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CHAPTER 3

Does the CJEU Misunderstand Investment Treaty Arbitration in *Commission v Micula*?

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Abstract

This article focuses on the recent judgment of the Court of Justice of the EU (CJEU) in *European Commission v Micula* (C-638/19 P) concentrating on two paragraphs in particular, namely paragraphs 144–145. These passages lead us to believe that the Court of Justice's more recent and hostile attitude towards intra-EU investment treaty arbitration (in *Achmea, Komstroy,* and *PL Holdings*) might be a result of several misunderstandings by the Court on how investor-state arbitration and BITs work. The first concerns the nature of consent to arbitrate under an investment agreement. The second concerns the purpose of investor-state dispute settlement (ISDS), and the third relates to the retroactive effects of the Court's judgment in relation to Romania's consent to arbitrate under the Romania-Sweden BIT. From these three issues the fourth misunderstanding follows, which is a lack of clarity on the relationship between EU law and the Member States' existing obligations under the ICSID Convention. This discussion is relevant because it shows that when a court which is foreign to a system and uses the features of that system to define and develop its own legal system, the chances that the foreign system will be potentially misunderstood or mischaracterised are very high. This in turn will not only cause legal problems, such as issues with legal certainty and the finality of decisions for already concluded arbitrations, but it will also set in motion other unexpected consequences.

1 Introduction

Those following the interaction between international investment law and EU Law have noticed that the past couple of years have produced a growing

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number of cases in which the Court of Justice of the EU (CJEU) takes a hostile attitude towards investment treaty arbitration (ITA) in an intra-EU setting. In its 2018 *Achmea* judgment[1] the Court of Justice concluded that investor-state arbitration clauses found in international agreements concluded between EU Member States, 'such as' the ones in the Netherlands-Slovakia BIT, were precluded by Articles 344 and 267 TFEU.[2]

This much discussed judgment[3] has resulted in most EU Member States signing an agreement to terminate intra-EU BITs,[4] and has been received in different ways by other adjudicative bodies; ITA (both Energy Charter Treaty (ECT)[5] and non-ECT) tribunals have so far taken an unsympathetic view to it,[6] while EU Member State courts started following the Court of Justice's instructions.[7]

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1 CJEU Case C-284-16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158.

2 We use this very specific language from the original *Achmea* judgment (para. 138), as the Court of Justice in *European Commission v Micula* (ECLI:EU:C:2022:50, para. 138) phrases its holdings from *Achmea* more broadly.

3 See M Andenas and C Contartese, 'EU Autonomy and Investor-State Dispute Settlement under *Inter Se* Agreements between EU Member States: *Achmea*' [2019] 56 CMLR 157; Sz Gáspár-Szilágyi, 'It is Not Just About Investor-State Arbitration. A Look at Case C-284/16, *Achmea BV*' [2018] 3(1) European Papers 357; J D H Pohl, 'Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?' [2018] 14(4) European Constitutional Law Review 767.

4 Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, SN/4656/209/INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) accessed 18 February 2022.

5 For the most recent case *Sevilla Beheer B.V. and Others v Kingdom of Spain,* ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, paras. 658–660.

6 See Sz Gáspár-Szilágyi and M Usynin, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's *Achmea* Judgment' [2019] 4 EILA Rev 29. Currently, 46 tribunals constituted under the ECT have rejected intra-EU objection. See J Ballantyne, 'Another ICSID Panel Rejects *Komstroy* Ruling' https://globalarbitrationreview.com/another-icsid-panel-rejects-komstroy-ruling accessed 18 February 2022.

7 H Wehland, 'German Supreme Court Confirms Intra-EU BIT Does not Give Access to Investor-State Arbitration in Light of CJEU's *Achmea* Decision' Kluwer Arbitration Blog, 9 February 2022, http://arbitrationblog.kluwerarbitration.com/2022/02/09/german-supreme-court-confirms-intra-eu-bit-does-not-give-access-to-investor-state-arbitration-in-light-of-cjeus-achmea-decision/ accessed 18 February 2022. Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2022 m sausio 18 d nutartis civilinėje byloje Nr e3K-3-121-916/2022 [Order of the Civil Cases Division of the Supreme Court of Lithuania dated January 18, 2022, in civil case no e3K-3-121-916 / 2022] https://www.infolex.lt/tp/2054335 accessed 18 February 2022. See also the contribution in this *Review* by R Satkauskas, 'Veolia v Republic of Lithuania: A case on the legality of suspended intra-EU Investment Arbitration and the question of Lis Pendens', at 76-86.

Things then picked up in late 2021, with the Court delivering its judgments in *Komstroy*[8] and *PL Holdings*.[9] In *Komstroy* the Court of Justice held *obiter* that the ECT was also incompatible with EU law in an intra-EU setting, even though the referring national court did not raise any questions concerning compatibility and the original arbitration was not an intra-EU arbitration.[10] Then, in *PL Holdings* the Court held that national legislation, which would permit the circumvention of *Achmea*, by allowing a Member State to conclude with an investor an *ad hoc* arbitration agreement that is identical in terms to an arbitration clause in an intra-EU BIT, is also precluded by Articles 267 and 344 TFEU.[11]

This was then followed by the recent judgment in the *European Commission v Micula et al.* appeal,[12] in which the Court of Justice set aside the judgment of the General Court of the EU and referred the case back to the lower court to adjudicate on several pleas and arguments. This much awaited judgment is part of a seemingly never-ending string of enforcement cases that followed the 2013 ICSID Award in *Micula v Romania*.[13]

The *Micula* case arose in the following circumstances. Romania – prior to its accession to the EU in 2007 – had given certain tax incentives for a period of 10 years to the businesses of two Swedish citizen investors of Romanian origin, who invested in an economically deprived area of the country. Before its accession to the EU, Romania had to bring its laws in line with EU law and decided to revoke the tax advantages given to the two investors, since those advantages would be considered illegal state aid under EU law.[14] The investors

8 CJEU Case C-741/19 *République de Moldavie v Komstroy LLC* ECLI:EU:C:2021:655.

9 CJEU Case C-109/20 *Republiken Polen v PL Holdings Sàrl* ECLI:EU:C:2021:875.

10 J Odermatt, 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the EU Legal Order' [2021] 6(3) European Papers 1255 https://www.europeanpapers.eu/en/europeanforum/is-eu-law-international-case-moldova-v-komstroy-and-autonomy-of-eu-legal-order accessed 18 February 2022. Using the same criticism, the ECT tribunal in *Sevilla Beheer v Spain* (n 5), para. 666 concluded that 'the CJEU's finding regarding the incompatibility between Article 26(2)(c) of the ECT and EU law can only be considered as an *obiter dictum*'. Moreover, in *Opinion 1/20* the CJEU found Belgium's request under Article 218(11) TFEU on the compatibility of the draft modernised Energy Charter Treaty with EU law to be inadmissible https://curia.europa.eu/juris/document/document.jsf?text=&docid=260993&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=15595191 accessed on 6 July 2022.

11 CJEU Case *PL Holdings* (n 9).

12 CJEU Case C-638/19 P *European Commission v Micula et al.* ECLI:EU:C:2022:50.

13 *Ioan Micula et al. v Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013 https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf accessed 18 February 2022.

14 A question which has not been settled to this day and on which the General Court will have to decide. J Fahner, 'The Court of Justice Dodges the Real Question in the Micula

commenced an ICSID arbitration in 2005 and in 2013 the arbitral tribunal held that Romania had breached the Fair and Equitable Treatment (FET) standard of the Sweden-Romania BIT of 2002. Romania then began to repay part of the award, but the EU Commission issued Decision 2015/1470 (the Decision) in which it held that repayment of the damages awarded by the arbitral tribunal constitute illegal state aid under EU law.[15] This Decision was challenged by the investors under the Article 263 TFEU annulment procedure before the General Court, which annulled the Decision.[16] This led to the appeal under discussion.

This of course is not the end of the story, because, in the meantime, the investors tried enforcing the ICSID award in the USA,[17] Belgium,[18] Sweden,[19] the UK,[20] and Romania,[21] with some of the cases won by the investors and others lost. These cases raise a myriad of legal issues but in this article, we will focus only on the recent judgment of the Court of Justice in *European Commission v Micula,* and even within that judgment we are only interested in paragraphs 144–145 (as quoted below). The statements made by the Court of Justice in these paragraphs lead us to believe that the Court of Justice's hostile attitude towards investment treaty arbitration might be due to the Court

case: Can an Investment Arbitration Tribunal Grant State Aid?', EU Law Live, 15 February 2022 https://eulawlive.com/op-ed-the-court-of-justice-dodges-the-real-question-in-the-micula-case-can-an-investment-arbitration-tribunal-grant-state-aid-by-johannes-fahner/ accessed 18 February 2022. The same issue has now resulted in the Commission bringing an infringement case under the UK' Withdrawal Act from the EU against the UK, because the UK Supreme Court decided in 2020 to enforce the Micula award.

15 European Commission, 'Sincere Cooperation and Primacy of EU Law: commission Refers UK to EU Court of Justice over a UK Judgment Allowing Enforcement of an Arbitral Award Granting Illegal State Aid', Press Release, 9 February 2022 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_802 accessed 18 February 2022.

16 GCEU Cases T-624/15, T-694/15 and T-704/15 *European Food SA et al v European Commission* ECLI:EU:T:2019:423.

17 US Court of Appeals for the District of Columbia Circuit, *Ioan Micula, et al. v Romania*, No.19-7127, Judgment https://www.italaw.com/sites/default/files/case-documents/italaw11504.pdf accessed 18 February 2022.

18 Cour d'Appel Bruxelles, *Micula v ROMATSA*, No. 2016/AR/293 & 2016/AR/394, Arrêt 12 March 2019 https://www.italaw.com/sites/default/files/case-documents/italaw10446.pdf accessed 18 February 2022.

19 Nacka Tingsrätt, *Ioan Micula, et al. v Rumänien*, Protokoll 2019-01-23 https://www.italaw.com/sites/default/files/case-documents/italaw10319.pdf accessed 18 February 2022.

20 UK Supreme Court, *Micula and others v Romania*, Judgment, 19 February 2020 https://www.italaw.com/sites/default/files/case-documents/italaw11213.pdf accessed 18 February 2022.

21 Curtea Constituțională, Decizie nr. 887, 15 December 2015 https://legislatie.just.ro/Public/DetaliiDocumentAfis/176582 accessed 18 February 2022.

misunderstanding or misrepresenting the role of investment law and the objectives of investor-State dispute settlement (ISDS).

2 The Problematic Statements

The Court of Justice in essence held that the General Court erred in its judgment when it concluded that the EU Commission had no competence under Article 108 TFEU to adopt the Decision on State aid.[22] The Court set aside the General Court's judgment and referred the case back to the General Court to adjudicate on several pleas raised before it. Among these was "the question whether the compensation granted by the [ICSID] award may constitute 'State aid'", over which the Court of Justice had no jurisdiction to decide as it was not the subject matter of the appeal.[23] If the General Court is to decide that the repayment of the ICSID award constitutes illegal State aid then the investors would face the possibility of repaying the compensation, which they have already received in late 2019.[24] This in turn could lead to another appeal before the Court of Justice, creating even more legal uncertainty, and Romania would breach its obligations under the ICSID Convention.

However, for the purposes of this article, we are more interested in the Court's criticisms of the General Court's holding that *Achmea* was irrelevant for the present case[25] and the subsequent paragraphs. The Court of Justice relied on *Achmea*, *Komstroy* and *PL Holdings* to deliver the following problematic paragraphs, which form part of the core arguments of this article:

> 144. Such consent [under a BIT], unlike that which would have been given in commercial arbitration proceedings, *does not originate in a specific agreement reflecting the freely expressed wishes of the parties concerned*, but derives from a treaty concluded between two States in the context of which they have, generally and in advance, *agreed to exclude from the*

22 *Micula* (n 12), para 126.

23 As mentioned in n 14, this will be the next 'hot' topic. *Micula* (n 12), para 131.

24 Romanian Gov't Decision/Hotărârea nr 917/2019, Art 2 mentions explicitly the payment of compensation in the ICSID case ARB/05/20 of 912 million RON https://gov.ro/ro/print?modul=subpagina&link=nota-de-fundamentare-hg-nr-917-13-12-2019 accessed 18 February 2022. A representative of the investor also confirmed with us that the sum had been received.

25 *Micula* (n 12), para 137.

> *jurisdiction of their own courts disputes* which may concern the interpretation or application of EU law *in favour of arbitration proceedings*.
>
> 145. In those circumstances, since, with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, *the consent given to that effect* by Romania, from that time onwards, *lacked any force*. [emphasis added]

We believe that these paragraphs contain several misunderstandings about how investor-state arbitration and BITs work. The first one concerns the nature of consent to arbitrate under an investment agreement, the second one concerns the purpose of ISDS and ITA, and the third one concerns the retroactive effects of the Court's judgment in relation to Romania's consent to arbitrate. From these three issues the fourth one follows, which is a lack of clarity on the relationship between EU law and the Member States' existing obligations under the ICSID Convention (except for Poland, which is not a party to ICSID).

Before looking at these issues, it is also worth mentioning that there are some other problematic statements of the Court, such as the repeated usage of the phrase that Romania's repeal of the tax incentives was "*allegedly* in breach of the BIT" [emphasis added].[26] The repeated use of this exact phrasing seems to suggest that the Court is doubtful about the outcomes of an international arbitral award, constituted under a multilateral treaty with 155 members, in which the arbitral tribunal found an *actual* (not just alleged) violation of the BIT and the award was later upheld by an ICSID annulment committee.

2.1 *The Nature of Consent*

The consent to arbitrate under an investment treaty is a long-standing issue in investment treaty arbitration and it goes back to initial cases, such as *SPP v Egypt*[27] for domestic investment laws and *AAPL v Sri Lanka*[28] for investment treaties, which established that the *arbitration agreement* is formed in a more peculiar way compared to commercial arbitration. Masterfully described by Jan Paulsson in his 'Arbitration Without Privity' article,[29] this development

26 ibid paras 108, 116, 117, 124, 125.

27 *Southern Pacific Properties* (*Middle East*) *Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3 https://www.italaw.com/cases/3300 accessed 18 February 2022.

28 *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3 https://www.italaw.com/cases/96 accessed 18 February 2022.

29 J Paulsson, 'Arbitration Without Privity' [1995] 10 ICSID Review – Foreign Investment Law Journal 232.

became a 'silent revolution'[30] of the then-nascent legal field. After nearly three decades, this revolution is now acknowledged as standard practice.[31] Thus, the State's consent in the treaty to submit the dispute to arbitration is a standing offer to arbitrate, which is accepted by the investors when they decide to bring an arbitral claim against the State. When the Court of Justice argues that this type of consent "does not originate in a specific agreement reflecting the freely expressed wishes of the parties concerned", the Court seems to question the standard practice under investment treaty arbitration. However, is the Court of Justice right in doing so?

Firstly, to say that the wishes of the parties concerned were not 'freely' expressed does not reflect the realities behind the conclusion of BITs and the commencement of investor-State arbitration. States, as the contracting parties to investment treaties, willingly sign these instruments for various reasons, but they are in no way coerced to do so. The treaties are only void if State consent was coerced by the threat or use of force (Article 52 VCLT), which is commonly understood to refer solely to *armed* force.[32] These freely concluded treaties most of the time also include the freely agreed possibility to allow investors of the other party to commence international arbitration, among *other* means of investor-State dispute settlement. An investor also willingly brings arbitral claims against the host State, which had willingly made a standing offer to arbitrate in the treaty. In other words, the disputing parties (the foreign investor and the host State) had willingly consented to arbitrate and the treaty parties (the host and the home States) had willingly agreed to conclude the treaties offering the possibility to arbitrate.[33]

30 J Pauwelyn, 'At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' [2014] 29 ICSID Review 372, 397. See also T St John, 'Intergovernmental Discussion and Ratification of ICSID', *The Rise of Investor-State Arbitration* (OUP 2018) 151.

31 Ch H Schreuer and others, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, CUP Press 2009) 205: 'Consent through BITs has become accepted practice'.

32 M E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 643.

33 One could also speculate whether instead of 'coerced' consent, the Court might have thought of consent 'given by mistake' or 'uninformed' consent (We would like to thank one of the commentators for raising this issue). See Poulsen's argument that negotiators were often not informed about the risks of disputes when they signed the treaties; 'Unanticipated Consequences', in LN Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015) 17–18. However, it is difficult to know what the Court meant, and one can of course

The treaty language is also important. If a State intended not to grant an unconditional offer to arbitrate, it could have framed the offer differently. For example, the State could have only promised to grant consent to arbitrate in the future by giving its assent to the investor's claim.[34] In such cases, the Secretary-General of ICSID would 'in all likelihood' have to deny registration of the claim until the State provides its binding consent to the jurisdiction of the Centre.[35] On the contrary, Article 7(2) of the Romania-Sweden BIT (2002) uses the clear expression "each Contracting Party hereby consents to the submission of the dispute", which leaves no room for interpretation. In other words, both parties to the dispute have without a doubt freely expressed their wishes; the investors by bringing the claim under the BIT, and the State by making a clear offer to arbitrate in the treaty.

Secondly, we find it difficult to understand what the Court of Justice means by a "specific agreement"? Would it have to be a separate, written arbitral agreement, as opposed to the accepted practice of a standing offer made by the host State in the treaty which is accepted by the investor when it brings a claim? If so, many commercial arbitration agreements would also not meet this standard. Some are included as arbitration clauses at the end of contracts (or as a reference to some general terms and conditions), others are concluded separately as *compromis* – after the dispute has arisen – in which the parties can adopt the model arbitration agreements of arbitration institutions, while others can be included in an exchange of emails or other forms of electronic messages. Moreover "it is also possible to have bilateral contracts in which parties express their consent by conduct" or arbitration agreements which are not reciprocal in nature, mostly used by parties that have a superior bargaining power.[36]

At the end of the day, an agreement is the acceptance by one party of an offer made by another. If this is the standard definition of an 'agreement', then the standard practice in ITA meets this definition. In other words, the Court of

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always argue that the Romanian authorities should have known what they were signing, as the country by 2002 had signed a number of BIT s.

34 E.g., Art 10 Netherlands-Pakistan BIT (1988). See the discussion in Schreuer (n 31) 208–209.

35 ibid 208.

36 On the differences between consent in ITA and commercial arbitration, see A M Steingruber, 'The Mutable and Evolving Concept of 'Consent' in International Arbitration – Comparing rules, laws, treaties and types of arbitration for a better understanding of the concept of 'Consent'', Oxford University Comparative Law Forum https://ouclf.law.ox.ac.uk/the-mutable-and-evolving-concept-of-consent-in-international-arbitration-comparing-rules-laws-treaties-and-types-of-arbitration-for-a-better-understanding-of-the-concept-of/ accessed 18 February 2022.

Justice seems to mischaracterize the nature and even the existence of an agreement to arbitrate if the offer is contained in a treaty and the offer is accepted when the claimant initiates arbitration. To take it one step further, what about those situations when ISDS provisions in treaties specifically state that the disputing parties can submit the dispute "to any other arbitration institution, or in accordance with any other arbitration rules, as may be *mutually agreed* between the parties to the dispute"[37] and not use just the 'standard' options under ICSID or *ad hoc* UNCITRAL arbitration? If the parties (the investor and the host State) can agree to any arbitral rules, then they must be able to agree to arbitrate as well. One could also mention the ECT, to which the EU is also a party and in the case of which neither the EU, nor the Member States insisted on including a 'disconnection clause'.[38] Article 26(3)(a) ECT clearly states that "each Contracting Party [...] gives its *unconditional* consent" [emphasis added] to settle the dispute via international arbitration.

Thirdly, what about the consent given by the EU and its Member States under the Comprehensive Economic and Trade Agreement (CETA) with Canada and the other investment agreements concluded recently by the EU, which include the Investment Court System(s)? Whilst the name can be deceiving, as it denotes a 'court' system, the first instance or tribunal phase of the proceedings is in essence investor-state arbitration. According to Article 8.25(1) of CETA, the respondent (the EU, the Member States or Canada) consent to the settlement of disputes between the investor and the state in accordance with the provisions laid down in Section F. Article 8.25(2) then states that this consent and the submission of a claim shall satisfy the requirements of Article 25 of the ICSID Convention, Chapter II of the ICSID Additional Facility Rules, or Article II of the New York Convention "for an agreement in writing".

In other words, CETA and the EU's new investment agreements follow exactly the same practice for forming an agreement to arbitrate in writing (unless one might call it something different, such as 'agreement to litigate'), as intra-EU BITs and all other investment treaties do. The States or the EU consent to have a standing offer to settle the dispute, which is accepted by the investor when it submits a claim "on its own behalf" or "on behalf of a locally established enterprise" which it controls (Article 8.23(1) CETA). This claim, "for greater certainty [...] shall satisfy the requirements of Article 25(1) of the ICSID Convention" (Article 8.23(4) CETA). Does this mean that the Member States

37 US-Romania BIT, Article VI.3(a)iv [emphasis added].

38 A clause, which the EU uses in multilateral treaties to shield EU law from the application of the multilateral instrument to intra-EU relations. This was most recently noted by the ECT Tribunal in *Sevilla Beheer v Spain* (n 5), para 629.

did not 'freely consent to arbitrate' in intra-EU BITs, but they 'freely consented' in CETA? Interestingly, the CETA ISDS mechanism – let us call it a partially standing court as the Tribunal members would be given a monthly retainer fee supplemented by the costs incurred for an actual claim – was held to be compatible with EU law in *Opinion 1/17,* even though it has no preliminary reference mechanism as required in *Achmea* for intra-EU investment treaties, and it operates on the same model of consent to settle disputes as all other investment treaty arbitration.[39]

Nevertheless, one might say that the ICS is a court, not an arbitral tribunal (even though it operates pursuant to the same consent mechanism as ITA). Therefore, the results should be different. However, as we have seen, the ICS refers to the two most established conventions used in investment-treaty arbitration. Furthermore, CETA's pre-2016 version and the Singapore Agreement's previous version both included old fashioned, NAFTA-inspired arbitration and there seemed to be no issue with the nature of consent to arbitrate. Not only that, but if we were to follow the Court's reasoning concerning consent to arbitrate pursuant to BITs, then hundreds of EU Member State investment treaties concluded with non-EU States would also contain 'non-freely expressed consents' to arbitrate.

Fourthly, playing devil's advocate, if we agree that consent in ITA is its Achilles' heel, because it is based on an accepted legal construct and it is not expressly included in a separate agreement to arbitrate,[40] then the same is true for the 'autonomy of EU law'. This nebulous term is used by the Court to substantiate its recent decisions against ITA in an intra-EU setting,[41] but at the root of it, it rests on the Court's holding in the seminal *Van Gend en Loos* case that the EU Treaties have created a "new legal order of international law",[42]

39 Sz Gáspár-Szilágyi, 'Between Fiction and Reality. The External Autonomy of EU Law as a 'Shapeshifter' after Opinion 1/17' [2021] 6(1) European Papers 675 https://www.europeanpapers.eu/en/authors/szil%C3%A1rd-g%C3%A1sp%C3%A1r-szil%C3%A1gyi accessed 18 February 2022.

40 However, the *travaux prèparatoires* to the ICSID Convention mention a possibility of unilateral consent expressed in host state legislation. See *History of the ICSID Convention*, vol II–1 (International Centre for Settlement of Investment Disputes 2009) 405; Schreuer (n 31) 196, 205. Due to the similar lack of privity, such consent is substantially equivalent to consent expressed in BITs.

41 C Contartese, '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' [2017] 54(6) CMLR 1627.

42 CJEU Case 26/62 *Van Gend & Loos v Netherlands* ECLI:EU:C:1963:1.

a statement which is by itself a legal construct and to this day has not been included in the EU Treaties.

In conclusion, we struggle to see how the Court of Justice's arguments surrounding consent to arbitrate in intra-EU BITs are legal and not political in nature. Furthermore, this analysis does not seek to provide a qualitative assessment of either the ICS or investor-State arbitration. It is simply pointing out, that from a legal perspective – taking into consideration what the Court has held in *Opinion 1/17*, and what is present in the new EU investment treaties and in old Member States BITs with third States – the Court's argument on the nature and existence of consent to arbitrate in intra-EU BITs simply lacks coherency and sound reasoning.

2.2 *The Purpose of ISDS and ITA*

In the second part of paragraph 144, the Court stated that EU Member States had "agreed to exclude from the jurisdiction of their own courts disputes which may concern the interpretation or application of EU law in favour of arbitration proceedings". We do not have the space here to inquire whether this 'agreement' to exclude from the jurisdiction of national courts certain disputes was also 'freely made'. Furthermore, for the sake of the argument we are making here, it is not that relevant whether EU law would be interpreted by a non-EU tribunal, even though this is one of the main concerns of the Court in cases concerning the compatibility of foreign dispute settlement mechanisms with EU law.[43] The reason why this is not that important, is because we want to focus on how – in the above statement – the Court of Justice potentially mischaracterises or misunderstands the parties' intent behind the conclusion of (now) intra-EU BITs and the purpose of investment treaties, ISDS, and ITA.

Firstly, in our view this passage indicates a misunderstanding of ISDS, and the purpose of BITs. Nowhere do BITs or other investment agreements (such as investment chapters in PTAs)[44] mention that their objective is to "exclude" cases from domestic courts. BITs are meant to promote investments (there is

43 Commenting on the ECT's construction as an *act of EU law*, Jed Odermatt questions, whether 'the Court must prevent the possibility of future diverging interpretations [of EU law]' also in the case of UNCLOS, *an act of EU law*. Such a move would evidently result in conflicts with the designated dispute resolution bodies. See Odermatt (n 10) 1266 (yet, it should be noted, in passing, that the claimed monopoly of interpretation threatens the Court of Justice's coexistence with virtually any other international court).

44 M Usynin and Sz Gáspár-Szilágyi, 'The Growing Tendency of Including Investment Chapters in PTAs' [2018] 48 Netherlands Yearbook of International Law 267.

a long-standing discussion whether they actually do[45]) and to protect them. Protection in turn is ensured by the inclusion of international standards of protection (national treatment, MFN treatment, FET, FPS, etc) and the presence of ISDS. However, *ISDS provisions are not uniform, and they are not restricted to ITA*. Some investment treaties do not provide for international arbitration, others provide for a choice between domestic courts, domestic arbitral institutions, alternative methods, such as voluntary or compulsory conciliation and mediation, as well as treaty-based arbitration.[46] Then there are also fork-in-the road and no-U turns clauses[47] as well as umbrella clauses.[48]

Whilst investment treaty arbitration has received most of the criticisms and legitimacy challenges in the last couple of decades,[49] as we can see, ISDS provisions in investment treaties are not confined to ITA and include several other venues, including domestic courts, which as one of us has shown,[50] foreign investors *do use even when ITA is an option*. ITA is a means of last resort and investors who want to continue investing in the host State will consider twice before resorting to ITA.[51] There are also other factors investors consider

45 The problem lies in various methodological nuances, such as availability of data and different choices of research strategy. See S Armstrong and L Nottage, 'Mixing Methodologies in Empirically Investigating Investment Arbitration and Inbound Foreign Investment' in D Behn, M Langford and OK Fauchald (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (CUP 2022).

46 The UNCTAD IIA Mapping project provides examples of different dispute settlement arrangements. See International Investment Agreements Navigator, UNCTAD Investment Policy Hub, 'Mapping of IIA Content' https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping accessed 18 February 2022.

47 UNCTAD, 'Investor-State Dispute Settlement: A Sequel' (2014) 86–90 https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf accessed 18 February 2022.

48 Ibid., 164–168.

49 See e.g., SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' [2005] 73 Fordham Law Review 1521; M Langford, D Behn and OK Fauchald, 'Tempest in a Teapot? The International Investment Regime and State Backlash' in T Gammeltoft-Hansen and TE Aalberts (eds), *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (CUP 2016).

50 Sz Gáspár-Szilágyi 'Let Us Not Forget about the Role of Domestic Courts in Settling Investor-State Disputes' [2020] 18(3) The Law & Practice of International Courts and Tribunals 389.

51 Ibid. In other situations, the pursuit of domestic proceedings is an essential requirement to prove a breach of an international standard. For example, arbitral tribunals have refused to hear claims alleging a breach of the FET standard due to a denial of justice, if the investors had not resorted to domestic courts. See F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' [2009] 20 European Journal of International Law 729.

when resorting to domestic courts, such as the high costs and length of ITA,[52] the different domestic remedies that can be received, or the reliance on local laws, as opposed to international standards with which domestic judges are not familiar with.[53] In short, the primary aim of investment agreements is not to exclude disputes from domestic courts, but to protect foreign investors by providing multiple avenues for dispute settlement.

Secondly, the Court of Justice seems to reinterpret *ex post* the Member States' intent behind the conclusion of (now) intra-EU BITs and the inclusion of investment treaty arbitration clauses in them. The Court states that the intent of Member States was to remove from the jurisdiction of their own courts disputes which may concern the interpretation of EU law, in favour of ITA. However, how could the Member States have intended to do that, if these BITs were signed prior to the Central and Eastern European (CEE) countries' accession to the EU, when issues concerning EU law were not involved? These BITs became intra-EU only after the accession of the CEE countries. This situation is not the same as the one in *Mox Plant,* when Ireland and the UK pursued dispute settlement outside of the EU, under UNCLOS (1982) and the OSPAR Convention (1992), both of which were concluded after the accession (1973) of the countries in question to the EU.[54] We would assume that the intent behind BITs that later became intra-EU was to promote and protect investments and investors, especially those of the then EU Member States in the CEE countries, following the fall of communism. Furthermore, as AG Wathelet has stated in his Opinion in *Achmea*, the conclusion of these BITs was supported by the Commission.[55]

In conclusion, the Court's statements seem to misunderstand or mischaracterise how BITs and ISDS work, and how ITA is only one way of settling investor-State disputes under a treaty. Furthermore, it appears problematic

52 For the estimates of costs, see G Bottini and others, 'Excessive Costs and Recoverability of Costs Awards in Investment Arbitration' [2020] 21 The Journal of World Investment & Trade 251, 255–257. The duration of proceedings is reviewed in JM Álvarez Zárate and others, 'Duration of Investor-State Dispute Settlement Proceedings' [2020] 21 The Journal of World Investment & Trade 300, 309–314.

53 We would like to thank Prof. Anna de Luca for pointing this out.

54 *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v United Kingdom*), PCA Case No 2001-03, Final Award (2 July 2003).

55 CJEU Case C-284/16 *Slowakische Republik v Achmea BV* [2017] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para. 40; A de Luca, 'The Intra EU-BITs in the Opinion of AG Wathelet between Light and Shadow', Kluwer Arbitration Blog, 4 February 2018 http://arbitrationblog.kluwerarbitration.com/2018/02/04/intra-eu-bits-opinion-ag-wathelet-light-shadow/ accessed 18 February 2022.

that the Court is trying to reinterpret *ex post* the original intent of the contracting parties behind the conclusion of what are now intra-EU BITs.

2.3 *The Retroactive Effect of the Court's Judgment*

In paragraph 145 of the judgment, the Court held that Romania's consent to "that effect" (to arbitrate under a now intra-EU BIT) *lacked any force* after Romania's accession to the EU, because the system of remedies provided by the EU Treaties and EU Law had *replaced* the ITA procedure. This statement is very puzzling and there are a host of questions that flow from it.

The first issue concerns the lack of any discussion of how the EU Treaties and the remedies provided by the EU – which might not be as 'complete' as the Court often suggests[56] – have 'replaced' investment treaty arbitration in an intra-EU setting. There is simply no legal analysis or argument provided by the Court that led to this conclusion. If the 'replacement' had happened on the 1st of January 2007, when Romania officially acceded to the EU, in what form did the replacement occur? Was it pursuant to the rules of international law or EU Law? From the perspective of international law, the EU Treaties are international treaties, not internal instruments with constitutional relevance. Article 30 of the VCLT lays down the rules applicable to the application of successive treaties relating to the *same subject matter.* If later treaties cover the same subject matter as earlier ones, the parties to the earlier and the later treaties are the same, and there is no termination or suspension of the earlier treaties, then the provisions of the earlier treaties apply to the extent they are compatible with the later ones. Are these three cumulative conditions met in this case? The parties to the EU Treaties and to intra-EU BITs are the same EU Member States and until the recent agreement terminating intra-EU BITs (which raises a whole set of issues on its own)[57] there was no express termination or suspension of intra-EU BITs (with the exception of Italy).

However, as multiple ITA tribunals have held, except for the dissent of arbitrator Marcelo G Kohen in the *Adamakopoulos v Cyprus* ICSID arbitration,[58] it

56 T Lock, 'Is private enforcement of EU law through State liability a myth? An assessment 20 years after *Francovich*' [2012] 49(5) CMLR 1675.

57 D Kochenov, N Lavranos, 'Rule of Law and the Fatal Mistake of Achmea: Could the Intra-EU BIT's Have Been the Last Hope for Justice in Captured Illiberal Member States?', Reconnect, Working Paper No. 12 – November 2020 https://reconnect-europe.eu/wp-content/uploads/2020/11/RECONNECT_WP12_KOCHENOV_LAVRANOS.pdf accessed 18 February 2022.

58 *Theodoros Adamakopoulos and Others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction (Statement of Dissent of Professor Marcelo G. Kohen), 7 February 2020 https://www.italaw.com/sites/default/files/case-documents/italaw11239.pdf

is hard to argue that the EU Treaties and the BITs cover exactly the same subject matter.[59] On the broader level, there is no self-standing FET or FPS clause under EU law, and being a regional economic organization, there is no MFN clause. This of course does not mean that intra-EU investors do not enjoy very broad protections under the EU's freedom of establishment, the free movement of capital, or the freedom to provide services. However, even if we disregard the names of the international investment standards, and we take them apart (FET, for example, encompasses many different standards of treatment), at the more granular level, even similar standards of treatment (e.g., the prohibition of expropriation without compensation) will differ. This is because "the scope of rights enjoyed by investors under EU law often hinges on their relationship with [the EU] fundamental economic freedoms".[60] The Court, however, provides no discussion on this very important matter. In other words, if no treaty succession occurred under international law, based on what grounds did the Court conclude that the EU Treaties and the remedies provided by the EU had replaced the ITA procedures found in intra-EU BITs?

Could these conclusions have been based on EU law? If so, on which provisions? Article 351 TFEU discusses the continued existence of prior Member State agreements. If an incompatibility exists with EU law, Member States shall take "all appropriate steps to eliminate the incompatibilities", which in practice could result in the termination or amendment of the prior Member State agreements. Nevertheless, amendment or termination due to incompatibility with EU law is not retroactive 'replacement' as the Court seems to suggest. Furthermore, as we will discuss in the next section, the obligations of EU Members flow not only from the now incompatible intra-EU BITs, but also from their obligations under the ICSID Convention, which is yet to be deemed incompatible with EU law. Maybe the conclusion is based on Article 344 TFEU, which was at the heart of the *Achmea* judgment? Even so, from Article 344 TFEU incompatibility might flow, but not 'replacement'.

Secondly, the Court states that Romania's consent to arbitrate under the Romania-Sweden BIT "lacked any force" from the moment of the country's accession to the EU. What exactly does "lacking any force" mean and if so under

accessed on 18 February 2022. For a short discussion, see Sz Gáspár-Szilágyi and M Usynin, 'Procedural Developments in Investment Arbitration' [2020] 19 Law and Practice of International Courts and Tribunals 269, 279–281.

59 For a similar discussion on whether EU law has succeeded the ECT, see *Sevilla Beheer v Spain* (n 5), paras. 646–647.

60 M Sattorova, 'Investor Rights under EU Law and International Investment Law' [2016] 17 The Journal of World Investment & Trade 895, 918.

which legal system? Is the lack of force the same or equivalent to invalidity? Or the consent is still valid under international law, but it has no effect under EU law? From the perspective of international law, the States' consent to conclude the BIT was validly expressed in 2002, on which the consent to arbitrate rested. The treaty remained in force until it was terminated in late 2021. EU law cannot affect the validity of either of those validly expressed consents under international law. Moreover, under Article 25(1) of the ICSID Convention "no party may withdraw its consent [to submit a dispute to the Centre] unilaterally".[61] Therefore, we can safely assume that Romania's consent to conclude the BIT and its consent to arbitrate was valid and 'had force' under international law. Moreover, the lack of force that the Court of Justice mentions is very questionable for arbitrations that were concluded prior to *Achmea* when no one knew for certain whether ITA provisions under intra-EU BITS were incompatible with EU law.

Let us expand on this third, temporal point. The judgments of the Court of Justice in annulment proceedings under Article 263 TFEU generally have *ex tunc* effects, meaning that the annulled act is void from the moment the act in question was adopted. However, the Court can and sometimes does decide that the effects of the judgment will be *ex nunc*, from the date of the Court's judgment.[62] In Article 267 TFEU proceedings as well, the Court could limit the effects of its judgment "where overriding considerations of legal certainty involving all the interests" (public and private) would mandate it.[63] Why then has the Court not provided for *ex nunc* effects in *Achmea* (which arose pursuant to Article 267 TFEU), knowing that it would affect pending or concluded arbitrations, the enforcement of arbitral awards, the interests of private investors, and the international obligations of Member States?

The recent practice of EU Member State courts confirms that the retroactive effects of *Achmea* have practical implications.[64] For example, in January

61 Tribunals have previously referred to this irrevocability of consent as a ground for ignoring *Achmea*. Gáspár-Szilágyi and Usynin (n 6), 40–41 https://brill.com/view/journals/eilo/4/1/article-p29_3.xml accessed 18 February 2022.

62 M Lang, 'Limitation of Temporal Effects of CJEU Judgments – Mission Impossible for Governments of EU Member States' in P Popelier, S Verstraelen, D Vanheule and B Vanlerberghe (eds) *The Effects of Judical Decisions in Time* (Intersentia 2014).

63 K Lenaerts, I Maselis, and Katleen Gutman, *EU Procedural Law* (OUP 2014) 476–477.

64 C Sanderson, 'Lithuanian Suit against Veolia Can Proceed despite ICSID Case', Global Arbitration Review, 19 January 2022 https://globalarbitrationreview.com/lithuanian-suit-against-veolia-can-proceed-despite-icsid-case accessed 15 February 2022; H Wehland, 'German Supreme Court Confirms Intra-EU BIT Does Not Give Access to Investor-State Arbitration in Light of CJEU's Achmea Decision', Kluwer Arbitration Blog, 9 February 2022

2022, the Supreme Court of Lithuania decided not to stay a domestic claim against the foreign investor, in spite of a pending ICSID case.[65] In justifying its position, the Supreme Court followed the guidance of the Court of Justice and concluded that the ISDS provision in the intra-EU BIT in question (Lithuania-France BIT) was 'inapplicable' since 2004,[66] the moment of Lithuania's EU accession, unbeknownst to anyone.

As we have discussed, from the perspective of international law, the Court's claim that Romania's consent lacks force since 2007, has no legal consequences. Nevertheless, the Court could have offered an olive branch for the sake of judicial comity and judicial certainty and specify that already concluded or pending arbitrations would not be affected by *Achmea.* Sadly, it did not do so, causing uncertainty and unpredictability for both investors and host States.

The last point concerns the relevance of this statement for the enforcement of the *Micula* case. Even if we agreed with the Court's statement that Romania's consent to arbitrate lacked any force since 2007 – when Romania joined the EU – the arbitral claim was brought on 2 August 2005,[67] prior to Romania's EU accession and the Tribunal was constituted in the same year. In other words, the consent to arbitrate had force, even from the perspective of EU law, as it was expressed prior to Romania joining the EU.

Let us now look at the existing obligations of Member States under ICSID, a convention which has yet to be held to be incompatible with EU law.

2.4 *The Existing Obligations under ICSID*

The *Micula* case signifies a growing conflict between the EU's (the Commission and the Court of Justice, more specifically) stance on intra-EU investment arbitration and investment law's international nature. The Court of Justice seemingly fails to see the difference between the arbitration regimes in ICSID and non-ICSID cases when it comes to domestic court control and enforcement. The Court's insistence that even ICSID based intra-EU investment awards are unenforceable undermines the legal status of the ICSID Convention in the legal orders of the EU Member States and its comparative advantages to the

http://arbitrationblog.kluwerarbitration.com/2022/02/09/german-supreme-court-confirms-intra-eu-bit-does-not-give-access-to-investor-state-arbitration-in-light-of-cjeus-achmea-decision/ accessed 18 February 2022.

65 Supreme Court of Lithuania (Order dated January 18, 2022) (n 7). See also Satkauskas (n 7).

66 Ibid 50.

67 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* [*I*], ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 7 https://www.italaw.com/sites/default/files/case-documents/ita0530.pdf accessed 18 February 2022.

New York Convention. Nevertheless, the EU continues to include provisions referring to the ICSID Arbitration Rules and enforcement under the ICSID Convention in its new investment agreements,[68] even though the EU is not and cannot be a party to ICSID.[69] At the same time the same EU is forcing its Member States, and now a former member State (the UK),[70] to breach their ICSID obligations to enforce the awards.

The readers are well aware of the different regimes for recognition and enforcement of arbitral awards rendered under the New York and the ICSID Conventions, which will receive only a brief mention here. The New York Convention allows both procedural possibilities for domestic court control and mechanisms of ensuring compliance with domestic substantive law of fundamental importance (arbitrability and public policy). The ICSID Convention is famously lacking both. Instead, it delocalizes arbitral proceedings from national courts' control[71] and subjects them to internal control mechanisms to the exclusion of "any appeal" or "any other remedy".[72] The ICSID enforcement regime "provides a clear advantage over other arbitration mechanisms" with their risks of protracted post-award litigation.[73] According to an express rule, an ICSID award becomes binding and pecuniary obligations are enforced as a final judgment of a domestic court.[74] The narrow focus on pecuniary obligations was a clear political compromise, accepted at the late stage of negotiations instead of a recourse to the public policy defence.[75] Such a defence is

68 EU-Vietnam Free Trade Agreement (EUVFTA), Art. 8.23(2); EU-Canada Comprehensive Economic and Trade Agreement (CETA), Art. 8.23(2); EU-Singapore Investment Protection Agreement, Art. 3.6(1).

69 However, the EU actively explores opportunities to participate in the ICSID Additional Facility Proceedings. See European Commission, 'Proposal for a Council Decision on the position to be taken on behalf of the European Union in the International Centre for Settlement of Investment Disputes (ICSID)', COM(2022) 38 final, 9 February 2022 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0038 accessed on 28 February 2022.

70 European Commission, 'Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid', Press-release, 9 February 2022 https://ec.europa.eu/commission/presscorner/detail/en/IP_22_802 accessed 18 February 2022.

71 Schreuer (n 31) 1103.

72 International Convention for Settlement of Investment Disputes 1965 (ICSID Convention) Art 53(1).

73 Schreuer (n 31) 1103.

74 ICSID Convention Art 54(1). We leave aside the discussion of sovereign immunity from execution, which often creates problems of enforcement in practice.

75 See the discussion in GA Bermann, 'Understanding ICSID Article 54' [2020] 35 ICSID Review – Foreign Investment Law Journal 311, 325.

accordingly not allowed under ICSID, a matter over which there can hardly be any greater consensus.

However, the developments in the *Micula* saga have become "a rude awakening" for international lawyers.[76] Instead of accepting the covenant, both the Commission and the Court of Justice seem to engage in a Kierkegaardian 'either/or' argument: "hang yourself, or do not hang yourself, you will regret both". Either the Commission's interpretation of international law matters succeeds in front of ITA tribunals, or it will be the Court who puts a nail in the coffin of intra-EU investment arbitration; the claimants are in a perilous position either way. What remains behind the scenes is that the issue of consent *is* irrelevant, as there is no opportunity for domestic courts to engage with it (or virtually any other issue[77]) under the ICSID Convention. The situation would have been different under the New York Convention with its mechanisms of domestic court control, but not in the delocalized ICSID system. As an intermediary conclusion, one is bound to recognize an ongoing violation of the ICSID Convention.[78]

Furthermore, EU Member States increasingly find themselves between a rock and a hard place. One the one hand, they have to comply with their EU law obligations and the Court of Justice's judgments. On the other hand, they are also bound by their international obligations under the ICSID Convention. These two competing sets of obligations turn out to be mutually exclusive when it comes to enforcement issues. Starting with *Achmea*, the initial debate concerned only the different instruments for consent (intra-EU BITs) and their inapplicability (in the eyes of the Commission and the Court of Justice) from the moment of EU accession. However, the initial debate said nothing about Member State obligations under the ICSID Convention, which in cases such as *Micula* require the recognition and enforcement of the award.

It comes therefore as a surprise that the EU is not pursuing the divorce further by obliging its Member States to abandon the ICSID Convention, which obliges them to enforce intra-EU BIT awards incompatible with EU law.

76 Ibid 330.

77 After a careful review, Bermann concludes that the 'courts were to refrain from conducting jurisdictional, procedural or substantive, including public policy, review of ICSID awards before enforcing them'. He convincingly interprets Article 54(1) of the ICSID Convention as stipulating only that the procedural requirements for enforcement of awards shall be no less favourable than domestic judgments. See Ibid., 343–344.

78 Schreuer (n 31) 1103–1104: "[A] party to ICSID proceedings may not initiate action before a domestic court to seek the annulment or another form of review of an ICSID award. A court of a State that is a party to the ICSID Convention would be under an obligation to dismiss such an action".

Instead, the EU refers to ICSID as a potential forum in the recently negotiated investment agreements on an equal foot with other fora.[79] Even the recent innovative modifications of ISDS, which increasingly appear in EU investment agreements in the anticipation of the Multilateral Investment Court, are still relying on the New York and ICSID Conventions for enforcement.[80] The current state of observing the ICSID Convention in recent EU investment treaties, but also breaking it in intra-EU cases, creates a state of confusion for the arbitration community. It also raises more profound questions about the EU's overall commitment to compliance with international law.

3 Why This Discussion Is Important

Why should all this matter, one might ask? It should matter because it shows that when a court which is foreign to a system and uses the features of that system to define and develop the features of its own legal system, the chances that the foreign system will be potentially misunderstood or mischaracterised are very high. This in turn will not only cause legal problems but will also set in motion other unexpected consequences.

From the legal side of things, the Court of Justice's more recent animosity towards ITA has resulted in protracted enforcement cases, disgruntled investors that cannot enforce their awards in the EU, EU Member States that do not know whether they should abide by their international or EU law obligations, foreign courts which do not understand EU law, and arbitral tribunals which seem to have become increasingly hostile towards EU law.[81] Once we go into the details of a case such as *Micula* we notice that a fundamental principle of law, that of legal certainty, is simply neglected. Just to repeat. The arbitral claim was brought in 2005, prior to Romania's accession to the EU, under a validly concluded international agreement and the award was to be enforced under a

79 EU-Vietnam Free Trade Agreement (EUVFTA), Art. 8.23(2); EU-Canada Comprehensive Economic and Trade Agreement (CETA), Art. 8.23(2); EU-Singapore Investment Protection Agreement, Art. 3.6(1).

80 EU-Vietnam Free Trade Agreement (EUVFTA), Art. 8.41; EU-Canada Comprehensive Economic and Trade Agreement (CETA), Art. 8.41; EU-Singapore Investment Protection Agreement, Art. 3.22. Cf. European Commission, 'Proposal for a Council Decision on the position to be taken on behalf of the European Union in the International Centre for Settlement of Investment Disputes (ICSID)' (n 69) 3: "However, until the establishment of a multilateral court, the current system of investment arbitration will continue to apply and any improvements to its rules should be welcomed".

81 Gáspár-Szilágyi and Usynin (n 6).

Convention to which 26 EU Member States and 129 other States are parties to, and which does not allow review by domestic courts. The Award was also rendered in 2013, five years prior to *Achmea.* Legal certainty requires that the law is predictable so that actors can act accordingly. In 2005, when the case was launched, the law was predictable: obligations under the Romania-Sweden BIT and obligations under the ICSID Convention.

In 2013, when the Award was rendered, EU law obligations came into play, but at that point in time no one knew in a definitive way if the BIT was incompatible with EU law. In other words, the legal rights and obligations of the disputing parties were clear. However, now in the enforcement phase, which saw the respondent State being dragged through courts in several EU and non-EU jurisdictions, no one knows what the outcome will be. Even though Romania fulfilled its ICSID obligations in late 2019 and paid the award in full,[82] following the appeal in *Commission v Micula* the General Court will still need to decide whether the payment of the award constitutes illegal State aid. If the answer is yes, then Romania will be forced to recover the moneys already paid to the investor. Which really begs the question: when is a case over? If the winning party cannot be sure even after being paid the compensation in full that they can hold on to that money, then one cannot speak of legal certainty or the finality of judicial decisions.

Then there is the issue of comity in an increasingly fractured legal landscape in which different rules and dispute settlement mechanisms try or should try to accommodate one another. Comity has worked in the *Mox Plant* cases when an arbitral tribunal constituted under the OSPAR Convention decided to suspend proceedings until the Court of Justice had settled the issue between Ireland and the UK.[83] However, the Court of Justice does not seem to be willing to defer to investment law and investment tribunals. One could argue that investment tribunals equally disregard comity. Nevertheless, as the very recent ECT tribunal in *Sevilla Beheer* has held when looking at the Court of Justice's *Komstroy* judgment, the issue of incompatibility between Article 26 of the ECT and EU law was considered *obiter dictum* in a case that did not concern the intra-EU application of the ECT.[84] What is a foreign tribunal to do with the *obiter dicta* of another tribunal in a scarcely argued judgment? In the interest of comity and legal certainty the Court of Justice could have opted – as explained above – to limit the effects of its judgments in *Achmea* to only

82 See (n 23).

83 *MOX Plant Case* (*Ireland v United Kingdom*), PCA Case No. 2002-01, Procedural order No. 3, 24 June 2003 https://pcacases.com/web/sendAttach/867 accessed 18 February 2022.

84 *Sevilla Beheer v Spain* (n 5), para. 667.

new intra-EU arbitrations, not affecting concluded or pending arbitrations. However, the Court did not do so, which of course will make other dispute settlement bodies less deferential to the Court of Justice and EU law. The message is clear. The Court is forcing EU Member States *ex post* and after the conclusion of arbitral proceedings to breach existing international obligations.

This in turn creates reputational damage and it will make it hard for the EU to argue on the international scene that other participants should abide by their international obligations, when it is forcing its own members not to do so. This power play, as Lavranos argues, could also lead to a broader avoidance of the EU as a seat of arbitration or enforcement, which will likely favour other venues with more arbitration-friendly regimes.[85] Not only intra-EU investment treaty arbitration is at risk (both ICSID and non-ICSID), but also those under the ECT (even if not in an intra-EU setting, such as in *Komstroy*) or commercial arbitrations if the agreement is similar to intra-EU ITA clauses (*PL Holdings*), and potentially even arbitration under Member State agreements with third countries.

This negative message the EU sends to foreign investors could lead to increased corporate restructuring to take advantage of non-intra-EU investment treaties, and the possibility that some EU States when they get into financial difficulties (as has happened to Hungary and Romania following the 2008–2009 crash) will not be able to raise capital on the international markets or from the IMF, until their ICSID debts are not settled, as the case of Argentina illustrates.[86]

Lastly, the argument which ties compliance with international legal obligations, as manifested in enforceable arbitration awards, with the social identity of democratic states deserves merit in EU cases as well.[87] It is hard to talk about the rule of law, when the EU does not observe its Member States' existing commitments to other international actors and to private parties. The poor quality of argumentation and misunderstandings used in cases such as the *Micula* appeal or *Komstroy* will make non-EU dispute settlement bodies less

85 N Lavranos, 'Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence to Permanent Conflict', Kluwer Arbitration Blog, 13 January 2022 http://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-eu-law-from-peaceful-co-existence-to-permanent-conflict/ accessed 2 February 2022.

86 M Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' [2016] 19 Journal of International Economic Law 681, 700–701.

87 Ibid 702–705.

sympathetic to EU law and the Court of Justice's arguments, as evidenced by the attitude of the UK Supreme Court[88] or by arbitral tribunals.

4 Conclusions

There are no great words to conclude with. The situation is quite unfortunate as it causes an unnecessary lack of legal certainty for EU Member States, third countries, and investors alike. The Court of Justice has now spoken quite clearly that intra-EU investment arbitrations of various forms do not have a future in the EU. Enforcement cases in and outside of the EU will drag on, arguments will be raised about competing legal obligations, States and investors will pay expensive legal fees, and academics will have something to write about for a number of years to come.

We want to make it abundantly clear that our contention here is not with the legitimacy of ITA, the usefulness of investment treaties, or how the investors might or might not have gained the tax incentives in a post-communist country in the 1990s, which had a struggling economy and a shaky system of governance. Instead, our argument here is quite clear. The rules of the game were clear in the beginning: there was a validly concluded investment treaty with a valid offer to arbitrate, a validly formed arbitral tribunal that concluded that a State had breached its international obligations under that treaty, and compensation had to be paid under another international treaty, which does not allow for domestic review or set aside proceedings. Then, a new actor – who was not present when the rules of the game were adopted – entered the game and decided that the rules of the game never really existed. What should we make of this?

88 See (n 20).