

SHORTER ARTICLE

Intra-EU Investment Contract Arbitration after *Achmea*

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Abstract

The Court of Justice of the European Union (the Court) has famously sought to eliminate intra-European Union (EU) investment arbitration under bilateral investment treaties and the multilateral Energy Charter Treaty. In doing so, the Court has navigated settled case law concerning commercial arbitration. In this regard, *Achmea* and subsequent rulings are premised upon a distinction drawn by the Court between investment and contract-based arbitration, based on the origin of arbitral proceedings and the intensity of the review of the relevant award. This article demonstrates that this distinction disregards important commonalities and the diversity of enforcement regimes. It is further argued that, even in the light of *Achmea*, EU law rightly permits intra-EU arbitration under investment contracts, that is, contracts between States and foreign investors. The article thus examines investment contract-based arbitration as the only surviving form of intra-EU investment arbitration and cautions against expansive applications of the *Achmea* reasoning to contractual agreements, signs of which are already emerging.

Keywords: European Union law; private international law; international investment law; international arbitration; international commercial arbitration; investment treaty arbitration; contract-based arbitration; investment contracts; *Achmea*

1. Introduction

In a series of high-profile and controversial rulings, the Court of Justice of the European Union (CJEU or Court) has sought to foreclose intra-European Union (EU) investment arbitration,¹ finding that arbitration under investment treaties, between a foreign investor from one EU Member State and another Member State, is incompatible with EU law. In particular, according to the Court, constitutional principles under EU law, relating to the autonomy of the EU legal order and

¹ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158 (*Achmea*); Case C-741/19 *Republic of Moldova v Komstroy LLC* EU:C:2021:655 (*Komstroy*); Case C-109/20 *Poland v PL Holdings Sàrl* EU:C:2021:875 (*PL Holdings*); Case C-638/19 P *Commission v European Food SA* EU:C:2022:50 (*European Food*).

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mutual trust, preclude the intra-EU application of arbitration clauses under investment treaties.²

To comply with the rulings, most EU Member States, supported by the European Commission (Commission), have concluded an agreement terminating intra-EU bilateral investment treaties (BITs),³ and are pursuing the intra-EU disapplication of the arbitration clause under the Energy Charter Treaty (ECT).⁴ Crucially, when considering the compatibility of intra-EU investment arbitration with EU law, the CJEU has relied on settled case law regarding international commercial arbitration,⁵ which is provided for under private contracts rather than treaties.⁶ Indeed, the Court premised its reasoning on a strict distinction between investment and commercial arbitration, and the latter appears to be unscathed from the EU's initiatives post-*Slovak Republic v Achmea* (*Achmea*).

This article critically analyses the distinction made by the Court between international investment and commercial arbitration under EU law, with a view to examining the extent to which EU investors still have recourse to contract-based arbitration (that is, arbitration under an investor–State contract) as a means of investment protection and dispute settlement against an EU Member State. First, the article considers the long-standing approach of the CJEU *vis-à-vis* commercial and, more broadly, contract-based arbitration. Second, it sets out the CJEU's rationale for differentiating commercial from investment arbitration and assesses its persuasiveness. The analysis is based on two criteria: the different origins of arbitral

² Indicatively, see C Contartese and M Andenas, 'EU Autonomy and Investor–State Dispute Settlement under *inter se* Agreements between EU Member States: *Achmea*' (2019) 56 CMLRev 157; S Centeno Huerta and N Kuplewatzky, 'On *Achmea*, the Autonomy of Union Law, Mutual Trust and What Lies Ahead' (2019) 4 EurPapers 61; A Dashwood, '*Republic of Moldova v Komstroy LLC*: Arbitration under Article 26 ECT Outlawed in Intra-EU Disputes by *Obiter Dictum*' (2022) 47 ELR 127.

³ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1 (Termination Agreement).

⁴ Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100 (ECT). See European Commission (Commission), 'Declaration on the legal consequences of the judgment of the Court of Justice in *Komstroy* and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings' [2024] OJ L (*Komstroy* Declaration); cf Government of Hungary, 'Declaration of the Representative of the Government of Hungary of 26 June 2024 on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and of the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings' <<https://cdn.kormany.hu/uploads/sheets//2/22/228/228f2c9ba861fae2b70f183ee4b5ddc.pdf>>. The *Komstroy* Declaration accompanied a formalised agreement between the EU and Member States to the same effect, which is now 'subject to internal procedures leading to its signature and entry into force': Commission, 'EU Notifies Exit from Energy Charter Treaty and Puts an End to Intra-EU Arbitration Proceedings' (Press Release 28 June 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513>.

⁵ In the judgments cited in n 1, the Court seems to consider the term 'commercial arbitration' broadly, as it referred to case law concerning arbitral proceedings under both commercial and consumer contracts: see especially Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* EU:C:1999:269 (*Eco Swiss*); Case C-168/05 *Elisa Maria Mostaza Claro v Centro Móvil Milenium SL* EU:C:2006:675 (*Mostaza Claro*).

⁶ *Achmea* (n 1), *Komstroy* (n 1) and *European Food* (n 1) concerned investment arbitration under international treaties. The circumstances under which *Achmea* is relevant to investment arbitration under ad hoc agreements, rather than treaties, will be considered in Section 4, in light of *PL Holdings* (n 1).

proceedings, and the intensity of the review of the relevant arbitral award. The former, distinguishing between the contractual and treaty origins of the respective proceedings, is largely convincing, though not entirely nuanced. However, the latter incorrectly suggests that investment awards are inherently subject to a lesser form of judicial review. Finally, even when differentiating according to these criteria, it is argued that arbitration under investment contracts can still serve as a mechanism for settling intra-EU investor–State disputes. This would accord with CJEU case law and uphold the Court’s approach of distinguishing between commercial and investment arbitration. In this respect, the present article does not develop an argument *de lege ferenda*; rather, it calls for a careful interpretation of the case law, and judicial restraint.

2. International commercial and contract-based arbitration in CJEU case law

There is ample CJEU case law relating to commercial and, more broadly, contract-based arbitration. As permitted under Article 267 of the Treaty on the Functioning of the European Union (TFEU),⁷ courts of EU Member States have referred various questions of EU law to the CJEU, primarily arising from litigation concerning parallel proceedings and post-award litigation. The Court’s approach towards commercial arbitration seems consistent, at least with respect to its compatibility with EU law, but areas of contention do exist. Open questions remain concerning the reach of EU law in arbitration-related proceedings before national courts: notably, the CJEU’s stance on this may well be seen as contingent upon the principle of effectiveness. The principle seeks to preserve the effective enforcement of EU law in national courts. For instance, by adopting a rationale of effectiveness, Advocate General Wathelet opined in *Genentech Inc v Hoechst GmbH and Sanofi-Aventis Deutschland GmbH* that a national court should be able to annul an award which violates ‘fundamental’ EU rules (*in casu*, Article 101 of the TFEU) even where the relevant national law governing annulment proceedings only permits review on the basis of flagrant violations of certain public policy rules.⁸ Nevertheless, while the Court has not been unconcerned about commercial arbitration, it has not shown an interest in challenging it ontologically, as it has done with intra-EU investment arbitration under international treaties.

For instance, the Court has considered international commercial arbitration in the context of litigation concerning parallel proceedings and anti-suit injunctions. In *Gasser GmbH v MISAT Srl*, the CJEU found that, in principle, it is for each national court seised to determine whether it has jurisdiction to resolve a dispute, in line with the relevant EU rules, which at the time were set out in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention).⁹ The Court further found that

⁷ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

⁸ Case C-567/14 *Genentech Inc v Hoechst GmbH and Sanofi-Aventis Deutschland GmbH* EU:C:2016:177, Opinion of AG Wathelet, para 67 in conjunction with paras 58, 70. For a comprehensive discussion of such concerns, see M Penades Fons, ‘The Effectiveness of EU Law and Private Arbitration’ (2020) 57 CMLRev 1069.

⁹ Case C-116/02 *Erich Gasser GmbH v MISAT Srl* EU:C:2003:657, paras 48–49, referring to Case C-351/89 *Overseas Union Insurance Ltd and Deutsche Ruck UK Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company* EU:C:1991:279, para 23.

injunctions issued by a court of one Member State are not compatible with EU law insofar as they prevent parties from commencing or continuing legal proceedings before a court of another Member State.¹⁰

This ruling has been extended to anti-suit injunctions sought pursuant to an arbitration agreement, despite arbitration being excluded from the Brussels Convention.¹¹ In *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* (*West Tankers*), the CJEU was famously asked whether a court of one Member State may issue an injunction precluding the commencement or continuation of judicial proceedings in another Member State insofar as the latter proceedings would breach an arbitration agreement.¹² The CJEU found that an anti-suit injunction would, in these circumstances, be incompatible with the Brussels I Regulation, which effectively replaced the Brussels Convention.¹³ The Court argued, *inter alia*, that an anti-suit injunction ‘necessarily amounts to stripping [a court of another Member State] of the power to rule on its own jurisdiction under [the] Regulation’.¹⁴ Moreover, it would be incompatible with the principle of mutual trust: it would ‘run counter to the trust which the Member States accord to one another’s legal systems and judicial institutions’.¹⁵ Lastly, the Court found that an anti-suit injunction could preclude an applicant from initiating proceedings under the Brussels I Regulation, as the national court would be ‘prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement’.¹⁶ This would ‘deprive’ the applicant of ‘a form of judicial protection’ to which they would be ‘entitled’ under EU law.¹⁷ While *West Tankers* illustrated that arbitration proceedings can generate some tension with national courts’ jurisdiction, the principle of mutual trust and the principle of effective judicial protection, the Court refrained from making any generalised remarks about (commercial) arbitration *per se*.

The CJEU has also considered issues relating to commercial arbitration raised in post-award judicial proceedings. Post-award proceedings include annulment proceedings, whereby a party to the arbitration requests the annulment of an award pursuant to grounds set out in the national law of the seat of arbitration, and recognition and enforcement proceedings, whereby a party requests a national court to acknowledge the binding force of the award rendered and to enable its execution. In *Nordsee*, the Court found that arbitral tribunals are not considered to

¹⁰ Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* EU:C:2004:228.

¹¹ With regard to said exclusion in particular, see Case C-190/89 *Marc Rich & Co AG v Società Italiana Impianti PA* EU:C:1991:319.

¹² Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* EU:C:2009:69 (*West Tankers*).

¹³ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I Regulation). This has since been replaced by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels I Regulation Recast).

¹⁴ *West Tankers* (n 12) para 28.

¹⁵ *ibid.*, para 30.

¹⁶ *ibid.*, para 31.

¹⁷ *ibid.*

be a 'court or tribunal of a Member State' within the meaning of Article 267 of the TFEU, even though 'arbitration is provided for within the framework of the law' and awards issued have 'as between the parties, the force of *res judicata*'.¹⁸ Nevertheless, it held that questions of EU law arising from arbitral proceedings may be referred to the CJEU by national courts in the course of the 'review of an arbitration award', and such a review 'may be more or less extensive depending on the circumstances'.¹⁹

The relevance of EU law within such a review will depend on, inter alia, the rules of EU law which are deemed to be affected by the arbitration. In *Eco Swiss*, the CJEU found that a national court hearing an application of annulment is required to annul an award which violates Article 101 of the TFEU (as it is now) where national law provides for annulment based on violations of public policy rules.²⁰ The same would also be the case for recognition and enforcement proceedings.²¹ This is owing to the 'fundamental' status of Article 101 of the TFEU within the single market edifice, as it contains rules prohibiting anticompetitive agreements and concerted practices.²² Furthermore, in *Asturcom*, which concerned arbitration under a consumer contract, a Spanish court asked the CJEU whether, in the context of enforcement proceedings, it may of its own motion annul an award where the arbitration clause is incompatible with EU consumer protection law.²³ The Court found that the time limit governed by national procedural law, subject to which a consumer could bring an action for annulment of the award, is compatible with the principle of effectiveness of EU law, even where the arbitration agreement breaches EU law.²⁴ The CJEU left the latter determination to the referring court.

The Court's approach in the case law examined above has been described as 'confirm[ing] the reluctance of the [CJEU] to interfere with the principle of procedural autonomy of Member States and the finality of arbitral awards, even in cases where rules of European public policy are engaged'.²⁵ While the extent of the CJEU's deference to national procedural autonomy on the whole can be contested,²⁶ the above case law indicates the Court's systemic tolerance of

¹⁸ Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG* EU:C:1982:107 (*Nordsee*) para 10.

¹⁹ *ibid.*, para 14.

²⁰ *Eco Swiss* (n 5) paras 31–41.

²¹ *ibid.*, paras 38–39.

²² *ibid.*, para 36. The classification of EU rules as 'fundamental' in this sense may be problematic from a legal certainty perspective: J Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32 *JintArb* 367, 373.

²³ Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* EU:C:2009:615. The judgment relates to arbitration provided for under a consumer, rather than commercial, contract. Both commercial arbitration and consumer arbitration are iterations of contract-based arbitration and, as such, differ from treaty-based investment arbitration.

²⁴ *Asturcom* *ibid.*, paras 46–48 in conjunction with para 53.

²⁵ Penades Fons (n 8) 1076. In the circumstances of *Asturcom* *ibid.*, para 53, a breach of EU law could arguably constitute a violation of domestic rules of public policy.

²⁶ See M Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member States' in HW Micklitz and B De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012); regarding time limits, see Case C-188/95 *Fantask A/S e.a. v Industriministeriet (Erhvervsministeriet)* EU:C:1997:321, Opinion of AG Jacobs.

contract-based arbitration. The Court's reasoning demonstrates its faith in the role of national courts and the preliminary reference procedure to resolve any tensions with EU law arising from arbitral proceedings.

3. Distinguishing between international investment and commercial arbitration

In *Achmea*, the CJEU found that intra-EU arbitration provisions in BITs are incompatible with EU law.²⁷ This finding was extended to intra-EU arbitration under the ECT in *Komstroy*²⁸ and intra-EU arbitration pursuant to certain ad hoc arbitration agreements in *PL Holdings*.²⁹ In those cases, the CJEU distinguished investment from commercial arbitration, while acknowledging their commonalities as forms of international arbitration: 'arbitration proceedings such as those [considered in the aforementioned judgments] are different from commercial arbitration proceedings'.³⁰ Drawing a firm distinction between investment and commercial arbitration was necessitated by the existing jurisprudential landscape, considered in Section 2, given that settled case law had never questioned the compatibility of commercial arbitration with EU law. The way in which, and the persuasiveness with which, the Court has distinguished the two will now be considered.

This section should be read in the light of the following terminological clarification: the Court's conception of commercial arbitration seems to capture all forms of contract-based arbitration. In describing commercial arbitration, the CJEU has relied on, inter alia, case law relating to consumer arbitration,³¹ and extended, at least in part, its understanding to sports arbitration.³² Moreover, the CJEU has effectively only considered investment arbitration under international treaties concluded by EU Member States.³³ The following discussion will refer interchangeably to investment arbitration and investor-State dispute settlement (ISDS), except where otherwise stated.

3.1. Origin of arbitral proceedings

The first criterion used by the CJEU to distinguish between investment and commercial arbitration concerns the 'origin' of the relevant arbitral proceedings.

²⁷ *Achmea* (n 1).

²⁸ *Komstroy* (n 1).

²⁹ *PL Holdings* (n 1).

³⁰ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59.

³¹ See *Mostaza Claro* (n 5), as cited in *Achmea* *ibid*, para 54.

³² Case C-124/21 P *International Skating Union v European Commission* EU:C:2022:988, Opinion of AG Rantos, paras 164–165, affirming the General Court in Case T-93/18 *International Skating Union v European Commission* EU:T:2020:610, para 162. While the CJEU did not explicitly address *Achmea*, it considered sports arbitration in light of *Nordsee* (n 18), *Eco Swiss* (n 5) and *Mostaza Claro* *ibid*, and case law concerning commercial and consumer—that is, contract-based—arbitration: Case C-124/21 P *International Skating Union v European Commission* EU:C:2023:1012, paras 192–193, 198.

³³ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59; *European Food* (n 1) para 144. For a discussion of *PL Holdings* (n 1), which raises additional, non-treaty issues, see Section 4.

On the one hand, commercial arbitral proceedings ‘originate in the freely expressed wishes of the parties’ concerned.³⁴ On the other hand, arbitral proceedings under intra-EU BITs or the ECT:

derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies [guaranteed by EU law,] disputes which may concern the application or interpretation of EU law.³⁵

This distinction is *prima facie* convincing. The involvement of the State is clearly different in the establishment of the respective arbitral proceedings. In treaty-based ISDS, an investor from one State brings a claim against the host State, alleging a breach of the provisions of the relevant international investment treaty and other applicable laws,³⁶ or customary rules of international law. Investment arbitration claims *ex hypothesi* centre around State actions or omissions. Commercial arbitration, however, is agreed upon by parties to a contract. Commercial disputes typically concern private conduct, including States’ *acta jure gestionis*.³⁷ They are generally determined on the basis of the applicable law agreed upon by the parties, which may be national, transnational³⁸ or possibly international law.³⁹

Nevertheless, the CJEU’s classification of arbitrations based on the origin of the proceedings appears insufficiently nuanced. For example, it juxtaposes the contractual basis of commercial arbitration with both the treaty basis of investment arbitration and the effect of such treaties in ‘removing’ particular disputes from the EU judicial system. According to the Court, by concluding investment treaties, Member States have agreed that certain disputes will be heard before arbitral tribunals, rather than their respective judiciaries. However, this ‘removal’ effect may still be produced by commercial arbitration, the *raison d’être* of which is to serve as an alternative to recourse to courts. Indeed, there is nothing to suggest that ‘disputes which may concern the application or interpretation of EU law’⁴⁰ are more likely to arise in the course of investment rather than commercial arbitral proceedings. Although investment claims more clearly involve State conduct compared to commercial claims, EU law is not confined to regulating the exercise

³⁴ *Achmea* *ibid*, para 55; *Komstroy* *ibid*, para 59; *European Food* *ibid*, para 144.

³⁵ *Achmea* *ibid*, para 55; *Komstroy* *ibid*, para 59; see also, to this effect, *PL Holdings* (n 1) para 45; *European Food* *ibid*, para 144.

³⁶ States, as parties to the treaty, determine the applicable law. This typically includes international standards of investment protection, such as fair and equitable treatment, but may also include national laws. According to the BIT considered by the CJEU in *Achmea* *ibid*, para 4, arbitral tribunals could apply, *inter alia*, the parties’ national laws and EU law.

³⁷ See generally Y Okada, ‘Can *Acta Jure Gestionis* Be Attributable to the State? A Restrictive Doctrine of State Responsibility’ (2023) 34 *EJIL* 383.

³⁸ See eg G Cuniberti, ‘Three Theories of *Lex Mercatoria*’ (2014) 52 *ColumJTransnatlL* 369; and H Ciurtin, ‘A Quest for Deterritorialisation: The “New” *Lex Mercatoria* in International Arbitration’ (2019) 85 *Arbitration* 123.

³⁹ For the applicability of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) in international arbitration, see G Favero Vaughn and K Duggal, ‘On International Arbitration, Choice of Substantive Law, and the CISG: A Case Law Study’ (2022) 38 *ArbIntl* 187.

⁴⁰ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59; and, to this effect, *PL Holdings* (n 1) para 45; *European Food* (n 1) para 144.

of public authority.⁴¹ Moreover, while investment tribunals can sometimes apply EU law⁴² or issue awards which are seen to disregard EU law,⁴³ commercial disputes are routinely determined on the basis of national law. In the case of EU Member States, this includes EU law. Such commercial disputes, even where questions of EU law arise, are equally removed from the jurisdiction of national courts.

In light of the above, it must be assumed that when the Court sought to distinguish investment arbitration from commercial arbitration,⁴⁴ it was more concerned with the fact that the former ‘derive[d]’ from a treaty between two EU Member States than by that treaty’s *stricto sensu* jurisdictional effect of ‘removing’ certain disputes from the EU judicial system.⁴⁵ Such an interpretation accords with the importance of the principle of mutual trust relied on by the Court in *Achmea*, which asserted the reciprocal nature of Member States’ obligations *vis-à-vis* the EU’s institutional and judicial framework.⁴⁶ The Court thereby implicitly confirmed, in principle, its long-standing acceptance of contract-based arbitration.⁴⁷

Notwithstanding the Court’s conclusion, it is worth further examining its understanding of parties’ consent in international arbitration. Investment treaties provide a State’s consent to arbitral proceedings in relation only to disputes which may arise within the scope of the treaty.⁴⁸ Proceedings are initiated via a claim brought by an investor, not by reason of the treaty itself. While investment treaty arbitration—as a form of ‘arbitration without privity’⁴⁹—can be distinguished from contract-based arbitration, it hardly falls outside the CJEU’s description of commercial arbitration as originating in the ‘freely expressed wishes of the parties’.⁵⁰ In his Opinion in *Komstroy*, Advocate General Szpunar discussed the different way in which commercial and investment arbitral proceedings rely on party autonomy. In particular, he noted that:

⁴¹ EU private law, as an obvious example of the salience of EU law in horizontal relationships, is expected to be more relevant in the context of consumer arbitration. An intra-EU commercial dispute which (partly) concerns, for instance, competition rules, data protection, environmental standards, financial regulations or intellectual property rights could also plausibly require the interpretation and application of rules of EU law.

⁴² See eg the arbitration clause under the BIT considered in *Achmea* (n 1) para 4.

⁴³ See eg *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013).

⁴⁴ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59; *PL Holdings* (n 1) para 45; *European Food* (n 1) para 144.

⁴⁵ *Achmea* *ibid*, para 41; cf paragraphs cited in n 44.

⁴⁶ *Achmea* *ibid*, paras 34, 58. For more, see JH Pohl, ‘Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?’ (2018) 14 *EuConst* 767; and Centeno Huerta and Kuplewatzky (n 2).

⁴⁷ Of course, the Court’s analysis did not end there. Section 3.2 will further examine the importance of ensuring effective judicial review of rendered awards, irrespective of their treaty or contractual basis, insofar as they concern the interpretation or application of EU law.

⁴⁸ See eg ECT (n 4) art 26(3)(a): ‘each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration’.

⁴⁹ J Paulsson, ‘Arbitration Without Privity’ (1995) 10 *ICSIDRev* 232.

⁵⁰ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59. To this effect, see G Cordero-Moss, ‘*Achmea*’s Distinction between Investment and Commercial Arbitration’ in A Calissendorff (ed), *The Future of Arbitration in Europe* (Jure 2020) 25; S Gáspár-Szilágyi and M Usynin, ‘Does the CJEU Misunderstand Investment Treaty Arbitration in *Commission v Micula*?’ (2023) 7 *EurInvL&ArbRev* 53, 59–62.

[c]ommercial arbitration proceedings presuppose the exercise by each party of its autonomy ... [T]he jurisdiction of a court or tribunal, in commercial arbitration, always derives from an arbitration agreement concerning a dispute specifically defined therein.⁵¹

With investment arbitration, however, he asserted that ‘the State waives the possibility that a dispute between it and an investor from another Member State falling within the scope of that agreement may be settled by the national courts’.⁵² This may not necessarily be so, as an international investment treaty may provide for a range of dispute settlement mechanisms, for example, the ECT itself envisages recourse to national courts rather than arbitration.⁵³ In any event, while Advocate General Szpunar was correct to identify that parties’ consent to arbitration differs according to the basis of the agreement (whether a contract or a treaty), it is not the case that investment treaties disregard respondent States’ party autonomy. A ‘systemic’⁵⁴ granting of consent to arbitration over a range of potential disputes is not rendered improper by virtue of its wide scope. However, this critique of Advocate General Szpunar’s comments on party autonomy does not undermine the arguments made by him in *Komstroy*,⁵⁵ and by the CJEU in other cases,⁵⁶ with regard to the principle of mutual trust and sincere cooperation which binds Member States.⁵⁷ However, as mutual trust strictly applies to relations of Member States *inter se*, it is not applicable in a private contractual context.

Moreover, although commercial arbitration cannot be said to ‘derive’⁵⁸ from international treaties, States have entered into international agreements to establish rules on the recognition and enforcement of arbitral awards. As Giuditta Cordero-Moss observed, Article II(3) of the New York Convention provides that a court must in principle refer parties to arbitration where it is seised of a matter which falls within the scope of an arbitration agreement.⁵⁹ There are 172 State Parties to the New York Convention, including all EU Member States. Therefore, while not themselves parties to commercial arbitral proceedings, Member States have acquiesced to the removal of certain commercial disputes from their national jurisdictions.⁶⁰ The formulation adopted, on the same point, by Advocate General Rantos is even broader than the Court’s. In *International Skating Union*, which

⁵¹ Case C-741/19 *Republic of Moldova v Komstroy* EU:C:2021:164, Opinion of AG Szpunar, para 60.

⁵² *ibid*, para 61.

⁵³ ECT (n 4) art 26(2)(a).

⁵⁴ *Komstroy*, Opinion of AG Szpunar (n 51) para 61.

⁵⁵ *ibid*, paras 63–66.

⁵⁶ *Achmea* (n 1) paras 34, 58; *PL Holdings* (n 1) paras 46, 52, 55.

⁵⁷ Such arguments posited that these principles precluded the application of clauses, included in international treaties, which provided for arbitration between an investor from one EU Member State against another EU Member State. These fall beyond the scope of the present article. For more, see Pohl (n 46); Centeno Huerta and Kuplewatzky (n 2).

⁵⁸ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59.

⁵⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, art II(3) (New York Convention); Cordero-Moss (n 50) 24.

⁶⁰ *cf* *Achmea* (n 1) para 55; and *Komstroy* (n 1) para 59: ‘a treaty by which Member States agree to remove from the jurisdiction of their own courts ... disputes which may concern the application or

concerned the annulment of a Commission decision finding that certain sports eligibility rules infringed EU competition law, Advocate General Rantos agreed with the General Court that arbitration before the Court of Arbitration for Sport (CAS) is different from investment treaty arbitration.⁶¹ He noted that, as with commercial arbitration proceedings, *Achmea* has no bearing on sports arbitration proceedings, because it:

concerned a (bilateral investment) treaty with a Member State and ... related to the principles of mutual trust and sincere cooperation between Member States, preventing those States from allowing private parties to submit disputes to a body which is not part of the EU judicial system.⁶²

However, if Member States are prohibited from merely ‘allowing private parties to submit disputes to a body which is not part of the EU judicial system’,⁶³ Member States would also be precluded from concluding an international agreement such as the New York Convention, which facilitates arbitration by enhancing the enforceability of awards. Since this is not the case, it follows that EU law only precludes Member States from concluding international agreements which specifically provide the basis for private intra-EU arbitral claims.⁶⁴

The above discussion demonstrates that at times the CJEU’s treatment of the ways in which parties may consent to arbitration has been insufficiently nuanced. Nevertheless, the above analysis demonstrates that the Court’s differentiation between investment arbitration and commercial arbitration was closely focused on the treaty basis of the former. Speaking extrajudicially in the aftermath of *Achmea*, CJEU President Lenaerts characterised a hypothetical contract including an arbitration clause between Achmea BV and the Slovak Republic, as being ‘100% compatible with European Union law’ and distinguished this from a ‘public international law treaty between two Member States’.⁶⁵ Indeed, the Court has never questioned the compatibility of contract-based arbitration, as such, with EU law.

3.2. Intensity of judicial review

The second way in which the CJEU has differentiated commercial and investment arbitration relates to the intensity of the judicial review of arbitral awards. With regard to commercial and consumer arbitration, the CJEU has recognised the

interpretation of EU law’; see also *PL Holdings* (n 1) para 45; *European Food* (n 1) para 139; *International Skating Union* EU:T:2020:610 (n 32) para 162.

⁶¹ *International Skating Union*, Opinion of AG Rantos (n 32) paras 164–166.

⁶² *ibid*, para 165. cf Case C-600/23 *Royal Football Club Seraing v Fédération Internationale de Football Association (FIFA) and others* EU:C:2025:24 (*Seraing*), Opinion of AG Čapeta, paras 82–94, who distinguished CAS arbitration under the FIFA Statutes from investment treaty arbitration by adopting a more nuanced rationale.

⁶³ *International Skating Union*, Opinion of AG Rantos *ibid* (emphasis added).

⁶⁴ As previously explained, such a finding is of course not solely supported by reference to the distinction between commercial and investment arbitration. Rather, the principles of autonomy of the EU legal order and mutual trust between Member States have been more influential in the Court’s reasoning.

⁶⁵ K Lenaerts, ‘Keynote Speech’ (III LAWTTIP Joint Conference, London, 21 March 2019) <<https://www.youtube.com/watch?v=qBOepzvPBYY>>.

importance of ‘efficient arbitration proceedings’, which require that judicial review of arbitral awards should only be ‘limited in scope’.⁶⁶ Review ‘should be possible only in exceptional circumstances’,⁶⁷ ‘provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling’.⁶⁸ Having distinguished between proceedings according to their basis as discussed in Section 3.1, the Court then found that ‘considerations’ relevant to the intensity of judicial review of commercial arbitral awards ‘cannot be applied’ to arbitral proceedings under investment treaties.⁶⁹ In this light, it found the latter proceedings to be incompatible with EU law.⁷⁰

The CJEU’s concern as to the judicial review of arbitral awards stems from the fact that this is governed by national law rather than EU law.⁷¹ Review is, in principle, exceptional and its rigour is not uniform across the EU legal order—some national courts in the EU may therefore not have the opportunity to refer certain questions of EU law to the CJEU under Article 267 of the TFEU. The preliminary reference procedure under Article 267 of the TFEU is seen as the ‘keystone’ of the EU judicial system, ensuring the effective protection of rights under EU law.⁷² However, the nature of review of awards is true of both commercial and investment arbitration. In both settings, awards are ordinarily subject to annulment or set-aside proceedings which are governed by the national law of the seat of arbitration as *lex fori*.⁷³ National law also governs recognition and enforcement proceedings, while the New York Convention is also typically applicable.⁷⁴ Although the parties’ choice of seat will determine the specific features of judicial review, the CJEU has accepted this as a sufficient mechanism for ensuring that commercial and other contract-based arbitral awards comply with ‘fundamental’ provisions of EU law.⁷⁵ Still, it took issue with the adequacy of judicial review to which investment arbitral awards are subject.

⁶⁶ *Eco Swiss* (n 5) para 35; *Mostaza Claro* (n 5) para 34.

⁶⁷ *Eco Swiss* *ibid*; *Mostaza Claro* *ibid*.

⁶⁸ *Achmea* (n 1) para 54; *Komstroy* (n 1) para 58.

⁶⁹ *Achmea* *ibid*, para 55; *Komstroy* *ibid*, para 59.

⁷⁰ *Achmea* *ibid*, para 60; *Komstroy* *ibid*, para 66.

⁷¹ See *Achmea* *ibid*, para 53; *Komstroy* *ibid*, para 57.

⁷² Opinion 2/13 *Union’s Accession to the European Convention on Human Rights* EU:C:2014:2454, para 176; *Achmea* *ibid*, para 37.

⁷³ The grounds for annulment may differ depending on the jurisdiction but are typically limited. The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (UNCITRAL Model Law), which has been adopted—often modified, by many States—envisages certain grounds to be considered by the competent court at the seat of arbitration, including: the incapacity of a party to the arbitration agreement or invalidity of agreement; the arbitrability of the subject matter of the dispute; or the conflict of the award with public policy; UNCITRAL Model Law, art 34(2).

⁷⁴ New York Convention (n 59) art V(1)–(2) sets out a closed list of grounds of refusal of recognition and enforcement of awards, for instance relating to the parties’ incapacity, validity of arbitration agreement, composition of the tribunal or consistency with public policy, in light of the relevant applicable national laws.

⁷⁵ *Achmea* (n 1) para 54; *Komstroy* (n 1) para 58.

As the same procedural rules largely also govern investment arbitration, the Court's reservation in this regard seems unconvincing. After all, *Achmea*, *Komstroy* and *PL Holdings*, concerning investment arbitration awards, were referred to the CJEU by national courts under Article 267 of the TFEU. It is clear from these references that national courts can play a robust role in reviewing the conformity of awards with EU law notwithstanding the customarily limited grounds of annulment. The CJEU can thus ensure the uniform interpretation and application of EU law under Article 19(1) of the Treaty on European Union (TEU).⁷⁶

However, investment arbitration proceedings submitted to the International Centre for Settlement of Investment Disputes (ICSID) in particular do not provide the same potential for judicial review by national courts. As of February 2025, over 1000 cases had been submitted to ICSID.⁷⁷ In the majority of cases,⁷⁸ the role of national courts shrinks drastically, as the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) rather than a national *lex fori* governs annulment proceedings, thereby precluding recourse to national courts.⁷⁹ Instead, Article 52(1) of the ICSID Convention provides for the establishment of an ad hoc committee, as part of the ICSID system, which considers annulment requests on the basis of the ICSID Convention.⁸⁰ With regard to recognition and enforcement, Article 54(1) of the ICSID Convention provides that Contracting States⁸¹ 'shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.⁸² This virtually automates the recognition and enforcement of an ICSID award and forecloses the possibility of refusal of recognition or enforcement, which differs from the approach under the New York Convention. Under Article V of the latter Convention, national courts can refuse

⁷⁶ Consolidated version of the Treaty on European Union [2012] OJ C326/13 (TEU).

⁷⁷ ICSID, 'The ICSID Caseload—Statistics: Issue 2024-2' (19 August 2024) <<https://icsid.worldbank.org/news-and-events/comunicados/icsid-releases-caseload-statistics-2024-fiscal-year>>; ICSID, 'ICSID Caseload Milestones' (8 August 2024) <<https://icsid.worldbank.org/resources/multimedia/icsid-caseload-milestones>>.

⁷⁸ Those brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), as opposed to those under the ICSID Additional Facility Rules (2022) or the ICSID Conciliation Rules (2022), ie 897 cases according to ICSID, 'The ICSID Caseload—Statistics: Issue 2024-2' *ibid* 2.

⁷⁹ ICSID Convention *ibid*, art 53(1): 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.' For more, see MB Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSIDRev 85.

⁸⁰ According to ICSID Convention *ibid*, art 52(1), the possible grounds of annulment are the following: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

⁸¹ In all, 158 States have ratified the ICSID Convention, including the UK and 26 EU Member States (Poland is not a State Party). For a full list, see ICSID, 'Database of ICSID Member States' <<https://icsid.worldbank.org/about/member-states/database-of-member-states>>.

⁸² ICSID Convention (n 78) art 54(1).

the recognition and enforcement of an arbitral award at the request of the party against whom it is invoked or even, in certain circumstances, on its own initiative.

In *Achmea*, Advocate General Wathelet noted that Member States ‘should avoid the choice of ICSID in their BITs’ because national courts would be unable to review the ‘compatibility of [such awards] with EU law’.⁸³ However, as the award in *Achmea* was not an ICSID award—parties had instead selected the Permanent Court of Arbitration as the registry and proceedings were governed by the UN Commission on International Trade Law (UNCITRAL) Arbitration Rules—he noted that risk was ‘purely hypothetical’ in the particular case.⁸⁴ Indeed, while the ICSID Convention minimises the role of national courts and the CJEU, this is not the case with the UNCITRAL Arbitration Rules,⁸⁵ which apply to ad hoc proceedings, and institutional rules such as the Stockholm Chamber of Commerce (SCC) Arbitration Rules.⁸⁶ Such rules were ‘originally meant to be applied’ to commercial disputes but are also applicable to investment disputes, subject to the parties’ agreement.⁸⁷ The level of judicial review of awards allowed under these rules has never been contested by the CJEU in the context of commercial arbitration. Ultimately, the courts of EU Member States and the CJEU can still become involved in the context of ad hoc and non-ICSID institutional arbitration, such as during enforcement proceedings, with a view to ensuring the uniform interpretation and effective application of EU law according to Articles 267 of the TFEU and 19(1) of the TEU.

It is clear from the above that in *Achmea* and subsequent case law the Court disregarded the profound differences between the ICSID and other arbitral regimes, by *a priori* associating all investment arbitration with an exclusion of judicial oversight. In fact, that is only true of ICSID proceedings. While the Court’s approach can be criticised on this basis, it does underline the importance it places on ensuring that arbitral awards are reviewable by national courts.

4. Intra-EU arbitration under investment contracts

The above would suggest that since *Achmea*, commercial arbitration or, more accurately, a closely related form of arbitration, is the sole remaining means of settling intra-EU investment disputes outside of courts of EU Member States.⁸⁸

⁸³ Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2017:699, Opinion of AG Wathelet, paras 252–253.

⁸⁴ *ibid.*, para 253.

⁸⁵ See UNCITRAL Arbitration Rules 2021 <<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>>.

⁸⁶ See Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2023 <<https://sccarbitrationinstitute.se/en/resource-library/rules-and-policies/scc-rules>>.

⁸⁷ Cordero-Moss (n 50) 21–2.

⁸⁸ Investment mediation will not be considered in the present article because, notwithstanding questions regarding its compatibility with EU law, mediation is reconciliatory in nature and typically aims at maintaining a good relationship between the parties. See eg ICSID, ‘Background Paper on Investment Mediation’ (12 July 2021) <<https://icsid.worldbank.org/resources/publications/background-paper-investment-mediation>>. Investment mediation is therefore not directly comparable to judicial or arbitral proceedings.

This section will consider the circumstances under which contract-based arbitration may emerge as a beneficiary of the conflict between EU law and ISDS under investment treaties, and as an effective avenue for investment protection and dispute settlement within the EU. This does not suggest that existing intra-EU investors necessarily have a choice between initiating investment or contract-based arbitral proceedings. Indeed, overlap may be limited in practice⁸⁹ since recourse to contract-based arbitration obviously requires the existence of a contract. Moreover, there may well be differences between investment and, in particular, commercial arbitration in terms of remedies, including the calculation of damages.⁹⁰

Nevertheless, a hybrid form of arbitration, which is provided for under a contract between an investor from one EU Member State and the government or a public authority of another, could have an investment protection function in compliance with EU law. The hybridity stems from the fact that such a contract would bind both private (investor) and public (State) parties, though under international law, investment contracts are often considered to be purely private in nature.⁹¹ Without prejudice to such characterisation in international law, for present purposes, it is argued that a State enters into an investment contract in a non-private capacity insofar as investment contracts mandate, condition or restrict its exercise of public powers. Their conclusion may also require special processes, such as parliamentary ratification.

Investment contracts between States and foreign investors are a known basis of investor–State arbitration,⁹² in addition to international treaties and domestic legislation. However, investment treaties have long represented the primary form of investment protection, particularly in Europe.⁹³ Substantively, contracts set out terms under which a particular foreign investment is to be made. The inclusion of a provision for arbitration in the event of a dispute upholds the principle of party autonomy, though in a strictly investor–State rather than State–State context, and procedural efficiency. While consent to arbitration is granted contractually, proceedings initiated on this basis are not deprived of their characterisation as

⁸⁹ For more on how treaty and contract-based claims can be reconciled where there is potential overlap, see J Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 *ArbIntl* 351.

⁹⁰ See eg ‘Damages Awards in International Commercial Arbitration: A Study of ICC Awards’ (PwC and Queen Mary University of London 2020) <<https://www.qmul.ac.uk/law/media/law/docs/research/Queen-Mary-research-paper-December-2020.pdf>>.

⁹¹ In particular, it has been suggested that States contract in their private capacity rather than as sovereign entities. See eg E De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 50–1; I Marboe and A Reinisch, ‘Contracts between States and Foreign Private Law Persons’ in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2021).

⁹² A contractual basis of consent was typically invoked in the early ICSID cases, with treaty-based proceedings proliferating in the 1990s, after *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990).

⁹³ For instance, a contractual basis of consent was invoked in 6 per cent of ICSID cases which were registered in the 2024 fiscal year, and 14 per cent of total historical ICSID cases: ICSID, ‘The ICSID Caseload—Statistics: Issue 2024-2’ (n 77) 7–8. Also, in 2023, the Permanent Court of Arbitration (PCA) provided registry services in 122 investor–State proceedings under international treaties and laws, and in 110 arbitrations ‘arising under contracts involving a State, intergovernmental organization, or other State entity’, though not all of these proceedings concerned claims by investors, let alone foreign investors; PCA, ‘Annual Report 2023’ (PCA 2023) 30 <<https://pca-cpa.org/en/about/annual-reports>>.

‘investment’ arbitration.⁹⁴ Nevertheless, looking at the main disputes in *Achmea*, *Komstroy* and *European Food*, which clarified the circumstances under which an intra-EU arbitration award may constitute unlawful State aid, the CJEU has only considered investment arbitration under investment treaties. As noted in the Introduction, such arbitration under an investment contract is referred to here as contract-based arbitration.

As explained in Sections 2 and 3, insofar as awards can be properly scrutinised by national courts, the CJEU has never expressed a general reservation against contractual arbitration agreements, even where this would remove disputes relating to the interpretation and application of EU law from national jurisdictions. The *PL Holdings* judgment appears to have been close to doing so.⁹⁵ The case concerned an investment dispute between a Luxembourg-based investor and Poland. The investor, PL Holdings, initiated proceedings under the applicable intra-EU BIT before a tribunal at the SCC Arbitration Institute. In set-aside proceedings before Swedish courts, Poland challenged, inter alia, the jurisdiction of the tribunal on the ground that the arbitration clause under the intra-EU BIT was incompatible with EU law. PL Holdings argued that, were the BIT clause found to be invalid, there was still a valid ad hoc arbitration agreement with Poland ‘in accordance with Swedish law and the principles of commercial arbitration’: PL Holdings submitted an ‘offer of arbitration’, which Poland ‘tacitly accepted’ by not challenging the tribunal’s jurisdiction.⁹⁶ Such an agreement would essentially be contractual in nature. The Court noted that the arbitration clause in the intra-EU BIT *in casu* was invalid as it was identical to the clause considered in *Achmea*.⁹⁷ As was ‘confirmed’ in the plurilateral agreement for the termination of intra-EU BITs, such treaty clauses can ‘no longer serve as the basis for arbitration proceedings between an investor and that Member State’.⁹⁸

It is only in the above circumstances that the Court found that an ad hoc agreement such as the one allegedly in place between PL Holdings and Poland would ‘in fact entail a circumvention of the obligations arising for that Member State under the Treaties’.⁹⁹ The Court did not take a position against contractual arbitration agreements between investors and Member States in general. Rather, it closely focused on instances where a party may seek, through contractual agreement, to rescue intra-EU arbitral proceedings from the invalidity of the BIT clause which initially served as the basis of the dispute. The Court noted that:

such an *ad hoc* arbitration agreement would produce, with regard to the dispute in the context of which it was concluded, the same effects as those resulting from such a [BIT] clause. The fundamental reason for that arbitration agreement is precisely to replace the arbitration clause in a provision such as Article 9 of the [relevant] BIT in order to maintain its effects despite that provision’s being invalid.¹⁰⁰

⁹⁴ See eg UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution 2023, art 1(a) and (b)(iii) <<https://uncitral.un.org/en/codeofconduct>>.

⁹⁵ *PL Holdings* (n 1).

⁹⁶ *ibid*, para 28.

⁹⁷ *ibid*, para 46.

⁹⁸ *ibid*; see also Termination Agreement (n 3).

⁹⁹ *PL Holdings* *ibid*, para 47.

¹⁰⁰ *ibid*, para 48 and, to this effect, para 65.

In other words, *PL Holdings* aimed at safeguarding the effectiveness of *Achmea*, not at expanding its scope. The Court was concerned that if such an ad hoc agreement were found to be compatible with EU law as interpreted in *Achmea*, this ‘legal approach ... could be adopted in a multitude of disputes which may concern the application and interpretation of EU law, thus allowing the autonomy of that law to be undermined repeatedly’.¹⁰¹ The Court explicitly noted that the ruling does not affect the validity of arbitration agreements included in ‘various types of contract’ concluded by Member States: ‘the interpretation of EU law provided in [*PL Holdings*] refers only to *ad hoc* arbitration agreements concluded in circumstances such as those at issue in the main proceedings’, namely where such agreements could ‘replace’ an invalid arbitration clause of an intra-EU investment treaty.¹⁰²

The above must be read in light of the CJEU’s distinction between investment treaty arbitration and commercial arbitration, grounded in, first, the different origins of the respective proceedings; and, second, the adequacy of the judicial review to which the respective awards are subject. First, arbitral proceedings under an investment contract would clearly ‘originate in the freely expressed wishes of the parties’ as understood by the CJEU.¹⁰³ The agreement’s contractual basis and hybrid private–public¹⁰⁴ nature would mean that the principle of mutual trust would not be undermined, as mutual trust applies *a priori* between Member States *inter se*, rather than between Member States and private entities.¹⁰⁵ As an investment contract is inherently more limited in scope than an international treaty between two or more States, a Member State’s consent to arbitration would not be ‘systemic’ in the sense understood by Advocate General Szpunar, but would rather be investment-specific.¹⁰⁶ Indeed, investment contracts can, by their nature, enable Member States to weigh more carefully the regulatory risks stemming from their obligations, at a lower level of abstraction.¹⁰⁷

Second, to ensure compliance with EU law, arbitral proceedings under an investment contract would need to guarantee a robust role for national courts and the CJEU in reviewing arbitral awards. As discussed in Section 3.2, the process

¹⁰¹ *ibid*, para 49.

¹⁰² *ibid*, para 67 in conjunction with para 65.

¹⁰³ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59; *European Food* (n 1) para 144.

¹⁰⁴ Indeed, according to De Brabandere (n 91) and Marboe and Reinisch (n 91), such contracts are often considered as purely private in nature, under international law.

¹⁰⁵ To this effect, see *Union’s Accession to the European Convention on Human Rights* (n 72) paras 191, 194; Opinion 1/17 *EU–Canada Comprehensive Economic and Trade Agreement* EU:C:2019:341, paras 128–129. However, in *International Skating Union AG Rantos* noted that both *Achmea* and *PL Holdings* ‘concerned a (bilateral investment) treaty with a Member State and which related to the principles of mutual trust and sincere cooperation between Member States’ without distinguishing the fundamentally different ways in which they do so: *International Skating Union*, Opinion of AG Rantos (n 32) para 165.

¹⁰⁶ *Komstroy*, Opinion of AG Szpunar (n 51) para 61.

¹⁰⁷ Investment contracts can constitute ‘the most useful tool’ for States to obtain greater environmental and sustainability commitments from foreign investors, even if complementarily to investment treaties: S Faccio, ‘Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability’ (2023) 38 *ICSIDRev* 625. For a broader discussion of such arguments, see JW Yackee, ‘Do We Really Need BITS? Toward a Return to Contract International Investment Law’ (2008) 3 *AsianJWTO&IntlHealthL&Pol* 121.

provided for by the ICSID Convention would not be satisfactory in this regard. In light of *Eco Swiss*, non-ICSID proceedings under an investment contract would be compatible with EU law, as they permit national courts to examine ‘fundamental’ EU law provisions in the course of their review of arbitral awards at annulment and/or enforcement proceedings.¹⁰⁸

While in *PL Holdings* the Court did not take a position on arbitration agreements under investor–State contracts as such, Advocate General Kokott explicitly endorsed them, though she arguably encouraged national courts to perform a more intensive review of awards:

individual arbitration agreements between Member States and investors from other Member States concerning the sovereign application of EU law are compatible with the duty of sincere cooperation ... and the autonomy of EU law ... only if courts of the Member States can comprehensively review the arbitration award for its compatibility with EU law, if necessary after requesting a preliminary ruling under Article 267 TFEU.¹⁰⁹

In *International Skating Union*, the Court of Justice also cast the reviewability of arbitral awards as an essential guarantee for the effectiveness of EU law.¹¹⁰ While the case did not concern intra-EU awards in particular, proceedings before CAS are relevant to the discussion insofar as they derive from a contract rather than an international treaty. By considering *Eco Swiss* and *Mostaza Claro*, on commercial and consumer contract-based arbitral proceedings, the Court questioned the adequacy of the judicial review to which CAS awards are subject.¹¹¹ Indeed, the CJEU alluded to the particular features of the CAS system by referring to relevant recitals in the Commission decision which was the subject of the annulment proceedings:¹¹² first, as the CAS is seated in Switzerland, Swiss courts may not refer questions to the CJEU under Article 267 of the TFEU in the course of annulment proceedings;¹¹³ and, second, CAS awards on eligibility disputes are, in principle, self-enforcing, and courts in the EU will therefore not be able to review their compatibility with EU law in the course of enforcement proceedings.¹¹⁴ In a

¹⁰⁸ *Achmea* (n 1) para 54 referring to *Eco Swiss* (n 5) paras 35, 36, 40; and *Mostaza Claro* (n 5) paras 34–39.

¹⁰⁹ Case C-109/20 *Poland v PL Holdings* EU:C:2021:321, Opinion of AG Kokott, para 65 in light of para 62.

¹¹⁰ *International Skating Union* EU:C:2023:1012 (n 32) para 194: ‘In the absence of [sufficient] judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies.’

¹¹¹ *ibid*, paras 193, 197, 199.

¹¹² *ibid*, para 199: ‘Thus, the General Court erred in law by merely finding, in an undifferentiated and abstract manner, that the arbitration rules “may be justified by legitimate interests linked to the specific nature of the sport” ... without seeking to ensure that those arbitration rules complied with all the requirements [relating to the effective judicial review of awards] ... even though the Commission correctly relied on those requirements in recitals 270 to 277, 282 and 283 of the decision at issue.’

¹¹³ Case AT.40208 *International Skating Union’s Eligibility Rules*, Commission Decision C(2017) 8240 final (8 December 2017) para 271.

¹¹⁴ *ibid*, para 272.

more straightforward manner, in her Opinion in *Seraing*, Advocate General Čapeta emphasised the implications of the self-enforcing nature of arbitration under the CAS—though under the International Federation of Association Football (FIFA) Statutes—for the power of national courts to ensure the compliance of awards with EU law.¹¹⁵

The above analysis suggests that intra-EU arbitration under an investment contract would in principle (except under the ICSID Convention) be compatible with EU law: not only can tribunals be seated within the EU, but also, crucially, enforcement is likely to be sought within the EU, within the disputing parties' respective jurisdictions. This would allow national courts to refer questions relating to the interpretation of EU law to the CJEU in the course of both annulment and enforcement proceedings.

A ruling by the Greek Council of State (Symvoulío tis Epikrateias; StE) suggests, however, that this view, grounded in the importance of ensuring effective judicial review of awards, may not be universally held.¹¹⁶ The StE heard an appeal concerning the tax liability of the company which developed and operated the Athens International Airport pursuant to a contract concluded between the Greek State and a consortium of German investors.¹¹⁷ It considered, *inter alia*, whether the dispute fell within the exclusive jurisdiction of an arbitral tribunal under the investment contract. The StE had previously found that awards issued on the basis of the same contract have the force of *res judicata*, though competent national courts can review them to establish that they were not issued *ultra vires*.¹¹⁸ The StE, referring to *Achmea* and *PL Holdings*, found that an award issued under an intra-EU contractual arbitration agreement is *ultra vires* insofar as the investment dispute concerns the interpretation and/or application of EU law, in particular regarding value added tax.¹¹⁹ In these circumstances, the tribunal would not have jurisdiction under the investment contract.

However, the foreclosure of intra-EU arbitration based on a contract is neither required nor supported by EU law. Tribunals constituted under the investment contract considered by the StE would follow the Arbitration Rules of the London Court of International Arbitration, which are primarily applied in commercial disputes.¹²⁰ As a result, national courts within the EU would still be able, at the enforcement stage, to review the award 'for its compatibility with EU law, if necessary after requesting a preliminary ruling under Article 267 TFEU'.¹²¹ What differentiates

¹¹⁵ *Seraing*, Opinion of AG Čapeta (n 62) paras 76–80, 100–107.

¹¹⁶ *Decision No 246/2022* (StE, 9 February 2022).

¹¹⁷ Law No 2338/1995, Government Gazette Issue A, No 202 (14 September 1995) 5651–6137.

¹¹⁸ *Decision Nos 582-587/2015* (StE, 25 February 2015) para 5. The StE could only review whether such an award exceeded the jurisdiction of the tribunal in order to determine whether the award was binding. It could not set aside the award or declare it unenforceable, which would ultimately be incumbent upon the Supreme Court (*Areios Pagos*).

¹¹⁹ *Decision No 246/2022* (n 116) para 8.

¹²⁰ London Court of International Arbitration, Arbitration Rules (2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>.

¹²¹ *PL Holdings*, Opinion of AG Kokott (n 109) para 65. With regard to annulment proceedings, the arbitration agreement in the investment contract considered by the StE renders English law (rather than the law of an EU Member State) as *lex arbitri*, as London has been selected as the seat of the

the arbitration agreement in this case from arbitration agreements under ordinary commercial contracts is State involvement. However, subject to the requirement of judicial review of awards, the CJEU has never suggested that a dispute which may concern the interpretation or application of EU law cannot be submitted to arbitration. As has been observed by the German Bundesgerichtshof (Federal Court of Justice):

the treatment of commercial arbitration by the [CJEU] also shows that the question of whether arbitration mechanisms comply with Union law does not (solely) depend on whether courts [or tribunals] that are not part of the judicial system within the meaning of Art. 267 TFEU potentially have to interpret Union law.¹²²

From an EU constitutional law perspective, as long as the principle of mutual trust is not undermined, as it is in an intra-EU treaty context, it is immaterial whether contracts are purely private or investor–State.

5. Conclusion

This article has argued that the foreclosure of investment arbitration under intra-EU investment treaties post-*Achmea* is conducive to the emergence of contract-based investor–State arbitration.¹²³ The CJEU case law can, in this sense, further shape both investment protection and the role of arbitration within the EU.

Settled CJEU case law has illustrated the ways in which international commercial and consumer arbitration and related judicial proceedings may generate tension with the jurisdiction of national courts, the principle of mutual trust and the principle of effective judicial protection. This article therefore began by setting out the Court’s historical approach regarding contract-based arbitration—an approach characterised by systemic tolerance and, largely, confidence in the EU judicial system to resolve tensions via the process under Article 267 of the TFEU.

The article then analysed how investment-treaty and commercial arbitration have been distinguished from one another with the *Achmea*, *Komstroy* and *European Food* rulings. Commercial arbitration has been considered broadly by the Court: its understanding in these cases, inter alia, drew from consumer arbitration and has since been invoked, in part, in respect of sports arbitration. In particular, the distinction was supported by two enquiries: first, the origin of arbitral proceedings; and, second, the intensity of the judicial review of awards. The first criterion is prima facie convincing: while the proceedings considered in *Achmea* originated from an international treaty between Member States, the proceedings considered in, say, *Eco Swiss*, derived from a commercial contract. However, the article disputes the Court’s assertion that treaty-based proceedings do not ‘originate in the

arbitration. However, the arbitral award considered by the StE was rendered in 2013, while the UK was still an EU Member State.

¹²² *Decision I ZB 12/23* DE:BGH:2023:121023BIZB12.23.0 (German Federal Court of Justice, 12 October 2013) para 25 (unofficial translation).

¹²³ In an extra-EU, and indeed global, context this would amount to a ‘resurgence’, as investment contracts were the preferred mode of investment protection prior to the proliferation of investment treaties: see helpful discussion focusing on the ECT in A Daszko, ‘The Energy Charter Treaty at a Critical Juncture: of Knowns, Unknowns, and Lasting Significance’ (2023) 26 JIEL 720, 722.

freely expressed wishes of the parties' as regards respondent States:¹²⁴ consent can legitimately be granted even if it relates to a wide range of potential disputes.

The second criterion, relating to the judicial review of awards, must be considered in light of the first one. Given the origin of investment treaty arbitration, and the implications thereof for mutual trust, the intensity of judicial review to which awards are subject does not, for the CJEU, suffice in order to 'ensur[e] the full effectiveness of EU law, even though [intra-EU disputes] might concern the interpretation or application of [EU] law'.¹²⁵ As a general statement, this seems problematic, as both commercial and investment-treaty awards are often subject to the same 'exceptional'¹²⁶ form of judicial scrutiny during annulment or enforcement proceedings. It is accepted that ICSID awards are largely shielded from judicial review under Articles 52(1) and 54(1) of the ICSID Convention, but this is not the case in relation to awards under the UNCITRAL Arbitration Rules and institutional rules, which typically apply to both commercial and investment disputes.

Notwithstanding the above criticism, it is not possible to read *Achmea* and subsequent CJEU case law as disrupting *contract*-based arbitration. Indeed, EU law cannot be said generally to preclude an agreement to refer 'disputes which may concern the application or interpretation of EU law'¹²⁷ to arbitration. Such agreements are permitted subject to the sufficiency of judicial review of awards, and the respect of constitutional conditions such as mutual trust, compliance with which is not disputed in a contractual context.

Thus, it has been argued that intra-EU contract-based arbitration is, correctly, permitted under EU law. Since it would derive from investment contracts concluded by a Member State and an investor from another Member State, rather than from treaties, it would closely follow commercial arbitration as understood by the CJEU. Contract-based arbitration has long been used for the settlement of investment disputes. Its intra-EU emergence post-*Achmea* would seek to balance, on the one hand, an investor's interest in procedural efficiency and enhanced State guarantees and, on the other, a State's interest in only granting proportionate regulatory or other commitments to specific investors. The CJEU's *PL Holdings* ruling does not question the above; rather, it merely precludes ad hoc investor-State arbitration agreements concluded in order to evade the consequences stemming from the invalidity of the underlying intra-EU BIT. The judgment of the StE, which found that an award rendered under an intra-EU investment contract was *ultra vires* in light of *Achmea* and *PL Holdings*, is therefore concerning. On this basis, this article cautions against the development of a judicial reflex, whereby the EU legal order becomes ideologically inimical to all forms of intra-EU arbitration. This would not only disregard the specific normative underpinnings of *Achmea* and the EU's

¹²⁴ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59; *European Food* (n 1) para 144.

¹²⁵ *Achmea* *ibid*, para 56.

¹²⁶ *Eco Swiss* (n 5) para 35; *Mostaza Claro* (n 5) para 34.

¹²⁷ *Achmea* (n 1) para 55; *Komstroy* (n 1) para 59; *PL Holdings* (n 1) para 45; *European Food* (n 1) para 144.

subsequent legal and policy initiatives but would also undermine the coherence of CJEU case law.

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