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# THE FUTURE OF EU INVESTMENT LAW

*by* Sushant Mahajan

## I. INTRODUCTION

The era of modern Bilateral Investment Treaties (BITs) originated in Europe, when Germany and Pakistan adopted a bilateral agreement for protection of foreign investments of their nationals.[1] Soon after Germany, other European States followed suit: Switzerland concluded its first BIT in 1961,[2] and France soon thereafter in 1972.[3] Since then, EU Member States have been the most prolific negotiators of such treaties.[4] The most significant facet of these modern BITs was the provision for investor-state dispute settlement (ISDS) whereby a foreign investor could directly submit a dispute concerning a violation of the BIT by a host state to international arbitration.[5] This process of dispute resolution found favor with investors and sovereigns alike. Foreign investors who were keen on preventing the host state from enjoying a "home court advantage" found a neutral forum whereas foreign sovereigns relished the fact that they would no longer be required to involve themselves in claims by their nationals against another state.[6]

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[1] *See* RUDOLF DOLZER, URSULA KRIEBAUM & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9 (3d ed. 2022).

[2] Traité entre la Confédération Suisse et la République Tunisienne relatif à la protection et à l'encouragement des investissements de capitaux [Treaty Between the Swiss Confederation and the Republic of Tunisia on the Protection and Encouragement of Capital Investments], Switz.-Tunis., Dec. 2, 1961, UN Conference on Trade and Development, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2982/download.

[3] Convention between the Government of the French Republic and the Government of the Republic of Tunisia on the protection of investments , Fr.-Tunis., June 30,1972, 848 U.N.T.S. 141.

[4] *See* Carrie E. Anderer, *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 BROOK. J. INT'L L. 851, 853 (2010).

[5] *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 144 (2006); *see also* STANIMIR ALEXANDROV, MARINN CARLSON & JOSHUA ROBBINS, *The Future of Investment Treaty Protection in Eastern Europe*, *in* THE EUROPEAN & MIDDLE EASTERN ARBITRATION REVIEW 2009, at 2 (2009), https://www.sidley.com/-/media/files/publications/2008/12/the-future-of-investment-treaty-protection-in-ea__/files/view-article/fileattachment/gareurope--middle east. pdf?la=en.

[6] *See* George M. von Mehren, Claudia T. Salomon & Aspasia A. Paroutsas, *Navigating Through Investor-*

The Court of Justice for the European Union (CJEU), however, shook the ground of the investment law framework in the EU with its landmark decision in *Slovak Republic v. Achmea* in March 2018.[7] The CJEU ruled that the ISDS provisions contained in the BIT between the Netherlands and Slovakia were incompatible with EU law. While the international arbitration community was still grappling with the implications of *Achmea*, the CJEU in its decision in *Moldova v. Komstroy* held that the ISDS provisions in the Energy Charter Treaty (ECT) were not applicable to intra-EU disputes (disputes between EU Member States and investors from other EU Member States).[8] Finally, the CJEU in *Poland v. PL Holdings* barred Member States also from entering into intra-EU ISDS agreements on an *ad hoc* basis.[9] These three decisions effectively preclude intra-EU ISDS and have further cast aspersions on the legality of ISDS provisions contained in BITs between EU Member States and other (non-EU) States.

This drastic change in the law by the CJEU formed the basis of the discussion in the ITA-IBA EU Investment Law Virtual Conference on "The Future of Investment Law in the EU after *Komstroy* and *PL Holdings*," held on December 1, 2021. Building on the discussion in the Conference, the objective of this article is to brief the current framework of investment protection in the EU and, thereafter, to take a peek at the future of investment protection in EU, especially in the context of ISDS.

## II. FRAMEWORK OF INVESTMENT PROTECTION IN THE EU

The Treaty Establishing the European Community ("EC Treaty"), the Treaty on the European Union ("EU Treaty") and the Treaty on the Functioning of the European Union (TFEU) comprise the major governing instruments of the EU. These treaties attribute certain areas to power of the EU, beyond which the EU cannot act. While the EC Treaty contained investment-related provisions, it did not confer exclusive

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*State Arbitrations—An Overview of Bilateral Investment Treaty Claims*, 59 DISP. RESOL. J. 69, 70 (2004); *see also* Wong, *supra* note 5, at 142.

[7] Case No. C-284/16, Slovak Republic v. Achmea B.V., ECLI:EU:C:2018:158 (Mar. 6, 2018).

[8] Case No. C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:655 (Sept. 2, 2021).

[9] Case No. C-109/20, Republic of Poland v. PL Holdings Sàrl, ECLI:EU:C:2021:875 (Oct. 26, 2021).

competence over foreign investment upon the EU nor did it confer upon the EU the power to conclude international investment agreements with non-EU countries, leaving these areas within the competence of the various EU Member States.[10] Member States largely implemented this power through the negotiation and conclusion of BITs.[11] This position changed when on December 1, 2009, the Treaty on Lisbon amending the Treaty on European Union and the Treaty establishing the European Community ("Lisbon Treaty") entered into effect. The Lisbon Treaty extended the competence of the EU to the field of "foreign direct investment."[12] The Lisbon Treaty reflected a new governance arrangement and a new legal order which was not contemplated in the pre-Lisbon investment system.[13] As a result, the EU now had the power to conclude investment treaties on behalf of its Member States, bringing into question the validity of the numerous BITs that Member States had entered into with other States, both Member and non-Member.

A. *Slovak Republic v. Achmea* B.V.

The biggest change in the EU policy concerning ISDS came about through the decision of the CJEU in the *Achmea* case. The CJEU ruled that that the ISDS provisions contained in the BIT between the Netherlands and Slovakia were incompatible with EU law. The reasoning of the CJEU was premised on two specific principles: (i) the autonomy of the EU legal order, and (ii) the principle of mutual trust between EU Member States.[14] In regard to the first principle, the court noted that an arbitral tribunal which is required to interpret or apply EU law would not be subject to the

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[10] Carrie, *supra* note 4, at 864.

[11] *See* Jan Ceyssens, *Towards a Common Investment Policy? – Foreign Investment in the European Constitution*, 32 LEGAL ISSUES OF ECON. INTEGRATION 259, 268 (2005).

[12] *See* Stephen Woolcock, *The Potential Impact of the Lisbon Treaty on European Union External Trade Policy*, EUR. POL'Y ANALYSIS, June 2008, at 3, https://www.sieps.se/en/publications/2008/the-potential-impact-of-the-lisbon-treaty-on-european-union-external-trade-policy20088epa/Sieps-2008_8epa.pdf?.

[13] *See* L. Yves Fortier, *Investment Protection and the Rule of Law: Change or Decline?*, Address at the British Institute of International and Comparative Law 50th Anniversary Event Series, at 23 (Mar. 17, 2009), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media01239278546014007 32_001.pdf.

[14] *See* Pierre Collet, *The Current European Union Investor State Dispute Resolution Reform: A Desirable Outcome for Investment Arbitration?*, 53 N.Y.U. J. INT'L L. & POL. 689, 694 (2021).

control of the CJEU as it would not be a "court of a Member State" within the meaning of Article 267 of the TFEU and thus not having access to the preliminary ruling procedure, which would violate the autonomy of the EU legal order.[15] As regards the second principle the court determined that the EU Member States enjoy an equal legal level of protection which cannot be selectively altered through a BIT.

The CJEU also considered whether the award made by the Tribunal would be subject to review by a court of the Member State, especially considering that the Netherlands-Slovakia BIT contemplated an *ad hoc* arbitral tribunal under the UNCITRAL Arbitration Rules. The court held that there was a sufficiently narrow scope of judicial review which was not sufficient to ensure compliance with EU law.[16] This conclusion appears to be hurried and contrary to the jurisprudence previously espoused by the CJEU itself in *Eco Swiss v. Benetton*.[17] The European Court of Justice (as the CJEU was known then) in *Eco Swiss* had ruled that arbitration in matters governed by EU law was permissible. The CJEU specifically noted that judicial review of an arbitral award by national courts of Member States was sufficient for the purpose of ensuring compliance with EU law.[18] Paradoxically, although the CJEU's judgment in *Achmea* is premised on the need for ensuring consistency in interpretation of EU law, the CJEU seems to have failed to abide by its own pronouncement in *Eco Swiss*.

B. *Republic of Moldova v. Komstroy LLC*

One could confidently argue that the impact and fallout of *Achmea* remained limited to intra-EU BIT situations. However, in *Komstroy* it was confirmed that the fallout of *Achmea* also applies to Energy Charter Treaty (ECT) disputes having a connection in the EU.[19] *Komstroy* concerned a dispute between the Republic of

[15] Case No. C-284/16, Slovak Republic v. Achmea B.V., ECLI:EU:C:2018:158, ¶¶ 42-50, 59 (Mar. 6, 2018); *see also* Collet, *supra* note 14, at 695 (citing Emmanuel Gaillard, *L'Affaire Achmea ou les Conflicts de Logiques*, 3 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 616, 625 (2018)).

[16] *Achmea*, ¶¶ 50-55.

[17] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-3055.

[18] *See id.* ¶ 48.

[19] *See* Nikos Lavranos, *Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence*

Moldova and a Ukrainian investor under the ECT. It is interesting to note that neither was the respondent state an EU Member State nor was the investor from an EU Member State. The CJEU nonetheless assumed jurisdiction on the ground that the ECT is an integral part of EU law and thus the CJEU can interpret ECT under its power to issue preliminary rulings.[20] The CJEU also ruled that the seat of arbitration being within a Member State, implied application of EU law as *lex fori*.[21] The CJEU then found that the ISDS provisions in the ECT ought to be interpreted as not being applicable to disputes between a Member State and an investor of another Member State.[22]

The CJEU's ruling stands as a strong reaffirmation of its strict position regarding intra-EU ISDS. Although the CJEU upheld its jurisdiction, the case at hand was arguably not best suited to rule on the validity of intra-EU arbitrations based on the ECT, as: (i) the dispute was not intra-EU and EU law was not directly applicable, (ii) no EU public policy concerns were raised, and (iii) this was not even the question referred to the CJEU for decision.[23] Nonetheless, the CJEU clarified the application of *Achmea* vis-à-vis the ECT rendering moot all prior academic discussions regarding the same.[24]

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*to Permanent Conflict*, KLUWER ARBITRATION BLOG (Jan. 13, 2022), https://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-eu-law-from-peaceful-co-existence-to-permanent-conflict/.

[20] Case No. C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:655, ¶ 27 (Sept. 2, 2021).

[21] *Id.* ¶¶ 33-34.

[22] *Id.* ¶ 66.

[23] *See* Peter Rosher et al., *Moldova v. Komstroy (Case C-741/19): Key lessons and takeaways*, REED SMITH: IN-DEPTH (Sept. 16, 2021), https://www.reedsmith.com/en/perspectives/2021/09/moldova-v-komstroy-key-lessons-and-takeaways.

[24] *See, e.g.*, Kim Talus & Katariina Särkänne, *Achmea, the ECT and the Impact on Energy Investments in the EU*, *in* THE FUTURE OF INVESTMENT TREATY ARBITRATION IN THE EU: INTRA-EU BITS, THE ENERGY CHARTER TREATY, AND THE MULTILATERAL INVESTMENT COURT 9 (Ana Stanič & Crina Baltag eds., 2020); Crina Baltag & Stefan Dudas, *Achmea, Arbitral Tribunals and the ECT: Modernisation or Regression? in* THE FUTURE OF INVESTMENT TREATY ARBITRATION IN THE EU: INTRA-EU BITS, THE ENERGY CHARTER TREATY, AND THE MULTILATERAL INVESTMENT COURT 23 (Ana Stanič & Crina Baltag eds., 2020).

C. *Republic of Poland v. PL Holdings Sàrl*

After *Achmea* and *Komstroy*, the CJEU in *PL Holdings* came to round out the trilogy by barring Member States from entering into intra-EU ISDS agreements that are identical to BIT arbitration clauses on an *ad hoc* basis.[25] The CJEU held that allowing a Member State to enter into such an *ad hoc* arbitration with an EU-based investor with "the same content as that clause [in a BIT]" would result in "a circumvention of the obligations arising for that Member State under the Treaties [of the European Union]."[26] The CJEU further held that national legislation permitting a Member State to enter into an *ad hoc* arbitration agreement, which would make it possible to continue arbitration on the basis of an agreement which is contrary to EU law, would also be contrary to EU law.[27]

D. *Micula v. Romania*

In its last blow to ISDS in the EU, the CJEU in *Micula* overturned a decision of the General Court quashing a Commission State aid ruling from 2015.[28] The Commission had held that payment of compensation to claimants as per their ICSID award was unlawful State aid and ordered them to recover amounts paid to Micula,[29] which decision was subsequently quashed by the General Court of the EU.[30] While reversing the decision of the General Court, the CJEU also held (inter alia) that any consent that may have been given by a Member State to arbitration pre-accession lacks any force, to the effect that the system of judicial remedies provided for by the EU and the TFEU replace the arbitration procedures upon accession to the EU.[31]

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[25] *See* Amina Ben Ayed, *Poland v PL Holdings: Another Twist in the Intra-EU Investor-state Arbitration*, SQUIRE PATTON BOGGS: LA REVUE (Dec. 14, 2021) https://larevue.squirepattonboggs.com/poland-v-pl-holdings-another-twist-in-the-intra-eu-investor-state-arbitration.html.

[26] Case No. C-109/20, Republic of Poland v. PL Holdings Sàrl, ECLI:EU:C:2021:875, ¶ 47 (Oct. 26, 2021).

[27] *Id.* ¶ 56.

[28] Case No. C-638/19 P, Comm'n v. Eur. Food SA et al., ECLI:EU:C:2022:50 (Jan. 25, 2022).

[29] Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013, 2015 O.J. (L 232) 43.

[30] Cases No. T-624/15, T-694/15 & T-704/15, Eur. Food SA, et al. v. Comm'n, ECLI:EU:T:2019:423 (June 18, 2019).

[31] Cyrus Benson et al., *The latest chapter of The Intra-EU Investment Arbitration Saga: What it entails for the protection of Intra-EU investments and enforcement of Intra-EU Arbitral Awards*, GIBSON DUNN (Feb.

E. *Effect of CJEU Rulings*

*Achmea* prompted EU Member States to sign the Agreement for Termination of all intra-EU Bilateral Investment Treaties ("Termination Agreement").[32] The Termination Agreement seeks to terminate some 130 intra-EU BITs along with their sunset clauses and declares that they cannot serve as legal bases for arbitral proceedings. The Termination Agreement also provides for the treatment of past, pending, and future arbitral proceedings under the various BITs. The European Commission in December 2021 initiated infringement proceedings against seven EU Member States, in addition to those previously initiated in 2020 against Finland and the UK, for failure to remove intra-EU BITs from their respective legal orders.[33] Through the judgments summarized above and actions of the European Commission, the EU (or at least the European Commission and the CJEU) has made it clear that ISDS in its current form is incompatible with EU law. The questions which now arise are what consequences this policy will have and what is in store for the future.

## III. THE FUTURE OF ISDS IN EU INVESTMENT LAW

Since *Komstroy*, several tribunals have been called upon to revisit their past decisions upholding jurisdiction and, although some accepted to undertake the analysis as a matter of principle, none of the tribunals acceded to the request.[34]

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4, 2022), https://www.gibsondunn.com/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards/.

[32] *See generally* Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, May 29, 2020, 2020 O.J. (L 169) 1.

[33] *See* Alessandra Scotto Di Santolo, *EU in battle with its own states as it threatens countries with court over bilateral deals*, EXPRESS (Dec. 4, 2021), https://www.express.co.uk/news/politics/1531240/eu-news-eu-commission-bilateral-investment-treaties-bits-ecj-infringement-proceedings.

[34] *See* Erica Stein & Quentin Muron, *Komstroy, PL Holdings, Micula: closing the door to intra-EU investment arbitration – again*? 2022 B-ARBITRA – BELGIAN REVIEW OF ARBITRATION 7, 37 (2022) (citing Infracapital F1 S.à.r.l. & Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, ¶ 117 (Feb. 1, 2022); Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd & Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, Decision on the Italian Republic's Request for Reconsideration (Dec. 20, 2021) (dismissing in an as yet unpublished decision Italy's request for reconsideration of the tribunal's decision on the intra-EU jurisdiction objection); Landesbank Baden-Wurttemberg, HSH Nordbank AG, Landesbank Hessen-Thuringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the Respondent's Application for Reconsideration of the Tribunal's Decision of 25 February 2019 Regarding the "Intra-EU"

Others, taking up the objection for the first time, similarly rejected the intra-EU jurisdictional objection.[35] *Ad hoc* committees, sitting in intra-EU ECT cases, have also declined to annul ICSID awards in the aftermath of the *Komstroy* judgment.[36] On the other hand, courts across EU are either annulling or refusing to enforce intra-EU awards. This peculiar situation is likely to continue to exist until the CJEU or European Commission take specific measures to bridge the gap between its policy, on the one hand, and principles of customary international law (especially the Vienna Convention on the Law of Treaties) on the other.

However, the CJEU's judgments have necessitated the evolution of a dispute resolution system to fill the void created by the CJEU. As a consequence, the EU has taken upon itself the burden to expedite the process of reform of ISDS and the establishment of a purportedly better system for resolution of investment disputes. In parallel, the EU has embarked on the propagation of a new policy for foreign investment which is premised on respect for Sustainable Development Goals (SDGs).

A. *Multilateral Investment Court*

The idea for a Multilateral Investment Court (MIC) was mentioned in the Transatlantic Trade and Investment Partnership (TTIP) Concept Paper and the Trade for all Communication.[37] Following an influx of criticism against the traditional ISDS mechanisms, the European Commission launched an ambitious global ISDS reform

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Jurisdictional Objection, ¶ 59 (Nov. 11, 2021); Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, ¶ 99 (Jan. 10, 2022); Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss et al. v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, ¶ 48 (Dec. 6, 2021)).

[35] *See* Stein & Muron, *supra* note 34, at 37 (citing Sevilla Beheer B.V. et al. v. Kingdom of Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, ¶ 678 (Feb. 11, 2022)).

[36] *See* Stein & Muron, *supra* note 34, at 37 (citing SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Decision on Annulment (Mar. 16, 2022); NextEra Energy Global Holdings B.V. & NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, Decision on Annulment (Mar. 18, 2022)); *see also* Catherine Amirfar et al., *The Future of Investment Law in the EU: A Practical Perspective*, DEBEVOISE & PLIMPTON: DEBEVOISE UPDATE (Dec. 8, 2021), https://www.debevoise.com/insights/publications/2021/12/the-future-of-investment-law-in-the-eu.

[37] *See* Arman Melikyan, The Legacy of Opinion 1/17: To What Extent Is the Autonomous EU Legal Order Open to New Generation ISDS?, 6 EUROPEAN PAPERS 645, 650 (2021); Commission, *Trade for All: Towards a more responsible trade and investment policy*, at 21-22, COM (2015) 497 final (Oct. 14, 2015).

agenda in 2018, promising to address all concerns of the existing ISDS system with the MIC.[38] Primary among those concerns were (i) the lack of consistency in case-law and, (ii) lack of legitimacy and transparency.[39] The European Commission commenced work on an impact assessment on the MIC in 2016. In September 2017, it made the impact assessment public and issued a Recommendation to the European Council to open negotiations on the establishment of the MIC.[40] The authorization and negotiating directives were adopted by the Council and the EU Member States in March 2018.[41] The negotiating directives contemplate a court-like structure with an appellate mechanism, staffed by full-time and highly qualified adjudicators.[42] The goal is to address the concerns of the present system in relation to legitimacy and ethics of adjudicators.

As a stepping stone to the Multilateral Investment Court the EU has included Investment Court System (ICS) clauses in negotiations on a number of free trade agreements,[43] including the Comprehensive Economic and Trade Agreement with Canada (CETA) (provisionally in force),[44] the Investment Protection Agreement with Vietnam (signed but not yet in force),[45] the EU-Mexico Free Trade Agreement

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[38] *See* Melikyan, *supra* note 37, at 646.

[39] *EESC backs criticism of investor-State dispute settlement (ISDS), and calls for a more holistic approach*, EUR. ECON. & SOC. COMM. (Nov. 7, 2022), https://www.eesc.europa.eu/en/news-media/news/eesc-backs-criticism-investor-state-dispute-settlement-isds-and-calls-more-holistic-approach#:~:text=The%20most%20frequently%20identified%20problems,to%20legal%20uncertainty%20and%20potential.

[40] *See* Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM (2017) 493 final (Sept. 13, 2017); Multilateral reform of investment dispute resolution, SWD (2017) 302 final (Sept. 13, 2017).

[41] *See Council Decision authorizing the European Commission to negotiate, on behalf of the European Union, a convention establishing a multilateral court for the settlement of investment disputes to the extent this falls within the Union's competence*, at 3 (Mar. 2, 2018), https://data.consilium.europa.eu/doc/document/ST-12981-2017-INIT/en/pdf.

[42] *See Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, at 4-5 (Mar. 1, 2018), https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

[43] *See* Melikyan, *supra* note 37, at 646.

[44] *See* Comprehensive and Economic Trade Agreement (CETA), Can.-EU, arts. 8.27-8.28, Jan. 14, 2017, 2017 O.J. (L 11) 23, 66-69.

[45] *See Proposal for a COUNCIL DECISION on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam,*

(agreement in principle),[46] and the EU-Singapore Investment Protection Agreement (signed but not yet in force).[47] These agreements contemplate a first-instance tribunal and an appellate tribunal. In *Opinion 1/17*, the CJEU opined that the dispute resolution provisions contained in CETA are compliant with EU law.[48] The CJEU in its opinion made the following observations:

i. Jurisdiction of tribunals under CETA is limited to interpretation of CETA in light of principles of international law. Therefore, the question of interpretation of EU law does not arise and there is no requirement for availing the preliminary procedure in terms of Article 267 of TFEU.[49]
ii. There is no impact on the power of the institutions of the EU from operating in accordance with EU framework since CETA tribunals do not have the jurisdiction to declare incompatible with CETA, any level of protection of a public interest established under EU law.[50]
iii. CETA tribunals can consider questions of domestic law only as a matter of fact. This cannot be considered as an opportunity to interpret EU law.[51]
iv. CETA tribunals ensure fair and equitable trial and effective protection of the legitimate interest of the investors through an independent forum, thus dissipating any possible concerns under the Charter of Fundamental Rights of the EU.[52]

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*of the other part*, Annex 1, arts. 3.38-3.39, at 72-81, COM (2018) 693 final (Oct. 17, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5932_2019_INIT&qid=1677074713378&from=EN.

[46] *See* European Commission, *Investment dispute resolution*, EU-MEXICO AGREEMENT: THE AGREEMENT IN PRINCIPLE, arts. 11-12, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en.

[47] *See Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part*, Annex 1, arts. 3.9-3.10, at 41-47, COM (2018) 194 final (Apr. 18, 2018).

[48] Opinion 1/17, ECLI:EU:C:2019:341 (Apr. 30, 2019).

[49] *Id.* ¶ 122.

[50] *Id.* ¶ 130.

[51] *Id.* ¶ 131.

[52] *Id.* ¶¶ 199-200.

The Opinion has surreptitiously given a green light to the ISDS reforms undertaken by the EU and to the establishment of a multilateral dispute resolution system.53 The efforts by the EU has coincided with the work on ISDS reform undertaken by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The Working Group looks to identify the areas of reform in ISDS and evaluate whether a MIC would be an ideal solution to the problems identified. The Working Group is intent on discussing the structure and function of such a MIC. In this light, *Achmea* could be categorized as a catalyst which lit fire to the movement of reform in ISDS.

B. *Sustainable Investment*

On June 23, 2022, the European Parliament adopted the Resolution on the future of EU international investment policy.[54] The key highlights of the Resolution include the following recognitions:

i. Investments should have positive impact on sustainable economic growth, job creation and sustainable development, and contribute to SDGs.[55]

ii. Investment arbitrations act as barriers for implementation of measures necessary for preservation of the environment and combat climate change.[56]

iii. Inclusion of ICS in new investment agreements would support the deliberations for a multilateral reform of ISDS system towards establishment of a MIC.[57]

The principles stressed by the European Parliament make it clear that EU Member States are intent upon acting towards fulfilment of SDGs and consider that purging investment protection through ISDS may be essential to fulfilling their goals. This

[53] *See* Melikyan, *supra* note 37, at 658.

[54] Resolution of 23 June 2022 on the future of EU international investment policy, EUR. PARL. DOC. P9_TA(2022)0268 (2022).

[55] *Id.* ¶ 1.

[56] *Id.* ¶¶ 28, 36.

[57] *Id.* ¶¶ 26, 45.

policy statement further reiterates the commitment of the European Union to the idea of a MIC and could be a final nail in the coffin for the traditional ISDS system in the EU.

## IV. CONCLUSION

Though the jurisprudence espoused by the CJEU left more questions unanswered than it embarked on answering, the CJEU has helped cement the policy of the EU. On the strength of the CJEU's judgments, the EU has come to champion the cause of expeditious reform of international investment law and the ISDS system. This is evident from its newly adopted trade agreements as well as a sustained call for the establishment of a MIC. International investment law in the EU will thus be characterized by rapid change, and investors must be conscientious of this when investing in the EU and/or conducting arbitrations seated in EU jurisdictions for the foreseeable future.[58]

**SUSHANT MAHAJAN** is a qualified lawyer from India with a practice focused on commercial dispute resolution. He has represented multinational corporations and governments in a wide spectrum of matters before numerous international and domestic courts as well as tribunals. He holds a Bachelor's of Law (LLB) from ILS Law College in India, and is a candidate of the LLM concentration in International Arbitration, Mediation, and Other Forms of Dispute Resolution' at George Washington University Law School.

[58] *See* Amirfar et al., *supra* note 36.

**INSTITUTE FOR TRANSNATIONAL ARBITRATION**
**OF**
**THE CENTER FOR AMERICAN AND INTERNATIONAL LAW**

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5201 Democracy Drive
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