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## Arbitration in the Battlefield of International Investment Protection Law and EU Law, with a Glance at Hungary's Recent Exposure\*\*

### ABSTRACT

In the last decade, investor-state arbitration procedures with the involvement of Hungary sometimes raised the issue of the compatibility of bilateral investment treaties (BITs), entered into between Hungary and other EU Member States, with EU law. The *Achmea* judgment of the Court of Justice of the European Union finally made it clear that arbitration clauses in intra-EU BITs are contrary to EU law. This article outlines the approach of arbitral tribunals in proceedings brought against Hungary towards the relationship between EU law and bilateral investment treaties, primarily from the perspective of the autonomy of the legal order of the EU, prior to and following the *Achmea* ruling. Even though arbitral tribunals in these cases often attributed a limited impact to EU law on the outcome of the procedure, the *Achmea* decision gave an impetus to the deconstruction of the existing system of intra-EU BITs, which seems to be endorsed now by the Member States which, by their joint declaration, have decided to terminate intra-EU BITs in the future.

**KEYWORDS:** investment protection, arbitration, Court of Justice of the European Union, autonomy of legal order of the EU, *Achmea*

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## I. INTRODUCTION

The *Achmea* judgment<sup>1</sup> of the Court of Justice of the European Union (CJEU) has been seen by commentators as a death blow,<sup>2</sup> a shock,<sup>3</sup> and a serious strike<sup>4</sup> for investment arbitration, or at least a huge surprise.<sup>5</sup> The case turned up in the battlefield between two systems,<sup>6</sup> namely EU law and international investment law, and the outcome largely depended on whether the first or the second is chosen as a point of departure.<sup>7</sup> Perhaps it is not that surprising that the CJEU opted in favour of EU law.<sup>8</sup>

Hungary cannot remain a simple spectator on the sidelines of this battlefield. Like most Central and Eastern European countries, Hungary entered into a number of bilateral investment treaties (BITs) with both EU Member States and third countries before its accession to the European Union (EU) in 2004. The European Commission (Commission) itself encouraged countries intending to accede to the EU to enter into such BITs.<sup>9</sup> These BITs were motivated first of all by the decrease in political risks and their aim was to provide protection for the investors of the old Member States regarding their investments made in the Central and Eastern European countries that were not yet EU Member States and at the same time to boost the flow of investment to these countries. Providing guarantees for investors demonstrated the commitment of these countries to political and economic changes and was clearly an important step towards the long-term objective, EU integration. In order to make the investment environment more favourable, Hungary had adopted investment protection legislation<sup>10</sup> and concluded several BITs, both with old Member States and third countries, since 1987,<sup>11</sup> i.e. already before the

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<sup>1</sup> Case C-284/16 *Slovak Republic v Achmea BV*, ECLI:EU:C:2018:158.

<sup>2</sup> D. Thym, Todesstoß für autonome Investitionsschutzgerichte, *Verfassungsblog*, 08.03.2018., <https://verfassungsblog.de/todesstoss-fuer-autonome-investitionsschutzgerichte/> (Last accessed: 30 December 2021).

<sup>3</sup> Cs. I. Nagy, Intra-EU Bilateral Investment Treaties and EU Law After Achmea: “Know Well What Leads You Forward and What Holds You Back”, (2018) 19 (4) *German Law Journal*, 981–1016., 984. <https://doi.org/10.1017/S2071832200022938>

<sup>4</sup> J. Katona and T. Kende, Több kérdés, mint válasz: számvetés az Európai Bíróság Achmea döntése után, (2018) 18 (4) *Európai Jog*, 27–35., 34.

<sup>5</sup> Nagy, Intra-EU Bilateral Investment Treaties and EU Law After Achmea: “Know Well What Leads You Forward and What Holds You Back”, 992.

<sup>6</sup> E. Gaillard, L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16), (2018) 3 (3) *Revue critique de droit international privé*, 616–630., 621. <https://doi.org/10.3917/rcdip.183.0616>

<sup>7</sup> T. Szabados, A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban, (2017) 58 (3) *Allam- és Jogtudomány*, 17–44., 17.

<sup>8</sup> See H. Burkhard, A European Law Reading of Achmea, *Conflict of Laws.net*, 08.03.2018., <http://conflictoflaws.net/2018/a-european-law-reading-of-achmea/> (Last accessed: 30 December 2021).

<sup>9</sup> Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16 *Slovak Republic v Achmea BV*, para 40.

<sup>10</sup> 1988. évi XXIV. törvény a külföldiek magyarországi befektetéseiről (Act XXIV of 1988 on the foreign investments in Hungary).

<sup>11</sup> See, for example, 25/1987. (VII. 28.) MT rendelet a Magyar Népköztársaság Kormánya és a Svéd Királyság Kormánya között a beruházások elősegítéséről és kölcsönös védelméről szóló megállapodás

change of the political system. From these treaties, only the BIT entered into with Italy was renounced in the meantime by Italy in accordance with the rules contained in the BIT.<sup>12</sup> As is well known, Italy terminated all of its intra-EU BITs already before the *Achmea* ruling.

The accession of the Central and Eastern European states to the EU brought a remarkable change.<sup>13</sup> Previously, the investors of the capital-exporting EU Member States participated as claimants in investment disputes. With the accession of the Central and Eastern European countries, EU Member States appear in more and more cases as respondents. This is also the case with Hungary.<sup>14</sup> In the last years, Hungary has participated in 15 ICSID proceedings as respondent. A decision was made in favour of the investors in only three cases;<sup>15</sup> in six cases the tribunal dismissed the investors' claims, either on the merits or on jurisdictional grounds<sup>16</sup> and two proceedings were settled or otherwise discontinued.<sup>17</sup> Four cases are still pending.<sup>18</sup>

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kihirdetéséről [Decree of the Council of Ministers No. 25/1987. (8 July) on the promulgation of the agreement concluded between the government of the Hungarian People's Republic and the government of the Swedish Kingdom on the promotion and mutual protection of investments].

<sup>12</sup> 9/2008. (II. 18.) KüM határozat a Magyar Népköztársaság Kormánya és az Olasz Köztársaság Kormánya között a beruházások elősegítéséről és védelméről szóló, Rómában 1987. február 17-én kelt, a 30/1990. (VIII. 21.) Korm. rendelettel kihirdetett Megállapodás és a hozzá csatlakozó Jegyzőkönyv hatályon kívül helyezéséről [Decision of the Minister of Foreign Affairs No. 9/2008. (18 February) on repealing the agreement and the protocol attached thereto concluded between the government of the Hungarian People's Republic and the government of the Italian Republic on 17 February 1987 and promulgated by Government Decree No. 30/1990. (21 August)].

<sup>13</sup> Concerning investment protection from the angle of Central and Eastern European countries, see: Cs. I. Nagy, Central European Perspectives on Investor-State Arbitration: Practical Experiences and Theoretical Concerns. Centre for International Governance Innovation, *Investor-State Arbitration Series*, Paper No. 16 – November 2016, <https://www.cigionline.org/sites/default/files/documents/ISA%20Paper%20No.16.pdf> (Last accessed: 30 December 2021).

<sup>14</sup> On Hungary's exposure to investment arbitration, see Szabados, A tagállamok közötti beruházás-védelmi egyezmények az uniós jogban, 41–43.; Cs. I. Nagy, Hungarian cases before ICSID tribunals: the Hungarian experience with investment arbitration, (2017) 58 (3) *Hungarian Journal of Legal Studies*, 291–310., 291. <https://doi.org/10.1556/2052.2017.58.3.4>

<sup>15</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Award (ICSID Case No. ARB/03/16); *UP and C.D Holding Internationale v. Hungary*, Award (ICSID Case No. ARB/13/35); *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, Award (ICSID Case No. ARB/17/27).

<sup>16</sup> *Telenor Mobile Communications AS v. Republic of Hungary*, Award (ICSID Case No. ARB/04/15); *Electrabel S.A. v. Hungary*, Award (ICSID Case No. ARB/07/19); *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, Award (ICSID Case No. ARB/07/22) and *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, Decision on Annulment (ICSID Case No. ARB/07/22); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, Award (ICSID Case No. ARB/12/3); *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, Award (ICSID Case No. ARB/12/2); *Vigotop Limited v. Hungary*, Award (ICSID Case No. ARB/11/22).

<sup>17</sup> *AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/01/4); *ENGIE SA, GDF International SAS and ENGIE International Holdings BV v. Hungary* (ICSID Case No. ARB/16/14).

<sup>18</sup> *Mazen Al Ramahi v. Hungary* (ICSID Case No. ARB/17/45); *Sodexo Pass International SAS v. Hungary* (ICSID Case No. ARB/14/20); *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21); *Dan Cake (Portugal) S.A. v. Hungary* (ICSID Case No. ARB/12/9).

The number of investment disputes brought before arbitral tribunals is increasing, as is the amount of compensation awarded in these proceedings. It is therefore not surprising that respondent Member States try to rely on EU law against the safeguards contained in BITs, which often restrict their room to manoeuvre.

## II. INVESTMENT PROTECTION FROM THE PERSPECTIVE OF EU LAW – THE *ACHMEA* JUDGMENT

EU accession causes uncertainties in the field of investment protection law to this day. It became doubtful whether intra-EU BITs are compatible with EU law. First is the question as to what extent the substantive guarantees provided for the investors overlap with EU law, and in particular with the freedom of establishment and the free movement of capital provisions, and whether the Member States have competence at all to regulate intra-EU investments. Second, BITs grant advantages to the contracting states and their investors, without extending these advantages to the investors of other Member States, which raises the question of discrimination. A third question was whether the possibility of having recourse to arbitration is compatible with EU law, as arbitral tribunals may decide cases involving the interpretation or application of EU law outside the EU judicial system.

The *Achmea* judgment answered this last question. The point of departure taken by the CJEU was the autonomy of the EU legal order, along with other principles such as the primacy, direct effect of EU law, the principle of mutual trust and the principle of loyal cooperation. Under Article 344 TFEU, ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’. Although Article 344 refers to disputes between Member States, in accordance with the aim of Article 344 (i.e. the uniform interpretation and application of the Treaties as well as the autonomy of EU law), the CJEU decided for a broad interpretation of this provision, extending its application to disputes that arise between a private investor and a Member State. The CJEU considered arbitration based on an intra-BIT as an agreement between two Member States, where the private parties’ autonomy does not have any role, to decide investment disputes outside the EU judicial system that infringe Article 344 TFEU.<sup>19</sup> The CJEU pointed out that an investment arbitral tribunal is not part of the judicial system of the Member States, and thus that of the EU, and cannot be considered as a court or tribunal of a Member State within the meaning of Article 267 TFEU, and as such cannot request a preliminary ruling from the CJEU.<sup>20</sup> The CJEU did not even see

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<sup>19</sup> See *Achmea*, para 55.

<sup>20</sup> *Achmea*, paras 43–49.

it guaranteed that questions raising the interpretation of EU law will be referred to it in the framework of a preliminary ruling procedure through the review of the arbitral awards by the courts of the Member States. This is because the possibility and the scope of the judicial review of arbitral awards depend on national law, but the review is usually limited. As a result, based on a BIT, the Member States in fact remove disputes which may concern the interpretation or application of EU law from the jurisdiction of their own courts, and, hence, from a system of judicial remedies ensuring the respect of EU law.<sup>21</sup> Taking all the above into account, the CJEU drew the conclusion that Articles 267 and 344 TFEU must be interpreted as precluding a provision in a 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, the jurisdiction of which that Member State has undertaken to accept.<sup>22</sup>

The determination of the *ratio decidendi* and the precise scope of the *Achmea* judgment has been debated. *Achmea* concerned an *ad hoc* arbitration based on a BIT, so it could be said that its relevance is limited to *ad hoc* arbitration in accordance with the facts of the case. However, following a teleological interpretation, the judgment can equally be applied to institutional arbitration, ICSID proceedings or Energy Charter Treaty (ECT) arbitration. In all these instances, an arbitral tribunal decides a case which may involve the interpretation or application of EU law, despite the fact that the arbitral tribunal is not part of the judicial system of the EU; it cannot turn to the CJEU with a request for preliminary ruling, and the review of the arbitral award by the courts of the Member States is not necessarily possible to a full extent or is even excluded. This is true in the case of institutional arbitration and the same holds for ICSID arbitration, where the review or the annulment of the award is possible only in accordance with the ICSID Convention within the ICSID regime itself. Following this line of reasoning, the *Achmea* judgment equally covers arbitration under the ECT, with the single difference that it is a mixed agreement and the EU is also a party to it. It cannot be ignored that the ECT dispute settlement also extends to disputes between investors from the EU and EU Member States. The interpretation or application of EU law may equally arise in the proceedings of arbitral tribunals established on the basis of the ECT in such intra-EU disputes; such tribunals are also outside the EU judicial system and cannot have recourse to the CJEU with a request for preliminary ruling. From this perspective, it is immaterial whether the arbitration agreement is based on a BIT or a multilateral treaty. The *Achmea* decision recognises that the EU has capacity to conclude international agreements that necessarily entail the power to submit to the decisions of a court by an international agreement, provided that the autonomy of

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<sup>21</sup> See *Achmea*, para 55.

<sup>22</sup> *Achmea*, para 60.

the EU and its legal order is respected.<sup>23</sup> Arbitral tribunals established pursuant to the ECT may qualify as a court established by an international agreement, but, as a request for preliminary ruling is not available to them, the violation of the autonomy of the EU legal order cannot *a priori* be excluded.

The consequence of the judgment is that arbitration clauses in intra-EU BITs cannot be applied. It means that the Member States are obliged to eliminate arbitration clauses by modifying the treaty or renouncing the provision concerned. If they fail to do so, the Commission may bring an infringement procedure against the Member State concerned. Furthermore, damages paid by a Member State on the basis of the arbitral award may be deemed illegal state aid by the Commission, irrespective of the nature of the arbitration procedure. The BITs concluded by Hungary with other Member States provide for the possibility of arbitration, including *ad hoc*, institutional or ICSID arbitration. Due to the *Achmea* judgment, it seems that these provisions may no longer be applied.

### III. THE RELATION BETWEEN EU LAW AND INTERNATIONAL INVESTMENT LAW FROM THE PERSPECTIVE OF ARBITRAL TRIBUNALS

As long as the battle takes place on the playing field of the EU, all this seems straightforward. However, if it takes place on the other playing field, that of arbitral tribunals, the outcome may be entirely different. An arbitral tribunal does not necessarily take EU law as a point of departure, but the underlying multilateral or bilateral treaty based on public international law. In the Hungary-related ICSID cases, arbitral tribunals sometimes had to address the relation between EU law and the respective BIT. In the *Telenor* case, where the Hungarian subsidiary of the Norwegian Telenor was obliged to contribute to a fund established for compensating the unrecovered costs incurred by the universal service providers and regulated prices were introduced for service providers with significant market power, including Telenor,<sup>24</sup> the claimant argued that Hungary had breached the relevant EU directives.<sup>25</sup> The tribunal was unclear as to why Hungary's duty to secure compatibility with EU legislation was relevant to the case,<sup>26</sup> and dismissed the investor's claims based on the Hungary-Norway BIT. In the *ADC Affiliate Limited and ADC & ADMC Management Limited* case, the question was whether Hungary expropriated the investments of the Cypriot investors

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<sup>23</sup> *Achmea*, para 57.

<sup>24</sup> *Telenor Mobile Communications AS v. Republic of Hungary*, Award (ICSID Case No. ARB/04/15).

<sup>25</sup> *Telenor*, para 47(4).

<sup>26</sup> *Telenor*, para 50.

made in relation to Ferihegy Airport in breach of the Hungary-Cyprus BIT.<sup>27</sup> The investors entered into an agreement with the Air Traffic and Airport Administration, a state entity, for the construction of a new terminal and the refurbishment of an existing one, as well as for the operation of the airport. However, later on, legislation was enacted that deprived the investors of the operation of the airport, a quite profitable business, and thereby of the related revenues. All activities of the project company in the airport were taken over by Budapest Airport Rt., a newly founded company and the legal successor of the Air Traffic and Airport Administration. The respondent Hungarian state argued that ground handling had to comply with certain EU directives, and air traffic control had to be separated from the commercial operation of the airport.<sup>28</sup> This argument was rejected by the ICSID arbitral tribunal, because, in its view, EU law had not required the steps taken by the respondent and established that expropriation took place.<sup>29</sup> However, the above cases addressed the relation between international investment law and EU law only marginally and did not explain it in depth.

The cornerstone of the *Achmea* judgment is the autonomy of the legal order of the EU. Arbitral tribunals do not refer to this concept explicitly.<sup>30</sup> Nevertheless, some arbitral awards have addressed the autonomy of EU law in one way or another. Two Hungary-related ICSID decisions rendered prior to *Achmea* are telling in this respect. In *Electrabel*, a long-term power purchase agreement (PPA) concluded between the Belgian investor and MVM, the state-owned electricity company, was terminated by Hungary.<sup>31</sup> In the view of the respondent Hungarian state, termination took place in order to comply with EU state aid law, because the Commission established by a decision that PPAs with a similar beneficial pricing well exceeding the market price constitute illegal state aid. Electrabel argued before an ICSID tribunal that the termination of the PPA and the introduction of a new price regulation constituted unlawful expropriation and Hungary was in breach of the standards laid down by Article 10(1) and Article 10(7) ECT. In *Electrabel*, the investor's claims were dismissed. It is interesting to note that, under similar circumstances, in *EDF International S.A. v. Hungary*, a contrary decision was rendered. In its unpublished decision, an *ad hoc* arbitral tribunal proceeding under the UNCITRAL rules awarded damages to the investor.<sup>32</sup> Nevertheless, coming back

<sup>27</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, Award (ICSID Case No. ARB/03/16).

<sup>28</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited*, paras 268–270.

<sup>29</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited*, para 272.

<sup>30</sup> P. Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration*, Academic Dissertation, Helsinki, 2017., <https://helda.helsinki.fi/bitstream/handle/10138/225135/TheRelat.pdf?sequence=1&isAllowed=y> (Last accessed: 30 December 2021) 114 and 116.

<sup>31</sup> *Electrabel S.A. v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability (ICSID Case No. ARB/07/19).

<sup>32</sup> *EDF International S.A. v. Republic of Hungary*, UNCITRAL.

to *Electrabel*, in its decision on jurisdiction, applicable law and liability, the tribunal stated that it was not an intra- or extra-EU BIT case, because the claimant did not advance any argument under EU law and therefore distinguished it from cases<sup>33</sup> such as *Eastern Sugar*,<sup>34</sup> *Binder*<sup>35</sup> and *Eureko*.<sup>36</sup> Under Article 26(6) of the ECT, the tribunal had to decide the dispute in accordance with the ECT itself and the rules and principles of public international law. The first question was whether the tribunal should apply EU law, and in particular EU state aid rules. Hungary as respondent asserted that EU law was to be considered as part of public international law and the Commission's state aid decision could not be ignored, while the claimant argued that EU law (save treaty law) could not be applied and could not excuse the termination of the PPA. The tribunal found that EU legal rules creating a regional system of international law can be regarded as part of the international legal order,<sup>37</sup> established that there is no conflict between EU law and the ECT,<sup>38</sup> then added that if there was a conflict, EU law takes precedence over the rules of the ECT by virtue of the interpretation of Article 351 TFEU.<sup>39</sup> In the relationship between Article 351 TFEU and Article 16 ECT, the conflict-of-laws rules of the later treaty, i.e. the current Article 351 TFEU, apply due to the *lex posteriori* rule.<sup>40</sup> Article 351 TFEU does not exclude the application of the rules of EU law to agreements between two Member States, such as Belgium and Hungary, in the case of incompatibility between EU law and the ECT.<sup>41</sup> A consequence of this statement is that the ECT does not protect an investor against a Member State enforcing a binding decision of the Commission.<sup>42</sup> So far, the arbitral award seems to respect the autonomy and primacy of EU law. Elsewhere, however, the tribunal recognised that it is required to interpret the Commission's state aid decision and, in this sense, to apply EU law without deciding on its validity.<sup>43</sup> Following the logic of the *Achmea* judgment, this is nothing else than the usurpation of the decision-making power of the courts of the EU. Moreover, the tribunal rejected the Commission's *amicus curiae* submission claiming that the tribunal had no jurisdiction, partly due to the application of the current Article 344 TFEU. Contrary to the position of the CJEU, the tribunal established that Article 344 is limited to disputes between Member States, but does not apply

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<sup>33</sup> *Electrabel*, para 4.11.

<sup>34</sup> *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial Award, SCC Case No. 088/2004.

<sup>35</sup> *Rupert Joseph Binder v. Czech Republic*, Award on Jurisdiction, UNCITRAL.

<sup>36</sup> *Electrabel*, para 4.12; *Eureko B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, UNCITRAL, PCA Case No. 2008-13.

<sup>37</sup> *Electrabel*, para 4.122.

<sup>38</sup> *Electrabel*, para 4.146.

<sup>39</sup> *Electrabel*, para 4.191.

<sup>40</sup> *Electrabel*, para 4.178.

<sup>41</sup> *Electrabel*, para 4.173–4.189.

<sup>42</sup> *Electrabel*, para 4.169.

<sup>43</sup> *Electrabel*, para 4.198.



to disputes between an investor and a Member State. The tribunal pointed out that, even in an ICSID procedure, compliance with EU law may be ensured through an infringement procedure initiated by the Commission.<sup>44</sup> Finally, it is interesting to note that the tribunal concluded that the state aid decision required Hungary to terminate the PPA and it was not legally responsible for the acts by the Commission under the ECT or under public international law.<sup>45</sup> The binding decisions of EU institutions could not entail responsibility for Hungary.<sup>46</sup> Nevertheless, as it is pointed out by Niemelä,<sup>47</sup> in its opinions on the EEA court<sup>48</sup> and the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>49</sup> the CJEU held that it endangers the autonomy of EU law when the courts under the relevant agreements are entitled to assess the distribution of competences between the EU and the Member States for the purposes of attributing responsibility for a specific act or omission. Therefore, a decision that addresses the distribution of competences, directly or indirectly, by ascribing a measure to the EU or a Member State, as happened in *Electrabel*, seems to infringe the autonomy of EU law.<sup>50</sup> The facts were similar in *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, with the difference that the case was initiated before the adoption of the Commission decision establishing the illegality of the PPAs and as such it concerned the new price regulation introduced by the Hungarian legislator, taking the potential unlawfulness of the PPAs, including the PPA entered into with AES Summit, into account.<sup>51</sup> The tribunal held that the dispute was not about a conflict between the EC Treaty (state aid law) and the ECT.<sup>52</sup> Instead, the dispute was about the conformity or non-conformity of the legislative intervention with the ECT.<sup>53</sup> The relationship between the newly introduced Hungarian price regulation and EU law, and whether EU law required Hungary to act in a specific way, was seen only as an element to be considered when determining the rationality, reasonableness, arbitrariness and transparency of the price regulation. The tribunal stated that respondent's measures consequently had to be assessed only under

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<sup>44</sup> *Electrabel*, paras 4.160–4.161.

<sup>45</sup> *Electrabel*, paras 6.70–6.71.

<sup>46</sup> *Electrabel*, para 6.72.

<sup>47</sup> Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration*, 173.

<sup>48</sup> Opinion 1/91 of the Court of 14 December 1991, ECR [1991] I-6079, paras 34–35.

<sup>49</sup> Opinion 2/13 of the Court of 18 December 2014, ECLI:EU:C:2014:2454, para 183, para 231, para 234.

<sup>50</sup> Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration*, 174–175.

<sup>51</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, Award (ICSID Case No. ARB/07/22).

<sup>52</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft.*, para 7.6.8.

<sup>53</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft.*, para 7.6.9.

the ECT as the applicable law; EC law was to be considered simply as a relevant fact.<sup>54</sup> With the benefit of hindsight, it is easy to make critical remarks on these decisions and find inconsistencies with *Achmea*. But what happened after *Achmea*?

In the post-*Achmea* era, some arbitral tribunals interpreted the *Achmea* judgment narrowly and established that it does not extend to ICSID arbitration based on an intra-EU BIT or the ECT. This may be well illustrated by a Hungary-related ICSID case, *UP and CD Holding Internationale v. Hungary*, where an ICSID arbitral tribunal found, for the first time after *Achmea*, that the *Achmea* judgment does not affect the jurisdiction of an arbitral tribunal established under an intra-EU BIT, namely the France-Hungary BIT.<sup>55</sup> The reorganisation of the meal and recreation voucher market by the Hungarian legislature led to a claim by an investor, one of the French companies forced out from the Hungarian market.<sup>56</sup> In this case, the Hungarian state made an attempt to profit from the *Achmea* ruling, arguing that, as a consequence of the *Achmea* decision, the tribunal lacked jurisdiction. The arbitral tribunal distinguished the case from *Achmea*.<sup>57</sup> It stated that the *Achmea* judgment did not refer at all to the ICSID Convention or ICSID arbitration,<sup>58</sup> and the CJEU did not say anything about the effect of the judgment on the consent to arbitration under the ICSID Convention.<sup>59</sup> It found that its jurisdiction was based on the ICSID Convention, a multilateral public international law treaty, and therefore the tribunal had to adjudicate the dispute in the context of public international law, and not under domestic or regional law.<sup>60</sup> After having excluded the impact of the *Achmea* judgment, the tribunal ruled that reorganising the Hungarian voucher market by Hungarian legislation amounted to an unlawful indirect expropriation and awarded damages to the company. The decision is not isolated. A similar approach has appeared in *Masdar Solar v Spain*<sup>61</sup> and *Vattenfall*<sup>62</sup> in the context of arbitration based on the ECT in cases where other Member States were involved as respondent.

<sup>54</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft.*, para 7.6.12.

<sup>55</sup> *UP and C.D Holding Internationale v. Hungary*, Award (ICSID Case No. ARB/13/35). See Quinn Emanuel trial lawyers, October 2018: ICSID Arbitration Victory: First Award Rejecting Achmea on Intra-EU BIT Case, <https://www.quinnemanuel.com/the-firm/our-notable-victories/victory-october-2018-icsid-arbitration-victory-first-award-rejecting-achmea-on-intra-eu-bit-case/> (Last accessed: 30 December 2021).

<sup>56</sup> It is noteworthy that in addition to *UP and C.D Holding Internationale*, the two other market players concerned initiated ICSID proceedings, too: *Sodexo Pass International SAS v. Hungary* (ICSID Case No. ARB/14/20); *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21).

<sup>57</sup> *UP and C.D Holding Internationale*, paras 252–255.

<sup>58</sup> *UP and C.D Holding Internationale*, para 258.

<sup>59</sup> *UP and C.D Holding Internationale*, para 263.

<sup>60</sup> *UP and C.D Holding Internationale*, para 253.

<sup>61</sup> *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, paras 678–683.

<sup>62</sup> *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue.

## IV. FINAL REMARKS

The *Achmea* judgment is based on the idea of mutual trust, while investment arbitration is about mutual distrust: Investors choose arbitration because they do not trust in the courts of the host state. The PPA cases and the voucher cases are revealing in terms of the divergent approaches of the CJEU and arbitral tribunals. It is illustrative that, both in the PPA cases and the voucher cases, investors first turned to the CJEU. In the PPA cases, Electrabel and AES Summit brought an action before the General Court for the annulment of the Commission state aid decision, which was dismissed.<sup>63</sup> The subsequent appeal submitted by Electrabel was equally dismissed by the Court of Justice.<sup>64</sup> In the voucher case, upon the complaint made by the excluded market actors, the Commission initiated infringement procedure against Hungary.<sup>65</sup> However, this was not enough; the investors concerned subsequently had recourse to ICSID arbitration. Such a switch from one regime to the other demonstrate how effective or ineffective investors deem the current EU investment protection regime.

To what extent investors relinquish potential investments in the EU and in Hungary following the *Achmea* judgment will be demonstrated by future practice. In any case, *Achmea* is not the sole case in which the CJEU has to rule on the relationship between investment protection law and EU law. In the pending *Micula* case, the annulment of a Commission decision, which qualified an arbitral award providing for damages to the investors as illegal state aid and which prohibited the payment of damages, has been requested from the CJEU.<sup>66</sup>

The *Achmea* judgment caused great commotion for investment protection law in the EU beyond this. In 2019, the Member States made a joint declaration on the termination of intra-EU bilateral investment treaties.<sup>67</sup> It laid down the Member States' commitment to observe their obligations stemming from the *Achmea* judgment. It not only confirmed that investor-state arbitration clauses in intra-EU BITs are incompatible with EU law, but also expressed the Member States' intention to terminate all intra-EU BITs by international agreement in the future. The content of the declaration clearly goes beyond what the CJEU seemed to require in *Achmea*. The plan for the future termination of the BITs concluded between the EU Member States also indicates that the substantive standards of investment protection contained therein are being

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<sup>63</sup> Case T-179/09 *Dunamenti Erőmű Zrt v European Commission*, ECLI:EU:T:2014:236; T-468/08 *Tisza Erőmű Kft. v European Commission*, ECLI:EU:T:2014:235.

<sup>64</sup> Case C-357/14P *Electrabel SA and Dunamenti Erőmű Zrt v European Commission*, ECLI:EU:C:2015:642.

<sup>65</sup> Case C-179/14 *European Commission v Hungary*, ECLI:EU:C:2016:108.

<sup>66</sup> Case T-694/15 *Micula v Commission*, Action brought on 30 November 2015.

<sup>67</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.

set aside and will be replaced by the EU fundamental freedoms. It is also interesting to note that Hungary made an individual declaration in which it shares the idea of terminating intra-EU BITs but, at the same time, it does not deem the *Achmea* ruling to be applicable to the investor-state arbitration based on the ECT.<sup>68</sup> This position has a clear practical relevance in light of Hungary's exposure to ECT arbitration.

In this way, the *Achmea* judgment can lead to the deconstruction of the existing system of intra-EU BITs, replacing it with an autonomous intra-EU investment protection regime based on the fundamental freedoms. Undoubtedly, this judge-triggered (r)evolution will not leave Hungary's stance towards investment protection unaffected.

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<sup>68</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.