup>11</sup> The [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](#) was signed by 22 Member States. On 16 January 2019 the remaining Member States made two separate declarations (one signed by Finland, Luxembourg, Malta, Slovenia and Sweden, and the other by Hungary alone). Both separate declarations, nevertheless, include the commitments with regard to the extra-EU BITs mentioned above and differ mainly as regards the position of the signatory Member States with regard to the ECT.

<sup>12</sup> Opinion 1/17, paras. 126-129.

- before CETA enters into force, appropriate measures must be taken (either bilaterally within CETA's Joint Committee or unilaterally by the EU) in order to ensure that the ICS is financially accessible to natural persons and small and medium sized undertakings;<sup>13</sup>
- while the parties may agree legally binding interpretations within the Joint Committee, such interpretations cannot be made applicable to pending disputes.<sup>14</sup>

The Commission is currently considering how to address the first of these two concerns, so as to allow the prompt ratification and entry into force of CETA.

The second concern does not require any immediate action by the parties. Rather, it sets a legal limit, which the EU will have to observe when agreeing to binding interpretations within the Joint Committee.

CETA was and remains the model for the other IPAs already negotiated, or currently being negotiated, by the Commission. It can be safely assumed, therefore, that those agreements are also compatible with the Treaties.

This does not mean, however, that Opinion 1/17 is devoid of practical legal consequences for the EU's agreements. Prior to Opinion 1/17, the various provisions included in CETA with a view to safeguarding the parties' regulatory autonomy may have been regarded as being desirable from a policy point of view, but not legally indispensable. In view of the emphasis placed by the Court on those provisions,<sup>15</sup> Opinion 1/17 may be read as implying that, from now on, all EU agreements should include safeguards of the right to regulate that are analogous to those contained in CETA. These safeguards include, in particular, the following provisions specifically cited by the Court in Opinion 1/17:

- Article 8.9, which recognises expressly the parties' 'right to regulate' for legitimate purposes;<sup>16</sup>
- Article 28.3, which provides for a 'general exception' clause, allowing the parties to derogate from the national treatment and most-favoured-nation treatment standards where necessary to achieve certain legitimate policy objectives;<sup>17</sup>
- Point 3 of Annex 8-A, which defines narrowly the notion of indirect expropriation;<sup>18</sup>
- Article 8.10, where the standard of 'fair and equitable treatment' is specifically circumscribed.<sup>19</sup>

<sup>13</sup> *ibid.*, paras. 205-222.

<sup>14</sup> *ibid.*, paras. 232-237.

<sup>15</sup> *ibid.*, paras. 137-161.

<sup>16</sup> *ibid.*, para. 154.

<sup>17</sup> *ibid.*, para. 152.

<sup>18</sup> *ibid.*, para. 157.

<sup>19</sup> *ibid.*, para. 158.



## 4 The Member States' extra-EU BITs

Opinion 1/17 may also have legal implications for the Member States' extra-EU BITs. I will address two possible legal implications resulting from the principle of autonomy of the EU legal order. But it should be borne in mind that additional legal implications might result also from Article 47 of the Charter, to the extent that that provision would have to be considered as applicable to the ISDS mechanisms established in the Member States' extra-EU BITs. However, this is a complex legal question, which I do not intend to explore today.

In the first place, Opinion 1/17 appears to indicate that EU law cannot form part of the law interpreted and applied by the arbitration tribunals established under the extra-EU BITs.

Recent extra-EU BITs often include clauses that mirror the relevant provisions of CETA and expressly exclude EU law from the scope of the applicable law.

However, some extra-EU BITs pre-dating the Grandfathering Regulation may contain clauses that expressly designate each party's national law (and hence EU law) as part of the applicable law. Other extra-EU BITs pre-dating the Grandfathering Regulation may not include any express clause on the applicable law. This has the consequence, in arbitrations under the rules of the International Centre for Settlement of Investment Disputes (ICSID) that national law (and hence EU law) will be part of the applicable law pursuant to Article 42 of the ICSID Convention.<sup>20</sup>

The second implication is that the extra-EU BITs should contain adequate provisions in order to ensure that the investment tribunal cannot call into question the level of protection of public interests established by the EU institutions.

It could be argued that the extra-EU BITs do not bind the EU and, therefore, cannot affect the powers of the EU institutions in a manner contrary to the principle of autonomy. However, it must be recalled that, even if the EU is not a party to the extra-EU BITs, the measure challenged by the claimant under those agreements may well be a EU measure and/or a measure taken by a Member State in order to implement EU law. This situation is illustrated by the pending case brought by some Mexican investors under the Spain/Mexico BIT with regard to the measures taken by Spain in order to implement the resolution of Banco Popular pursuant to the Single Resolution Mechanism Regulation.<sup>21</sup> In this type of situation, the decisions of the arbitration tribunals under the extra-EU BITs of the Member States may well have the effect, in practice, of forcing the EU to abandon its chosen level of protection in order to avoid Member States being repeatedly compelled to pay damages for complying with EU law.<sup>22</sup>

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<sup>20</sup> The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes.

<sup>21</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

<sup>22</sup> See Opinion 1/17, para. 149.

In its decisions under the Grandfathering Regulation authorising the Member States to open negotiations, the Commission requested the Member States to include appropriate safeguards of their right to regulate. However, once again, the extra-EU BITs predating the Grandfathering Regulation may not include appropriate explicit safeguards in respect of that right. One might argue that such safeguards are nevertheless implicit, as confirmed by the case-law of the arbitral tribunals. However, that case-law is notoriously inconsistent. Therefore, if only for reasons of legal certainty, the Member States should take the necessary steps to align their extra-EU BITs with CETA.

## 5 Conclusion

*Achmea* and Opinion 1/17 have provided much-needed clarity. *Achmea* has confirmed that an intra-EU ISDS is inherently incompatible with the Treaties. In turn, Opinion 1/17 has confirmed that an extra-EU ISDS is, subject to certain conditions, compatible with the Treaties. Following Opinion 1/17, the EU's foreign investment protection policy can be pursued on firm legal foundations. At the same time, Opinion 1/17 has 'locked in' the CETA model and made a return to the traditional model impossible.

Opinion 1/17 may also have certain legal implications for the Member States' extra-EU BITs. These agreements can be distinguished from intra-EU BITs and are compatible in principle with EU law. However, Member States may in some cases need to make certain adjustments. In particular, they should ensure that EU law is not part of the applicable law and that the agreements contain adequate safeguards of the parties' right to regulate.

# Banking and financial investment arbitrations: past, present and future post *Achmea* and Opinion 1/17

By Laurie Achantouk-Spivak<sup>1</sup>

## 1 Introduction to banking and financial investment arbitrations

In its 2018 Commission Report on Financial Institutions and International Arbitration, the International Chamber of Commerce (ICC) noted that investment arbitration 'is a relatively novel feature in the banking and financial landscape'.<sup>2</sup> This landscape, however, is rapidly changing, and any traditional reluctance on the part of banks and financial institutions to resort to commercial arbitration is not seen in the case of investment arbitration. Partly in response to financial crises,<sup>3</sup> but also due to a growing awareness on the part of banks and financial institutions of the protections afforded to them by international investment law, banks and financial institutions have become increasingly eager to turn to investment arbitration as a forum for pursuing claims.

The importance of investment arbitration in the banking and financial sectors<sup>4</sup> is evidenced simply by looking at the statistics. According to publicly available sources, as at 31 December 2018, of the 942 total pending or concluded investment arbitration cases 89 concern the banking or financial sectors, and 37 of these cases have been concluded.<sup>5</sup>

Of the 37 concluded cases in the banking or financial sector, the tribunal found in favour of the state in 24 cases, with the claims dismissed at the jurisdictional or merits phase. In 12 cases, the tribunal found in favour of the investor, and in one case, liability was found but no damages were awarded.<sup>6</sup>

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<sup>1</sup> Counsel, Cleary Gottlieb Steen & Hamilton LLP. All views expressed herein are personal. No view or opinion expressed herein should be understood as representing the views or opinions of Cleary Gottlieb Steen & Hamilton LLP or any of its clients. The author would like to thank Robert Garden and Charlotte Blondel for their help in preparing this paper.

<sup>2</sup> International Chamber of Commerce (2018), *ICC Commission Report, Financial Institutions and International Arbitration*, ICC, Paris, p. 2.

<sup>3</sup> *ibid.*, p. 7.

<sup>4</sup> Banking and financial investment arbitrations are defined broadly to include cases in which a bank or a financial institution acts as the claimant, or where the claimant holds a direct or indirect shareholding in a financial institution in the host state, is a depositor in such institution, or asserts claims in relation to financial services other than insurance or pension funds, as well as claims based on debt instruments issued in or by host states.

<sup>5</sup> United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator (data correct at 31 December 2018).

<sup>6</sup> *ibid.*

Of the 322 total pending investment arbitration cases, there are still 30 pending cases in the banking or financial sector, while 22 banking or financial cases have been discontinued or settled.<sup>7</sup>

## 1.1 Driving factors for the use of investment arbitration in banking and financial disputes

The growing appeal of investment arbitration in the increasingly globalised banking and financial sector has many causes. These include large cross-border flows of funds as well as strict supervision and regulation of the sector.

Against this background, investment arbitration is perceived by investors as a direct, neutral remedy against any wrongful conduct of, or attributable to, the state. Investment arbitration, where available under an investment treaty, typically enables investors to trigger the international responsibility of a state for any violation of its international obligations provided for in the treaty. Banks and financial institutions thus routinely challenge the conduct of regulatory authorities such as central banks, where they can show that the conduct of those authorities should be attributed to the state pursuant to the customary rules on attribution set forth in the International Law Commission (ILC) Articles on State Responsibility.<sup>8</sup>

As a remedy, investment arbitration can be described as 'all-encompassing'. Investors may seek to challenge various regulatory measures for resolving a given dispute, including regulatory and prudential measures, tax measures, as well as measures taken in the context of criminal proceedings.

In addition, investors increasingly seek provisional measures during the pendency of an investment arbitration with the aim of maintaining the status quo in the context of ongoing regulatory, tax, judicial and criminal proceedings. For example, the tribunal in *Marfin v. Cyprus* recommended that Cyprus suspend the enforcement of criminal arrest warrants.<sup>9</sup>

Finally, because investor-state arbitral tribunals typically allow claims brought by shareholders for measures having an effect on the value of their indirect, minority shareholding in a local bank,<sup>10</sup> the number of potential claimants for a single set of measures can rise exponentially.

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<sup>7</sup> *ibid.*

<sup>8</sup> International Law Commission (2001), 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', *Yearbook of the International Law Commission*, Vol. II, Part Two, pp. 31-143.

<sup>9</sup> *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, paragraph 1290.

<sup>10</sup> See, e.g., Gaukrodger, D. (2014), 'Investment treaties and shareholder claims for reflective loss: insights from advanced systems of corporate law', OECD Working Papers on International Investment, 2014/02, pp. 7-8.

## 2 Overview of banking and financial investment arbitrations to date

### 2.1 Typology of disputes

Banking and financial investor-state arbitrations may arise in varied circumstances, but certain factual patterns emerge from a review of the cases to date.

First, investment arbitrations frequently arise as a result of changes to business and legal frameworks in the context of political instability, or a change of regime.

In particular, privatisations or conversely compulsory acquisitions in the wake of a governmental change have triggered some investment claims. In *Saluka Investments B.V. v. Czech Republic*, for example, the investor's claim arose in the context of the reorganisation and privatisation of the Czech banking sector following the end of the Communist period in 1990.<sup>11</sup> In *British Caribbean Bank v. Belize*, the financial institution's claims resulted from the compulsory acquisition by the state of its interests in certain loan and security agreements concluded with a telecommunications company, and an investment vehicle in Belize.<sup>12</sup>

Banks and financial institutions have also brought claims under bilateral investment treaties (BITs) in response to a changing business framework in conflict zones. The cases brought against the Russian Federation in relation to the Crimea are one such example.<sup>13</sup>

Second, investment arbitrations have frequently arisen in the context of measures taken in the course of financial regulation, and specifically measures taken in response to the alleged misconduct of banks or bank shareholders.

Specifically, some investor claims have arisen in the context of criminal investigations and prosecutions for fraud and money laundering, such as the *Al Warraq v. Indonesia* case.<sup>14</sup> In a similar vein, in the pending case of *Jochem v. Panama*, the claimant, who owned several entities operating in Panama, including a brokerage firm, reportedly brought a claim in response to the forced liquidation of the brokerage firm following alleged violations of security laws.<sup>15</sup> Other cases have arisen following the revocation of banking licences, such as *Genin v. Estonia*, in which claims arose following the

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<sup>11</sup> *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2016, paragraph 1.

<sup>12</sup> *British Caribbean Bank Limited v. Government of Belize*, UNCITRAL, Award, 19 December 2014, paragraph 4.

<sup>13</sup> See Peterson, L.E., 'In jurisdiction ruling, arbitrators rule that Russia is obliged under BIT to protect Ukrainian investors in Crimea following annexation', *Investment Arbitration Reporter*, 9 March 2017; and *Oschadbank v. Russian Federation*, UNCITRAL, Award, 26 November 2018. See Ross, A., 'Ukrainian bank wins billion-dollar award against Russia', *Global Arbitration Review*, 26 November 2018.

<sup>14</sup> *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, Award, 15 December 2014, paragraph 108 et seq.

<sup>15</sup> Charlotin, D., 'Dutch investor Jochem Bernard Buse sees BIT claim against Panama registered', *Investment Arbitration Reporter*, 12 May 2017.

cancellation by the Central Bank of Estonia of an operating licence held by a financial institution incorporated in Estonia in which the claimants were shareholders.<sup>16</sup>

Third, investment arbitrations may arise in the context of prudential and other regulatory measures taken in response to financial crises.

Liquidity assistance and capital support measures, as well as resolution measures, have prompted a significant number of investment treaty arbitrations. For example, in the pending case of *GBM v. Spain*, the claimants complain that the authorities refused to provide financial support to GBM during the bank's liquidity crisis in 2017, leading to the forced resolution of the bank and its sale to a Spanish bank.<sup>17</sup> Financial crises have also resulted in sovereign debt restructurings and, in turn, investment arbitration claims, notably in *Abaclat v. Argentina*<sup>18</sup> and *Poštová banka v. Greece*.<sup>19</sup>

Against these factual backgrounds, the types of claims investors bring may vary.

The most frequently invoked claim in banking and financial investment arbitrations is a claim that the investor was not afforded fair and equitable treatment (FET), including as a result of the frustration of the investor's legitimate expectations, unreasonable or arbitrary treatment, a lack of stability in the legal or business framework, denial of justice, inconsistent conduct, coercion, harassment and a lack of due process.

After FET claims, unlawful expropriation claims are the second most frequent set of claims in banking and financial arbitrations. Banks or other financial institutions invoking such grounds would typically allege that the state deprived them, directly or indirectly, of their investment, involving the total or near-total deprivation of an investment without a formal transfer of title or outright seizure by the State.<sup>20</sup> Numerous investors in financial disputes have alleged expropriation without prompt and adequate compensation, lack of due process and/or discrimination.<sup>21</sup>

Claimants have also invoked the standard of full protection and security, in relation to claims that the state failed to exercise sufficient due diligence in order to protect an

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<sup>16</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, paragraph 42 et seq.

<sup>17</sup> *GBM Global and Others v. Kingdom of Spain*, ICSID Case No ARB/18/33, Request for arbitration, 23 August 2018, paragraphs 7-8 (cited in Charlotin, D., 'Twin arbitrations started against Spain in wake of Banco Popular's resolution', *Investment Arbitration Reporter*, 24 August 2018).

<sup>18</sup> *Abaclat and Others v. Argentine Republic*, ICSID Case No ARB/07/5, Consent Award under ICSID Arbitration Rule 43(2), 29 December 2016.

<sup>19</sup> *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No ARB/13/8, Award, 9 April 2015.

<sup>20</sup> United Nations Conference on Trade and Development (2012), 'Expropriation', UNCTAD *Series on Issues in International Investment Agreements II*, p. 7. See also *Metaclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paragraph 103; and *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award, 12 December 2016, paragraph 320.

<sup>21</sup> See, e.g., *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No ARB/08/9, Decision on jurisdiction, 8 February 2013, paragraph 530; and *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award, 31 October 2012, paragraph 523.

investor, with investors raising claims for failure to protect the legal security of their investments.<sup>22</sup> Further grounds for launching claims include most-favoured nation standards, national treatment standards, and the failure of the State to protect an investment from impairment resulting from discriminatory measures.<sup>23</sup>

BITs often include provisions guaranteeing the free transfer of funds, obliging host states to permit the payment, conversion and repatriation of funds relating to an investment. Investors have invoked these protections in a number of banking and financial investment arbitrations, such as *Daimler v. Argentina* and *Metalpar v. Argentina*.<sup>24</sup>

## 2.2 Outcome of concluded cases

To date, statistics based on publicly available information show that investment treaty tribunals have found in favour of the state in the majority of cases in the banking and financial sector. Of the 37 recorded concluded cases in the banking and financial sector, 24 cases were decided in favour of the state.<sup>25</sup> In 14 of those cases, the tribunal found it had no jurisdiction over the claim;<sup>26</sup> the remaining 10 cases were

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<sup>22</sup> See, e.g., *Antoine Goetz and Others v. Republic of Burundi (II)*, ICSID Case No ARB/01/2, Award, 21 June 2012, paragraph 239; and *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No ARB/97/4, Award, 29 December 2004, paragraph 170.

<sup>23</sup> See, e.g., *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paragraphs 242-243; and *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, 24 October 2014, paragraph 272.

<sup>24</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, paragraph 42; and *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No ARB/03/5, Award on the merits, 6 June 2008, paragraphs 107-111.

<sup>25</sup> United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator, and other publicly available resources.

<sup>26</sup> *Dawood Rawat v. Republic of Mauritius*, PCA Case No 2016-20, Award on Jurisdiction, 6 April 2018, paragraph 195; *B.V. Belegging-Maatschappij "Far East" v. Republic of Austria*, ICSID Case No ARB/15/32, Award, 30 October 2017; *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No ARB/15/18, Award, 22 June 2017, prayer for relief; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Award, 26 April 2017, paragraph 215; *Poštová banka and Istrokapital SE v. Hellenic Republic*, ICSID Case No ARB/13/8, Award, 9 April 2015, paragraph 379; *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of*, ICSID Case No ARB/12/31, Award, 22 September 2015, paragraph 152; *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No ARB/12/29, Award, 30 April 2015, paragraph 240; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013, paragraph 229; *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No ARB/11/13, Award on jurisdiction, 16 July 2013, p. 74; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, paragraph 286; *Alps Finance and Trade AG v. Slovak Republic*, Award, 5 March 2011, prayer for relief; *Alasdair Ross Anderson and Others v. Republic of Costa Rica*, ICSID Case No ARB(AF)/07/3, Award, 19 May 2010, paragraph 65; *Stéphane Benhamou v. Uruguay*, UNCITRAL, Award, 19 December 2002, pp. 86-87; and *Philippe Gruslin v. Malaysia (II)*, ICSID Case No ARB/99/3, Award, 27 November 2000, p. 510.

dismissed on the merits.<sup>27</sup> Twelve cases were decided in favour of investors<sup>28</sup> and, in one case, the tribunal found liability, but no damages were awarded.<sup>29</sup>

## 2.3 Objections to the jurisdiction of the arbitral tribunal

States have raised various jurisdictional objections in response to claims brought by banking and financial institutions. The jurisdiction of investment treaty tribunals is predicated on and limited by the consent of the state to resort to arbitration. Therefore, jurisdictional objections raised by the state based on the existence of and limit to such consent abound.

Five types of jurisdictional objections typically arise: objections to jurisdiction *ratione personae*, *ratione materiae*, *ratione voluntatis*, *ratione temporis* and *ratione loci*. Various other preliminary objections, such as objections to admissibility, are also raised by states, but these will not be discussed for the purposes of this paper. Three jurisdictional objections – *personae*, *materiae*, and *loci* – are the most relevant to disputes in the banking and financial sector.

Objections to jurisdiction on *ratione personae* grounds have been raised in at least 13 reported investment arbitration proceedings involving financial institutions, of which one, *ABCI Investments v. Tunisia*, is still pending. Objections on *ratione personae* grounds relate to the definition of an ‘investor’ under the relevant legal instrument or BIT. For instance, issues of corporate nationality and related issues of abuse of treaty protection may arise. In *Capital Financial Holdings Luxembourg v. Cameroon*, for instance, the tribunal found that a domestic investor did not have its registered office in

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<sup>27</sup> *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, p. 363; *Evrobalt LLC and Kompozit LLC v. Moldova*, SCC Case; *Renée Rose Levy and Grencitel S.A. v. Republic of Peru*, ICSID Case No ARB/11/17, Award, 9 January 2015, paragraph 203; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, p. 133; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No ARB/03/5, Award on the merits, 6 June 2008, paragraph 235; *Fireman’s Fund Insurance Company v. The United Mexican States*, ICSID Case No ARB(AF)/02/1, Award, 17 July 2006, paragraph 226; *Noble Ventures, Inc. v. Romania*, ICSID Case No ARB/01/11, Award, 12 October 2005, paragraph 223; *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No ARB/98/5, Award, 26 July 2001, p. 192; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, paragraph 385; and *Ayoub-Farid Saab and Fadi Saab v. Cyprus*, Decision on jurisdiction, 10 September 2015.

<sup>28</sup> *Oschadbank v. Russian Federation*, UNCITRAL, Award, 26 November 2018; *British Caribbean Bank Limited v. Government of Belize*, PCA Case No 2010-18, Award, 19 December 2014, paragraph 328; *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, 24 October 2014, paragraph 335; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award, 31 October 2012, paragraph 591; *Continental Casualty Company v. Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, paragraph 320; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. Republic of Estonia*, ICSID Case No ARB/04/6, Award, 19 November 2007, paragraph 376; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paragraph 511; *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No ARB/97/4, Award, 29 December 2004, paragraph 374; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No ARB/96/3, Award, 9 March 1998, p. 1397; *Antoine Goetz and Others v. Republic of Burundi (II)*, ICSID Case No ARB/01/2, Award, 21 June 2012, paragraph 307; *City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine*, ICSID Case No ARB/14/9, Award, 26 July 2018; and *PL Holdings S.à.r.l. v. Ukraine*, SCC Case No V 2014/163, Final Award, 28 September 2017, paragraph 64.

<sup>29</sup> *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014.



Luxembourg and had simply created the appearance of a Luxembourg company to benefit from treaty protections for the purposes of the arbitration.<sup>30</sup>

Objections to jurisdiction on *ratione materiae* and *ratione loci* grounds have been raised in a minimum of 22 cases. *Ratione materiae* objections relate to the definition of an ‘investment’ under the applicable legal instrument or BIT. States seeking to object to jurisdiction on *ratione materiae* grounds have, for example, argued that certain financial instruments, such as sovereign bonds or derivatives, do not qualify as a protected investment. In practice, jurisdiction *ratione materiae* is often analysed in conjunction with jurisdiction *ratione loci*. *Ratione loci* objections typically relate to the requirement in investment treaties that the relevant investment be made ‘in the territory of the host state’. States may challenge whether complex international financial transactions which do not necessarily have a single physical location or involve a flow of funds into the host state can actually be deemed to have been made in the territory of the host state.

For example, states have queried whether sovereign bonds qualify as an ‘investment’ for the purposes of Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or the applicable BIT, on the grounds that: (i) a sovereign bond in the form of dematerialised securities or interest therein does not fall within typical definitions of investment included in BITs or meet the inherent characteristics of an investment, such as contribution, duration and risk; and (ii) sovereign bonds are often traded in secondary markets, and therefore the territorial requirement may not be satisfied.<sup>31</sup>

## 2.4 Defences on the merits

In addition to jurisdictional objections, states typically rely on several types of defences on the merits.

First, states generally contend that the measures complained of fall within the legitimate exercise of the state’s sovereign regulatory power. In light of the public interest served by financial regulation and supervision, investment arbitration tribunals have, on the whole, shown deference to legitimate regulatory activity with respect to financial institutions. By way of example, in *Marfin Investment v. Cyprus*, an investor alleged that their investment had been indirectly expropriated following a Cypriot decree increasing governing participation in Laiki Bank. Cyprus contended that it did not intend to nationalise the bank, and that the measure was a legitimate response to the economic crisis. The tribunal found that Cyprus had not sought to nationalise the bank, and that the measures were taken in good faith in the exercise of Cyprus’

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<sup>30</sup> *Capital Financial Holdings Luxembourg SA v. Republic of Cameroon*, ICSID Case No ARB/15/18, Award, 22 June 2017, paragraphs 362-365.

<sup>31</sup> See, e.g., *Abaclat and Others v. Argentine Republic*, ICSID Case No ARB/07/5, Decision on jurisdiction and admissibility, 4 August 2011, paragraphs 352-357; *Ambiente Ufficio SpA and Others v. Argentine Republic*, ICSID Case No ARB/08/9, Decision on jurisdiction and admissibility, 8 February 2013, paragraph 423; *Giovanni Alemanni and Others v. Argentina*, ICSID Case No ARB/07/8, Decision on jurisdiction and admissibility, 17 November 2014, paragraph 296; and *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No ARB/13/8, Award, 9 April 2015), paragraphs 360-371.

regulatory powers in the pursuit of a 'legitimate public policy objective – the protection of the health of Cyprus' financial system during a time of profound economic crisis'.<sup>32</sup>

Second, states facing claims for discriminatory measures have relied as a defence on the argument that non-discrimination requires similar treatment of investors in similar circumstances and does not require similar treatment vis-à-vis entities or persons in a different situation or under different circumstances. This defence was mounted in *Invesmart B.V. v. Czech Republic*, in which claims arose in the context of the alleged withdrawal of commitments made by the Czech Republic to provide state aid to a foreign-owned bank. The claimant alleged that the denial of state aid was discriminatory, in response to which the Czech Republic argued that the circumstances of Union Banka differed to those of other Czech banks and, accordingly, the denial of state aid was not discriminatory.

Third, states have also sought to deny any causation between the measures complained about by claimants, and the loss alleged. For example, in *De Levi v. Peru*, which concerned the bankruptcy of a French-owned bank, Peru contended that 'public funds had been withdrawn not only from [the bank at issue] but from all private-sector banks' and that 'the Claimant has not shown that the Bank's failure has been due to those withdrawals,' with the withdrawal of private deposits instead causing the bank's liquidity crisis.<sup>33</sup>

Fourth, state of necessity defences are frequently raised by states in case of financial crises. States have invoked this customary international law excuse to liability in case of wrongful conduct in a number of investment arbitrations in the banking and financial sector.<sup>34</sup> In those cases, the debate turns on whether the requirements for a finding of a state of necessity, as defined in Article 25 of the ILC Articles on State Responsibility, are met.<sup>35</sup>

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<sup>32</sup> *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, paragraph 830.

<sup>33</sup> *Rose Renée de Levi v. Republic of Peru*, ICSID Case No ARB/10/17, Award, 26 February 2014, paragraph 205.

<sup>34</sup> See, e.g., *Continental Casualty Company v. Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, paragraphs 160-161.

<sup>35</sup> International Law Commission (2001), 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', *Yearbook of the International Law Commission*, Vol. II, Part Two, p. 31, Article 25, p. 80. See, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Parzuergoa v. Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016.

## 3 Present and future intra-EU banking and financial investment arbitrations

### 3.1 Overview of banking and financial disputes in the EU

Banking and financial investment arbitrations involving EU parties have proliferated, with 29 reported cases brought against Member States,<sup>36</sup> and 47 cases brought by EU claimants,<sup>37</sup> according to publicly available information.<sup>38</sup> Some 18 cases have been brought under BITs between Member States, with nine cases brought under intra-EU BITs still pending.<sup>39</sup>

### 3.2 Overview of concluded intra-EU cases

According to publicly available information, in the banking and financial sector, there have been at least nine concluded intra-EU cases between a Member State and an investor from another Member State.<sup>40</sup>

Of the nine concluded cases since 2004, the tribunal has found in favour of states in four cases<sup>41</sup> and in favour of investors in four cases,<sup>42</sup> with one case being settled.<sup>43</sup>

### 3.3 *Slovak Republic v Achmea* – Judgment of the CJEU of 6 March 2018 on the compatibility with EU law of investor-state arbitration clauses in intra-EU BITs

The landscape for investment arbitration in the EU is rapidly evolving.

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<sup>36</sup> The EU Member States against which reported cases have been brought are as follows: the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Cyprus, the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland, Romania, the Slovak Republic and the Kingdom of Spain.

<sup>37</sup> The home States of such claimants are as follows: the Republic of Austria, the Kingdom of Belgium, the Republic of Cyprus, the Czech Republic, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, the Italian Republic, the Republic of Latvia, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Poland, the Kingdom of Spain and the United Kingdom.

<sup>38</sup> United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, Investment Dispute Settlement Navigator (data correct at 31 December 2018).

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> See *Marfin Investment Group v. Republic of Cyprus*, ICSID Case No ARB/13/27; *B.V. Belegging-Maatschappij "Far East" v. Republic of Austria*, ICSID Case No ARB/15/32; *Invesmart B.V. v. Czech Republic*, UNCITRAL; and *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No ARB/13/8.

<sup>42</sup> See *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No 2014/163; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. Republic of Estonia*, ICSID Case No ARB/04/6; *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No ARB/97/4; and *Saluka Investments B.V. v. Czech Republic*, UNCITRAL.

<sup>43</sup> *K + Venture Partners v. Czech Republic*, UNCITRAL.

On 6 March 2018, the Court of Justice of the European Union (CJEU) found in its judgment in *Slovak Republic v Achmea* that investor-state arbitration under a BIT between two Member States is incompatible with EU law, stating that:

‘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 [Slovakia – Netherlands] BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.’<sup>44</sup>

The CJEU reasoned in particular that investor-state arbitration under intra-EU BITs has an adverse effect on the autonomy of EU law because (i) arbitral tribunals constituted under intra-EU BITs may be called upon to interpret and apply EU law to determine possible infringements of the BIT, but (ii) may not request preliminary rulings on EU law from the CJEU; and (iii) the decisions of international arbitral tribunals may not be subject to extensive review by the courts of Member States.<sup>45</sup>

### 3.4 The impact of *Achmea* on arbitral proceedings

In the wake of *Achmea*, multiple awards have addressed intra-EU jurisdictional objections.<sup>46</sup> To date, publicly available information suggests that no such jurisdictional objection has been successful.

The majority of the arbitral tribunals that have dismissed jurisdictional objections on grounds of compatibility of intra-EU investment arbitration with EU law were considering claims brought under the Energy Charter Treaty (ECT). They have found

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<sup>44</sup> Judgment of the Court of Justice of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, paragraph 62.

<sup>45</sup> *ibid.*, paragraphs 31-59.

<sup>46</sup> See, e.g., *Masdar Solar & Wind Cooperatif U.A. v. Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018; *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018; *Vattenfall AB and Others v. Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea issue, 31 August 2018; *UP and C.D Holding Internationale v. Hungary*, ICSID Case No ARB/13/35, Award, 9 October 2018; *Foresight Luxembourg Solar 1 S.A.R.L. and Others v. Kingdom of Spain*, SCC Arbitration V (2015/095), Final Award, 14 November 2018; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Arbitration V (2015/095), Final Award, 23 December 2018; *CEF Energia B.V. v. Italian Republic*, SCC Arbitration V (2015/158), Award, 16 January 2019; *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No ARB/15/20, Decision on jurisdiction, liability and partial decision on quantum, 19 February 2019; *Landesbank Baden-Württemberg and Others v. Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on jurisdiction, 23 February 2019; *NextEra energy Global Holdings B.V. and NextEra energy Spain Holdings B.V. v. Spain*, ICSID Case No ARB/14/11, Decision on jurisdiction, liability and quantum principles, 12 March 2019; *Eskosol S.P.A. In Liquidazione v. Italian Republic*, ICSID Case No ARB/15/50, Decision on Italy’s request for immediate termination and Italy’s jurisdictional objection based on inapplicability of the Energy Charter Treaty to intra-EU disputes, 7 May 2019; *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No 2014-22, Award, 15 May 2019; *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, Award, 15 May 2019; *WA Investments-Europa Nova Limited (Cyprus) v. Czech Republic*, PCA Case No 2014-19, Award, 15 May 2019; *9Ren Holding SARL v. Spain*, ICSID Case No ARB/15/15, Award, 31 May 2019; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No ARB/14/24, Award, 21 June 2019; and *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No ARB/17/14, Decision on the intra-EU jurisdictional objection, 26 June 2019.

that *Achmea* does not preclude bringing intra-EU disputes under the ECT, to which the EU is a party.

As to the scope of *Achmea*, in the recent and much awaited decision of the General Court in *European Food and Others v Commission*, delivered on 18 June 2019, the General Court annulled the European Commission's decision to bar Romania from complying with a 2013 ICSID award. The General Court observed that the arbitral tribunal was not bound to apply EU law because the measures in question pre-dated Romania's accession to the EU, unlike the situation in *Achmea*.<sup>47</sup>

Despite this limited clarification on the scope of *Achmea*, the impact of *Achmea* on proceedings within and outside the EU is still in a state of flux and will also depend largely on the outcome of any annulment, recognition or enforcement proceedings initiated both within and outside the EU.<sup>48</sup>

### 3.5 Declarations of EU Member States of 15 and 16 January 2019

In the short to medium-term, a very significant development in the post-*Achmea* landscape is to be found in the Declarations of EU Member States of 15 and 16 January 2019. In the Declaration of 15 January 2019, 22 Member States referred explicitly to the *Achmea* judgment and declared as follows:

'Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable.'<sup>49</sup>

In their Declaration, the 22 Member States subsequently declared as follows:

'In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally.'<sup>50</sup>

Following the Declaration of 15 January 2019, further declarations were made on 16 January 2019 by the remaining Member States. In Hungary's Declaration, it declared that 'the *Achmea* judgment concerns only the intra-EU bilateral investment treaties. The *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty (ECT) and it does not concern any pending or prospective arbitration proceedings initiated under the ECT.'<sup>51</sup> In a similar vein, the Declaration of

<sup>47</sup> Judgment of the General Court of 18 June 2019, *European Food and Others v Commission*, T-624/15, T-694/15 and T-704/15, ECLI:EU:T:2019:423, paragraph 87.

<sup>48</sup> As a first step, the German Federal Court of Justice (Bundesgerichtshof), which had referred the *Achmea* dispute to the CJEU, implemented the CJEU's judgment and set aside the contested *Achmea* award. German Federal Court of Justice, order of 31 October 2018, Case I ZB 2/15.

<sup>49</sup> 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, p. 1.

<sup>50</sup> *ibid.*, p. 4.

<sup>51</sup> Declaration of the representative of the Government of Hungary of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, p. 3.

Finland, Luxembourg, Malta, Slovenia and Sweden noted that the *Achmea* judgment was silent on arbitrations initiated under the ECT and therefore declared that 'it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra-EU application of the Energy Charter Treaty'.<sup>52</sup> The Declaration of Hungary and the Declaration of Finland, Luxembourg, Malta, Slovenia and Sweden also contained a declaration that those Member States would terminate all intra-EU BITs.<sup>53</sup>

If EU Member States do terminate their intra-EU BITs including any sunset clause contained in those treaties, this may have a dramatic effect on the willingness of investors to initiate arbitrations and may also impact on the willingness of third party funders to fund any such arbitrations.

## 4 Future of extra-EU banking and financial investment arbitrations

### 4.1 Opinion 1/17

In relation to extra-EU investment arbitrations, the EU and its Member States have agreed to investor-state dispute settlement mechanisms in the form of a permanent, two-level standing arbitration court system.

The Comprehensive Economic and Trade Agreement<sup>54</sup> (CETA) between Canada, the EU and its Member States provides for a multi-tiered system for the resolution of investment disputes. Disputes will initially be submitted to a CETA Tribunal, composed of fifteen members. Five of those members are to be nationals of a Member State of the EU, five are to be nationals of Canada, and five are to be nationals of third countries.<sup>55</sup> Appeals requesting the review of awards rendered by the CETA Tribunal can be heard by an Appellate Tribunal, in accordance with Article 8.28 of CETA. Looking forward, Article 8.29 of CETA envisages that '[t]he Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes,' to replace the CETA Tribunal and Appellate Tribunal mechanism.<sup>56</sup>

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<sup>52</sup> Declaration of the representatives of the Governments of the Member States of 16 January on the enforcement of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, p. 3.

<sup>53</sup> Declaration of the representative of the Government of Hungary of 16 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, p. 3; and Declaration of the representatives of the Governments of the Member States of 16 January on the enforcement of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, p. 3.

<sup>54</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23).

<sup>55</sup> *ibid.*, Article 8.27.

<sup>56</sup> *ibid.*, Article 8.29.

In response to this proposal for the creation of an investment court system, Belgium requested an opinion from the CJEU on the compatibility of Chapter 8 of the CETA with EU law. In its opinion of 30 April 2019 (Opinion 1/17), the CJEU concluded that:

‘Section F of Chapter Eight of the CETA is compatible with EU primary law.’<sup>57</sup>

In reaching its conclusion on the compatibility of Section F of Chapter 8 of the CETA with EU law, it was comforting to the CJEU that the Parties had planned certain safeguards. Pursuant to the following general exemption, the CETA excluded from the jurisdiction of the CETA Tribunal and the CETA Appellate Tribunal (together the ‘CETA Tribunals’) certain ‘choices democratically made’ by the state:

‘[T]he Parties have taken care to ensure that those tribunals have no jurisdiction to call into question the choices democratically made within a Party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights.’<sup>58</sup>

The CJEU concluded that the CETA Tribunal ‘has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU ...’.<sup>59</sup>

In relation to procedural guarantees and the rights of access to the CETA Tribunals, the CJEU approved of Statement No 36 by the Commission and the Council<sup>60</sup>, which provides that ‘there will be better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals’ and that ‘to that end, [...] the “adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA ... will be expedited so that these additional rules can be adopted as soon as possible” and that, “irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court”’.<sup>61</sup> The Court also took comfort from the procedural guarantees provided in the CETA regarding the independence of the CETA Tribunals,<sup>62</sup> as well as in its assessment that the effectiveness of EU competition law cannot be jeopardised by the decisions of the CETA Tribunals.<sup>63</sup>

The principle of equal treatment was of particular concern to Belgium when it requested an opinion from the CJEU, on the grounds that only Canadian investors could initiate proceedings before the CETA Tribunal with respect to their investments within the EU, whereas EU investors will not have that possibility with respect to their

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<sup>57</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI: EU:C:2019:341, paragraph 245.

<sup>58</sup> *ibid.*, paragraph 160, and paragraphs 152-158, referring to Articles 28.3.2 and 8.9.1 of the CETA, and Point 3 of Annex 8-A thereto and to Point 1(d) and Point 2 of the Joint Interpretative Instrument (OJ L 11, 14.1.2017, p. 3).

<sup>59</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI: EU:C:2019:341, paragraph 153.

<sup>60</sup> Statements to be entered in the Council minutes (OJ L 11, 14.1.2017, p. 9).

<sup>61</sup> Opinion 1/17 of the Court of 30 April 2019, *CETA*, ECLI: EU:C:2019:341, paragraph 217.

<sup>62</sup> *ibid.*, paragraphs 223-244.

<sup>63</sup> *ibid.*, paragraph 187.

investments within the EU.<sup>64</sup> However, the CJEU held that the situation of Canadian investors investing within the EU is only comparable to that of EU investors investing in Canada.<sup>65</sup> Moreover, the EU law principle of equal treatment does not apply in a situation where, on the one hand, an enterprise established under EU law is owned or controlled by Canadian investors and, where, on the other hand, an enterprise established under EU law is not owned or controlled by such investors. In the first case, the enterprise constitutes investments made by Canadian investors, whereas in the second case it does not.<sup>66</sup> The CJEU therefore found that the investor-state dispute resolution mechanism in the CETA is not incompatible with the principle of equal treatment, as it does not create a difference of treatment between persons in a comparable situation.<sup>67</sup>

## 4.2 Financial services under extra-EU international investment agreements

Chapter 8 (Investment) of the CETA, which sets out the scope of investment protections, expressly excludes financial services from the scope of its application, which are covered separately in Chapter 13 (Financial Services).<sup>68</sup> However, certain provisions of Chapter 8 of the CETA are incorporated by reference in Chapter 13. For example, Article 13.2.3 provides for the application of Articles 8.10 (Treatment of investors and of covered investments), 8.11 (Compensation for losses), 8.12 (Expropriation), 8.13 (Transfers), 8.14 (Subrogation), 8.16 (Denial of benefits) and 8.17 (Formal requirements) to financial services, through the incorporation of such provisions into Chapter 13. Similarly, Article 13.3 provides for the application of Article 8.6 (National treatment) and Article 13.4 for the application of Article 8.7 (Most-favoured nation treatment) to the treatment of financial institutions and investments in financial institutions, through the incorporation of these provisions into Chapter 13.

In addition, Article 13.2.4 incorporates the dispute settlement mechanisms set out in Section F of Chapter 8 with Article 13.21 stipulating that a modified version of such mechanisms will apply to certain types of claims in investment disputes related to financial services.

The CETA therefore offers substantive protections and recourse to dispute settlement mechanisms to investors in financial services in the EU. But the CETA also contains certain carve-outs permitting EU Member States express discretion to adopt certain measures for prudential or monetary reasons. In particular, under the 'prudential carve-out', the CETA does not preclude an EU Member State, or Canada, from adopting or maintaining 'reasonable measures for prudential reasons', setting out non-exhaustive examples of permitted measures, such as measures aimed at

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<sup>64</sup> *ibid.*, paragraphs 51-59.

<sup>65</sup> *ibid.*, paragraph 80.

<sup>66</sup> *ibid.*, paragraphs 82-83.

<sup>67</sup> *ibid.*, paragraphs 79-81.

<sup>68</sup> Article 8.3 of the CETA.



‘ensuring the integrity and stability of a Party’s financial system’.<sup>69</sup> A further carve-out in the CETA relates to monetary policy, providing that the agreement ‘does not apply to measures taken by a public entity in pursuit of monetary or exchange rate policies’.<sup>70</sup> The CETA thereby aims to ensure that the liberalisation of financial services in the wake of the agreement will not take place at the expense of either the stability of financial systems, or the protection of consumers and investors, and to ensure that the CETA Tribunals may not interfere in the monetary policy of states.

Chapter 13 of the CETA further provides for the creation of a Financial Services Committee, to ‘include representatives of authorities in charge of financial services policy with expertise in the field’.<sup>71</sup> A respondent party to an investment dispute may refer to the Financial Services Committee the issue of whether the prudential carve-out is a ‘valid defence to the claim’.<sup>72</sup> If the Financial Services Committee issues a joint determination concluding that the prudential carve-out is a valid defence to all parts of the claim, the investor is deemed to have withdrawn the claim and if it issues a joint determination concluding that the carve-out applies only parts of the claims, that determination is binding on the investor-state tribunal.<sup>73</sup>

### 4.3 Debt restructuring

In addition to certain carve-outs for regulatory and monetary policy, certain extra-EU international investment agreements expressly exclude certain claims relating to debt restructuring from the scope of its investor-state dispute settlement mechanisms.

Annex 8-B to the CETA expressly prevents most claims related to debt restructuring from being referred to the dispute settlement mechanism set out in Section F of Chapter 8. Annex 8-B(2) ensures that claims related to a ‘negotiated restructuring’, other than claims that this restructuring violates Article 8.6 (National treatment) or 8.7 (Most-favoured nation treatment), also fall outside the scope of this mechanism. Similar exemptions have been included in the text of other recent investment treaties, such as the EU-Vietnam Investment Protection Agreement.<sup>74</sup>

### 4.4 Future directions

Jurisdictional and merits issues that have arisen in banking and financial disputes under investment treaties are likely to continue to arise under the new generation of extra-EU free trade agreements with investment chapters, even in modified form.

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<sup>69</sup> *ibid.*, Article 13.16.

<sup>70</sup> *ibid.*, Article 13.17.

<sup>71</sup> *ibid.*, Article 13.18.1.

<sup>72</sup> *ibid.*, Article 13.21.3.

<sup>73</sup> *ibid.*, Article 13.21.4.

<sup>74</sup> Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam of the other part (2018), COM(2018) 693 final, Annex 5.

As states choose to foster the liberalisation of trade and investment without impairing their sovereign regulatory powers, users and practitioners of investment arbitration will need to adapt to the evolution of the legal framework.

# Scrutinising the resolution of EU banks through the looking glass of investment treaty arbitration

By Georges Affaki<sup>1</sup>

1. Illustrating the challenges raised by the resolution of banks in the European Union (EU) with a case involving the liquidation of a Peruvian bank may seem a bold introduction. However, the lessons to be learned from this case may be of guidance to many a national resolution authority when exercising their powers under Directive 2014/59/EU<sup>2</sup> (BRRD) on the recovery and resolution of credit institutions.
2. Banco Nuevo Mundo (BNM) was incorporated in Peru in 1992. It soon became the country's sixth largest bank.<sup>3</sup> Like a number of other Peruvian banks, BNM was negatively impacted by the Russian financial crisis in 1998. Through successive on-site reviews that extended through 2000, the Peruvian bank superintendent found several failures in BNM's safety and soundness tests, which triggered the imposition of fines. Around that period, state entities began to withdraw their deposits from BNM. This was followed by a massive withdrawal of private deposits. The bank's liquidity ratio fell below the required 8% threshold. The Central Bank of Peru refused to provide an emergency loan to BNM and, soon after, excluded the bank from its automated clearing house after it failed to settle its multilateral liability. Ultimately, BNM was dissolved and liquidated with a negative balance of USD 222,517,000. A French shareholder of the bank brought an action against Peru before ICSID under the France-Peru bilateral investment treaty for infringement of the standards of fair and equitable treatment, national treatment and full protection and security, alleging that the Peruvian banking authorities' actions amounted to an indirect expropriation.
3. The final award rendered by the arbitral tribunal in 2014 totals over 180 pages and merits attentive reading on the part of banks and their regulators. In brief, the majority of the members of the arbitral tribunal declined to consider that the Central Bank of Peru's refusal to grant an emergency loan to the failing BNM amounted to an infringement of Peru's international law obligation to protect an investment. While the Central Bank was the 'lender of last resort' in Peru and was therefore required to contribute to the stability of the banking system, the

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<sup>2</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

<sup>3</sup> All the facts are taken from the final award in *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17.

applicable banking law required it to demand collateral before granting a loan. BNM did not offer collateral. The tribunal therefore found that the Central Bank did not act arbitrarily in denying the loan.<sup>4</sup> Similarly, the majority of the tribunal rejected the claimant's argument that discriminatory treatment had resulted from the Central Bank bailing out certain Peruvian banks, but allowing BNM to fail, and from the state's triggering that failure by withdrawing deposits with BNM. Like any depositor, the tribunal ruled, the state could remove sight deposits when deemed expedient. The tribunal added that the Central Bank has no obligation to act in any specific way to mitigate a potential run on the banks since it owed its duties to the public, not to a specific bank or to its shareholders.

4. The tribunal concluded that it was the bank's own bad business decisions, which entailed taking risks in times of liquidity crisis, that had led to its liquidation, not any expropriation by the state. Importantly, the tribunal added:

'No investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.'<sup>5</sup>

5. The failed claim against the Peruvian bank authorities is mirrored in subsequent investment treaty claims brought by bank shareholders against EU Member States for alleged misuse by the national bank regulators of their regulatory powers or by the national resolution authority of its resolution powers. They likewise failed on the merits.<sup>6</sup> Beyond the difference in the terms of the heads of claim, the question of law is almost identical: is a state liable if its central bank does not fulfil its duty as the lender of last resort in aiding banks that face liquidity crises? A creditor, or a shareholder, of a regulated bank in the EU might argue that it legitimately expected, and reasonably relied upon, the central bank fulfilling its role as lender of last resort if the regulated bank were to face a liquidity crisis. And a claimant would argue that beyond liquidity assistance, the bank regulator should be expected to provide other forms of support, in terms of supportive public statements of the 'whatever it takes'<sup>7</sup> kind to reassure depositors and mitigate a run. In turn, regulators targeted by such a claim would likely respond by calling that moral hazard.
6. How can a creditor or a shareholder of a failing bank who claims to have suffered a loss as a result of the resolution of the bank require the state to which the acts of the resolution authority are attributed to submit to arbitration? In considering that question, it is critically important to remember that the arbitral process contemplated by the putative claimant is not an ordinary commercial arbitration

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<sup>4</sup> *Renée Rose Levy de Levi v. Republic of Peru*, pp. 338 and 367.

<sup>5</sup> Award in *Renée Rose Levy de Levi v. Republic of Peru*, p. 478. Previous awards holding the same include *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, award, 13 November 2000, p. 64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, award, 25 May 2004, p. 178; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, decision on jurisdiction, 17 July 2003, p. 29; and *Eudoro Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, award, 26 July 2000, p. 73.

<sup>6</sup> *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27 (the Laiki Bank case); *GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain*, ICSID Case No. ARB/18/33; and ICC case 20588 (award of 15 January 2019, unpublished).

<sup>7</sup> See [speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012](#).

arising out of a provision of a contract. Rather, that arbitral process arises out of one of more than 3,000 investment protection treaties or free trade agreements concluded between sovereign states. In a treaty of this kind, the host state will make a unilateral public offer to investors from the other contracting state to have eligible disputes relating to their investments submitted to international arbitration. When an investor submits a notice of dispute, it is deemed to have accepted that offer. The treaty, which is itself a contract between the two contracting states, thus functions as the equivalent to an arbitration agreement between claimants and respondents in commercial contracts, and offers a contractual basis for the arbitrators' jurisdiction.

7. For the arbitral tribunal to claim jurisdiction based on the host state's consent to arbitration expressed in the treaty, the investment in relation to which the loss is claimed needs to qualify as a 'protected investment'. The treaty can exclude certain sectors, or certain types of government measures. After the Argentinian bonds cases,<sup>8</sup> some states took the initiative of excluding sovereign debt rescheduling from the scope of treaties.<sup>9</sup> The now defunct Trans-Pacific Partnership excluded measures adopted for prudential reasons.<sup>10</sup> That aside, the majority of investment treaties adopt a broad asset-based approach to defining qualifying investments. 'Claims to money' are generally listed in treaties as an example of qualifying investments. There are numerous reported cases where providing financing, investing in bonds, purchasing an equity stake in the capital of a bank, issuing or benefiting of a guarantee or a derivative have been held by arbitral tribunals as being qualifying investments absent exclusion in the relevant treaty.<sup>11</sup>
8. In addition, the investment has to be made in the territory of the host state for jurisdictional purposes. Whilst it may be straightforward to determine the location of a dam, a highway, or a mine, dematerialised securities and derivatives may be more challenging to situate for legal nexus purposes. Arbitral tribunals have accepted in a number of cases that if the funds ultimately benefit the host state, the jurisdictional nexus condition is fulfilled, regardless of where those funds are paid.<sup>12</sup> However, that consensus, which was established in the Argentine bonds cases, was broken in a Greek bonds case, *Poštová banka*, where the majority of

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<sup>8</sup> *Abaclat v. Argentine Republic* (ICSID Case No. ARB/07/5); *Ambiente Ufficio S.P.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9); and *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8.

<sup>9</sup> See, e.g., the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 23), which is a free-trade agreement between Canada, the EU and its Member States, signed on 30 October 2016.

<sup>10</sup> Trans-Pacific Partnership, Article 11.11, text released on 5 November 2015: 'For greater certainty, if a measure challenged under Section B of Chapter 9 (Investment) is determined to have been adopted or maintained by a Party for prudential reasons in accordance with procedures in Article 11.22 (Investment Disputes in Financial Services), a tribunal shall find that the measure is not inconsistent with the Party's obligations in the Agreement and accordingly shall not award any damages with respect to that measure'.

<sup>11</sup> See, e.g., *Fedax v. Venezuela*, ICSID Case No. ARB/96/3; *British Caribbean Bank v. Belize (UNCITRAL)*; *Ceskoslovenka Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4; *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/2; *Abaclat and Others v. Argentine Republic*; *Ambiente Ufficio S.p.A and Others v. Argentine Republic*; and *Giovanni Alemanni and Others v. Argentine Republic*.

<sup>12</sup> Decision on jurisdiction of 4 August 2011, *Abaclat and Others v. Argentine Republic*, para. 374 ('With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property.').

the tribunal refused to take the view that there was sufficient territorial nexus in relation to the host state where the dematerialised securities were purchased by the investors on the secondary market, as opposed to directly from the issuer state itself.<sup>13</sup>

9. As concerns the specific topic of this paper, that of resolution; in order to place an entity into resolution, the resolution authority must ascertain that all of the following conditions are met:<sup>14</sup>
  - (a) the bank is failing or likely to fail;
  - (b) there are no supervisory or private sector measures that can restore the bank to viability within a reasonable timeframe; and
  - (c) resolution is necessary in the public interest, i.e. resolution is preferable to normal insolvency proceedings, with the corollary no creditor worse off (NCWO) principle also being applicable.<sup>15</sup>
10. Once the resolution authority has determined that a resolution is warranted, there are four possible resolution tools to choose from:
  - (a) the sale of business tool, involving the total or partial disposal of an entity's assets, liabilities and/or shares to a private purchaser;
  - (b) the bridge institution tool, involving the transfer of part or all of the assets, liabilities and/or shares to a controlled temporary entity;
  - (c) the asset separation tool, involving the transfer of assets to an asset management vehicle; and
  - (d) the bail-in tool, involving the write-down or conversion of equity and debt, placing the burden on the shareholders and creditors of a bank, rather than on the public.<sup>16</sup>
11. The conditions and circumstances in which the resolution authority may determine the fulfilment of the required prerequisites for a resolution, or its use of any of the four resolution tools listed in the BRRD, may potentially offer grounds to bring a treaty-based claim for misuse of powers or for misfeasance in public office. To date, treaty-based claims have been exclusively directed against the national resolution authority, but not against the European banking regulator. However, in the case of a bank that is considered a globally systemically important bank, and is therefore supervised by the ECB and falls within the jurisdiction of the Single Resolution Board (SRB), would the conditions of its resolution, however contestable, exclude the investment treaty-based liability of the national resolution authority of the Member State where the bank is located?

<sup>13</sup> *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8.

<sup>14</sup> Article 32 of the BRRD.

<sup>15</sup> Under the NCWO principle, no creditor or shareholder shall incur greater losses than they would have incurred if the institution had been wound up under normal insolvency proceedings. The application of the NCWO principle is carried out under Article 74 of the BRRD.

<sup>16</sup> Article 37 of the BRRD.

Some investors might consider relying on the following Commission statement in an attempt to bring a claim against the national resolution authority to take advantage of the investment treaty with the relevant Member State, given the rarity of treaties of which the EU itself is a ratifying member:<sup>17</sup>

‘National resolution authorities are closely involved in the resolution process. They assist the Board in preparing its actions (...). Crucially, national authorities are also in charge of implementing the resolution decisions in line with national company and insolvency law. Member States are thus integrated into the mechanism in the preparatory and implementation stage regarding banks in their jurisdiction.’<sup>18</sup>

12. That argument led Mexican shareholders of Banco Popular to bring a claim under the Mexico-Spain Treaty against Banco España, not against the ECB or the SRB, although Banco Popular was supervised by the ECB.<sup>19</sup>
13. On what legal ground can an investor bring a treaty claim for misuse of resolution powers by the competent authority? Almost all investment protection treaties guarantee investors treatment in accordance with international customary law, including fair and equitable treatment (FET), as well as full protection and security, in connection with their investments. The requirement to provide FET is generally interpreted as protecting foreign investors against arbitrary and discriminatory treatment. Investors argue that FET, an international law obligation of the host state, requires that state to provide a stable and predictable legal and regulatory environment, and act in a consistent and even-handed way in accordance with applicable laws and regulations. Investors may also argue that FET also includes the state’s obligation to act with transparency in enacting measures that affect protected investments.
14. The above might lead investors to argue that a state has breached its FET obligation if it takes any or all of the following acts or measures:
  - (a) Withdrawal, by the state or its agencies and other entities it controls of deposits from the failing bank, thus aggravating its liquidity crisis.<sup>20</sup>
  - (b) The making of alarming public announcements that damage the reputation of the bank, leading to a run; or, alternatively, the failure to make reassuring announcements to mitigate a bank run.<sup>21</sup>
  - (c) Discrimination against the failing bank by denying it liquidity stabilising measures that the state may have approved for other banks. For instance, the investors in the *Laiki Bank* case<sup>22</sup> argued that the Bank of Cyprus was

<sup>17</sup> Such as the Energy Charter Treaty. After the Lisbon Treaty came into effect, future investment treaties with third countries are expected to be concluded by the EU, but no longer by its Member States.

<sup>18</sup> European Commission, Memo, A Single Resolution Mechanism for the Banking Union – frequently asked questions, Brussels, 15 April 2014.

<sup>19</sup> *GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain*.

<sup>20</sup> *Renée Rose Levy de Levi v. Republic of Peru; GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain*.

<sup>21</sup> *ibid.*

<sup>22</sup> *Laiki Bank* case.

offered state support, but not Laiki Bank. Eventually, the Bank of Cyprus was recapitalised and took Laiki Bank's viable assets.

- (d) Discrimination amongst the creditors by choosing (arbitrarily, as the investor may contend) which debts are to be transferred to the bridge bank and which will stay in the failing bank. That argument was made in relation to the setting up of Novo Banco and the transfer to it of selected assets from Banco Espírito Santo. It could be argued that the very concept of resolution seeking to avoid bankruptcy by selecting viable assets is antinomical to the principle of equal treatment of creditors. Recital 13 of the BRRD should be kept in mind as a useful guidance for resolution authorities:

'The use of resolution tools and powers provided for in this Directive may disrupt the rights of shareholders and creditors. In particular, the power of the authorities to transfer the shares or all or part of the assets of an institution to a private purchaser without the consent of shareholders affects the property rights of shareholders. In addition, the power to decide which liabilities to transfer out of a failing institution based upon the objectives of ensuring the continuity of services and avoiding adverse effects on financial stability may affect the equal treatment of creditors. Accordingly, resolution action should be taken only where necessary in the public interest and any interference with rights of shareholders and creditors which results from resolution action should be compatible with the Charter of Fundamental Rights of the European Union (the Charter). In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and proportionate to the risks being addressed and should be neither directly nor indirectly discriminatory on the grounds of nationality.'

- (e) The bailing in of creditors without first determining whether there were private sector alternatives to resolution.<sup>23</sup>
- (f) Deprivation of shareholders and creditors of the opportunity to be heard before the resolution, including discussion of possible private initiatives to stabilise the bank's financial condition.<sup>24</sup>
- (g) The conditions in which the resolution authority implements a sale-of-business resolution tool, including, in particular, how expert valuation is conducted and a bidding process is organised. In the sale of Banco Popular Español in 2017, the Spanish resolution authority is reported to have only invited five Spanish banks to bid and gave prospective buyers less than 24 hours to review the documents uploaded in the virtual data room and submit their offers. Only Banco Santander was able to meet that deadline. It submitted its offer for EUR 1, which was accepted by the resolution authority. The exclusion of foreign bidders and the short

<sup>23</sup> *GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain* (ICSID Case No. ARB/18/33).

<sup>24</sup> *ibid.*, ICC Case 20588(2019), unpublished.



timeframe were grounds for the claim brought by Mexican shareholders of the failing bank against Spain claiming the violation of their rights under the Treaty to fair and equitable treatment and full protection and security, national treatment and most favored nation treatment, and protection against expropriation without due process and just compensation.<sup>25</sup>

15. To date, investment tribunals have generally shown deference towards the actions of national resolution authorities. In the *Laiki Bank* case, the tribunal held that the decisions of the banking regulator were entitled to be treated with some deference, opining that:

‘a central bank acts as a regulator of a highly technical and sophisticated economic sector, that it has intimate knowledge of the underlying data and is best placed to assess whether one course of action is preferable to another’.<sup>26</sup>

However, this affords only limited comfort to resolution authorities. A breach of international law would be found, according to the tribunal in the *Laiki Bank* case, ‘[i]f there is any evidence that a decision taken by a regulator was abusive, did not afford due process or was a pretence of form designed to conceal improper ends’. Where the regulator misuses its powers, or uses them disproportionately or discriminatorily, tribunals have found a breach of international law and awarded damages.<sup>27</sup>

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<sup>25</sup> *GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain*, op. cit., footnote 24 above, Request for Arbitration, 23 August 2018, at paragraph 90 et seq.

<sup>26</sup> *Laiki Bank* case.

<sup>27</sup> *PL Holdings v Poland* (SCC case No. V 2014/163 – suspension of voting rights and required sale of shares held in the bank); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*.

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Yves Mersch is a member of the Executive Board of the European Central Bank. His eight-year term started in December 2012. He was Governor of the Banque centrale du Luxembourg from 1998 to 2012 and has been a member of the Governing Council of the ECB since its creation in 1998.

After obtaining postgraduate degrees in international public law and political science, Mr Mersch started his career at the Luxembourg Ministry of Finance in 1975. Since then he has held numerous public sector positions in Luxembourg and abroad, including at the IMF and the UN.

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Cristina Contartese is a Lecturer in EU Law at the European Law and Governance School/European Public Law Organization (Athens). Previously she held positions as a postdoctoral researcher at the University of Bologna, where she taught International Law, and at the University of Luxembourg (Marie Curie fellow/FNR-Luxembourg), where she researched dispute settlement from EU and international law perspectives. She was a visiting researcher at the Max Planck Institute Luxembourg, and at the iCourts Centre (University of Copenhagen).

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She has acted as counsel and advocate in several commercial and sovereign arbitrations, including a high profile debt-restructuring case for the Greek government.

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Georges Affaki is a Professor of International Banking Law and Dispute Resolution at the University of Paris II and an avocat admitted to practice before the Court of Appeal of Paris. He is a Chartered Arbitrator, a member of the ICC International Court of Arbitration, and a member of the ICSID Panels of Arbitrators and Mediators. He is the Chairman of the Banking Commission of ICC France.

He chaired the ICC Task Force on Financial Institutions and International Arbitration whose two-volume report is publicly available on the ICC website (also referred to in his outline).

Professor Affaki was appointed Foreign Trade Counsellor of France by a Decree of the Prime Minister.

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