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Investment arbitration and the autonomy of the EU's legal order: a rule of law perspective

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ABSTRACT

Steps taken by the European Union (EU) towards putting an end to intra-EU investment arbitration have attracted much criticism, which ranges from accusations of legal imperialism to observations that the notion of autonomy of the EU's legal order, which is the primary tool weaponised against intra-EU arbitration, is politically malleable. Nevertheless, those supporting the EU's position argue that in a legal community like the EU, it is expected to litigate against state authorities before national courts. This article informs the debate from a rule of law lens – it contends that the concerns for the EU's legal order with respect to intra-EU investment arbitration resonate dual standards and undermine article 2 of the Treaty on European Union (TEU). First, it analyses the inconsistencies of the European Commission's position considering its failure to protect judicial independence in the EU. Then, it explains why the politicisation of the principle of the autonomy of the EU's legal order in the Court of Justice of the European Union's case law, which reflects the court's commitment to self-increasing its jurisdiction and to prioritising procedure over substantive human rights, leads to tension with article 2 TEU. After shedding light on concrete cases illustrating why the EU's stance on intra-EU investment arbitration hampers investors' rights, it contemplates what solutions could be envisaged to ensure more adequate investor protection in the EU.

Keywords: intra-EU investment arbitration; autonomy of the EU legal order; rule of law; judicial independence; article 2 TEU; CJEU jurisdiction; judicial activism; investor rights; ICSID arbitration; defending investor rights at the ECtHR.

INTRODUCTION

After the end of the Cold War, many Western European countries entered bilateral investment treaties (BITs) with Eastern European countries in the hope of promoting trade. As Eastern European countries started acceding to the European Union (EU),[1] these BITs, which created the framework of what is now commonly referred to as 'intra-EU investment arbitration', became a major source of concern for EU institutions.

1 Chechia, Estonia, Hungary, Poland, Latvia, Lithuania, Slovakia and Slovenia acceded to the EU in 2004; Bulgaria and Romania in 2007; and Croatia in 2013.

Suffocating intra-EU investment arbitration

In the past decade, there has been a peculiar ping-pong game between the European Commission, the Court of Justice of the European Union (CJEU), and some EU member states aimed at suffocating intra-EU investment arbitration. In 2015, the European Commission launched infringement proceedings against five EU members in order to have intra-EU BITs repealed, arguing that these BITs were 'incompatible with EU law'.[2] Since 2018, the CJEU has also started closing the door to intra-EU investment arbitration via a series of judgments.[3] The CJEU invokes the principle of autonomy of the EU's legal order which it developed in its own prior case law and whose effects primarily secure the CJEU's authority to interpret EU law as a final instance.[4] In 2020, 23 EU members signed the Agreement for the Termination of Bilateral Investment Treaties between EU members,[5] which the European Commission has also been aggressively seeking to enforce via infringement procedures.[6]

The EU's recent steps towards putting an end to intra-EU investment arbitration have induced heated debates. Some critics have accused the CJEU of 'legal imperialism'.[7] Others are convinced that intra-EU BITs 'accelerate the internal market' – hence the EU's stance on intra-EU investment arbitration impedes EU integration.[8] There are scholars who are troubled by the vagueness and fluidity of the notion of autonomy in CJEU case law on which the same court relies to justify its attack against intra-EU arbitration.[9] Moreover, the CJEU's conception of autonomy leads to tension between EU law and international law.[10]

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2 European Commission, 'Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties' Press Release IP/15/5198 (European Commission 18 June 2015).

3 For instance, C-284/16 *Slowakische Republik v Achmea BV*, 6 March 2018; C-741/19 *République de Moldavie v Komstroy LLC*, 2 September 2021; C 109/20 *Republiken Polen v PL Holdings Sàrl*, 26 October 2021; Case C-638/19 *P Commission v European Food SA and Others*, 25 January 2022.

4 N N Shuibhne, 'What is the autonomy of EU law, and why does that matter?' (2019) 88(1) Nordic Journal of International Law 1–32, 9.

5 OJ L 169, 29 May 2020, 1–4.

6 European Commission, 'December Infringements Package: Key Decisions' (European Commission 2 December 2021).

7 D Müller, 'EU law and arbitration under international investment instruments: the (never-ending) story of incompatibility' (*Jus Mundi* 27 September 2021).

8 C I Nagy, 'Intra-EU bilateral investment treaties and EU law after *Achmea*: "Know well what leads you forward and what holds you back"' (2018) 19(4) German Law Journal 981–1016.

9 P Koutrakos, 'The autonomy of EU law and international investment arbitration' (2019) 88(1) Nordic Journal of International Law 41–64, 41–42.

10 Ibid.

Yet, it has also been noted that there is 'some merit' in the CJEU's position against intra-EU investment arbitration:

> In a community of law, there is little reason not to submit such disputes before regular courts … It is not, and it should not be *shocking* to litigate against State authorities in front of State courts within the EU.[11]

Why a rule of law reading?

This article purports to inform the debate on intra-EU investment arbitration from a rule of law lens. Its main argument is that EU institutions' recent policy towards investment arbitration seems to undermine article 2 of the Treaty on European Union (TEU):

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The principle of the rule of law was mentioned for the first time in the case law of the European Court of Justice (ECJ), which referred to the then European Economic Community as a 'community based on the rule of law' in 1986.[12] The rule of law was formally recognised as a principle in primary EU legislation in the Maastricht Treaty of 1992.[13] The current version of article 2 TEU identifying the rule of law as a 'value' made its way to primary EU legislation via the Treaty of Lisbon in 2007.[14]

Definitions of the rule of law may vary, but its key features include legal certainty, prevention of abuse and misuse of powers, such as arbitrariness, equality before the law and non-discrimination, and access to justice.[15] Judicial independence is seen as a 'fundamental aspect of the rule of law'.[16] As put by the CJEU:

> [The] requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of

11 Müller (n 7 above) emphasis added.

12 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament*, 23 April 1986, para 23.

13 On the evolution of the notion of 'rule of law' in the EU context, see generally L Pech, 'The rule of law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* 3rd edn (Oxford University Press 2021) 307–338.

14 Ibid.

15 See Venice Commission, Rule of Law Checklist Adopted at the 106th Plenary Session (Venice 11–12 March 2016) CDL-AD(2016)007-e.

16 See Council of Europe, *Judges: Independence, Efficiency and Responsibilities*, Recommendation CM/Rec(2010)12 and Explanatory Memorandum (2010) 7.

> cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[17]

In this light, it is often said that 'arbitrators serve as a ... safety valve, impartial, objective and independent' and thus help shield from unlawful state interference with property rights.[18] The soar of BITs since the 1950s is recognised as a major step forward towards building the international rule of law – these BITs put in place 'rules and procedures ... where power play and uncertainty reigned before'.[19] BITs reduce the political risks associated with rogue states, too. In such states expropriation may involve unlawful or even criminal conduct by public officials. Meanwhile, the local courts are not independent, so there is no opportunity for fair legal proceedings leading to just compensation for the expropriation. The breaches of investors' rights often amount to breaches of human rights – namely, the violation of the right to a fair trial (due process) and the right to (private) property.[20]

Thus, in many cases, contrary to the romanticised perspectives on the EU mentioned above, it may indeed be 'shocking' to be forced to litigate before national, albeit EU, courts, and be deprived of the opportunity to bring the dispute before an arbitral tribunal, especially if a BIT was in force when the investment was made. First, some EU member states face unprecedented rule of law backsliding which the European Commission has failed to curtail via the available mechanisms at the EU level – the independence of its courts can be questioned, which means that *a priori* some intra-EU investors will have access to independent and impartial courts in states respecting the rule of law while others will be forced to defend their rights in captured courts. When confronted with compromised national courts,[21] which is the

17 Joined Cases C-585/18, C-624/18 and C-625/18 *Krajowa Rada Sądownictwa, CP, DO v Sąd Najwyższy*, 19 November 2019, para 120.

18 M Waibel, A Kaushal, L K H Chung and C Balchin, 'The backlash against investment arbitration: perceptions and reality' in M Waibel, A Kaushal, L K H Chung and C Balchin (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) xlvii.

19 P T Stoll, 'International investment law and the rule of law' (2018) 9(1) Goettingen Journal of International Law 267–292, 276.

20 See art 6(1) of the ECHR and art 1 of protocol 1 to the ECHR; see arts 47 and 17 of the EU Charter of Fundamental Rights.

21 Courts can be compromised for different reasons which point to failures of external or internal judicial independence – they may be captured by the executive, they may be known for corrupt practices, judges may be subjected to undue influence or even overt pressures by colleagues, etc. In some cases, judges may simply be unwilling to respect EU law because of legal cultural or political reasons.

case in some EU countries, intra-EU investors will be primarily left with the questionable remedy of submitting an application before the European Court of Human Rights (ECtHR), which is not only notoriously slow in delivering its judgments, but which itself has been under fire for tampering with admissibility and for being susceptible to political influences (see section 4 below, 'The aftermath').

Moreover, there are a number of International Centre for Settlement of Investment Disputes (ICSID) cases,[22] which arose from controversial final judgments by national courts of EU members (see section 4 below). Had these intra-EU investors been deprived of access to investment arbitration, they would have been left without an effective remedy for the breaches of their rights. Furthermore, in one of the cases that will be examined, disputes arose on the same facts between the host state, on the one hand, and non-EU investors and local investors, on the other. Hence, we are confronted with the sad conclusion that non-EU investors have more and better protected rights than EU investors in identical circumstances.

The article begins by critically analysing the European Commission's hostility towards intra-EU BITs which is troublesome in view of the rule of law backsliding in EU member states that it has failed to curtail (section 2 'Unpacking the EU Commission's stance on investment arbitration'). Then, it examines what seems to lurk behind the CJEU's concerns that investment arbitration threatens the autonomy of EU's legal order – it argues that the court's formalistic approach is self-serving because it prioritises the *illusion* of protecting its own jurisdiction over the protection of the rule of law (section 3 'The CJEU, investment arbitration and the autonomy of the EU'S legal order'). Afterwards, the article studies several ICSID and ECtHR cases to illustrate the consequences of EU policy – in all of them, national courts in the EU have handed down controversial judgments and can be criticised for compromising the principle of the rule of law (section 4 'The aftermath'). Finally, the article concludes by examining what solutions could be envisaged to ensure more adequate investor protection in the EU (section 5 'Conclusions and recommendations').

22 ICSID is an institution under the chapeau of the World Bank which was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

UNPACKING THE EUROPEAN COMMISSION'S STANCE ON INVESTMENT ARBITRATION

The anti-investment arbitration attitude in the EU is not an isolated phenomenon – the past few decades have seen a backlash against investment arbitration worldwide.[23] Criticism focuses on both procedural issues, such as the need for better transparency, and substantive matters, such as rigid or controversial interpretations of investment law by some tribunals.[24]

It has been argued, however, that the change in the attitude towards investment arbitration by governments has primarily a pragmatic explanation. The rise of treaty-based investment arbitration claims in the 1990s showed the effectiveness of the global investment arbitration system – notably, 'states were ordered to pay substantial sums to foreign investors'.[25] The European Commission, nevertheless, has tried to portray its anti-investment arbitration stance in a noble light – namely, enforcing EU law and levelling the playing field for investors. The European Commission's arguments not only seem to ignore the reality of adjudication in courts in the EU, but also disregard the rule of law backsliding in some EU member states. This is worrisome because the ultimate result of the European Commission's policy is that intra-EU investors would have no choice but to defend their rights in national courts, unless they restructure their investments and put on the hat of a non-EU investor, of course.[26]

The beginnings of the attack

Before analysing the European Commission's arguments, it should be clarified that the EU's anti-investment arbitration stance has an external and an internal dimension. Following the adoption of the Treaty of Lisbon which listed foreign direct investment as a matter falling under the common commercial policy, the EU articulated its position on BITs with third countries in a regulation.[27] The European Commission's position against investment arbitration with third parties became more prominent during the negotiations for the Transatlantic Trade

23 See generally Waibel et al (n 18 above).

24 L Wells, 'Backlash to investment arbitration: three causes' in Waibel et al (n 18 above) 341.

25 A Uzelac, 'Why Europe should reconsider its anti-arbitration policy in investment disputes' (2019) 1(2) Access to Justice in Eastern Europe 6–30, 8 and 16.

26 It is questionable, however, if such restructuring may be a durable solution because there may be challenges at the enforcement stage. One may envisage a scenario in which national courts pierce the corporate veil.

27 Regulation (EU) No 1219/2012 of the European Parliament and Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351.

and Investment Partnership, the proposed trade agreement between the EU and the United States, which did not see the light of day.[28]

EU institutions managed to deliver the first successful blow against investment arbitration with third parties with the EU–Canada Trade Agreement (CETA) adopted in 2017.[29] While articles 8.18 and subsequent of this agreement refer to the resolution of investment disputes by a 'tribunal', it has been noted that this tribunal is 'everything but an arbitral body' because it does not bear the features of such body.[30] In parallel, the European Commission launched an attack against intra-EU arbitration which is more covert in nature and which is the focus of this article.

The European Commission's initial concerns

In the 2000s, reports about the European Commission's scepticism towards the lawfulness of intra-EU investment arbitration expressed on different occasions had started multiplying amidst the arbitration community.[31] Thanks to a partial arbitral award rendered under the auspices of the Stockholm Chamber of Commerce (SCC) in 2007, which has been made public, one can take a glimpse at a letter which the European Commission sent to the Economic and Financial Committee, a consultative body of the EU, in 2006.[32] The European Commission maintained:

> Investors could try to practice 'forum shopping' by submitting claims to BIT arbitration instead of … national courts. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with *unequal treatment* of investors among Member States as a possible outcome.[33]

This statement is revealing of the Commission's naiveté regarding 'forum shopping' and the reality of adjudication in the EU's national courts. First, nothing impedes investors from restructuring their investments and benefiting from BITs, which are not intra-EU. Second, in some EU

28 Ibid 9.

29 [2017] OJ 11/23.

30 See the discussion in Uzelac (n 25 above) 9–10; it should be noted that since 2015, the European Commission has been working towards establishing a Multilateral Investment Court (MIC) which would replace the bilateral investment court systems included in EU trade and investment agreements, such as CETA. It is hoped that the MIC will adjudicate disputes between EU members and third parties. See 'Multilateral Investment Court Project' (Official Website of the European Commission).

31 C von Krause, 'The European Commission's opposition to intra-EU BITs and its impact on investment arbitration' (*Kluwer Arbitration Blog* 28 September 2010).

32 *Eastern Sugar v The Czech Republic*, 27 March 2007, SCC No 088/2004.

33 Ibid, para 126, emphasis added.

member states, national judges notoriously ignore the case law of the CJEU.[34] Furthermore, many national judges completely disregard the existence of the preliminary reference mechanism envisaged in article 267 TEU. For instance, empirical analysis of preliminary references from Bulgaria carried out by Aleksander Kornezov, current judge at the EU's General Court, showed that between 2007 and 2017 most preliminary references came from the same small group of judges.[35] Moreover, in countries experiencing rule of law backsliding, judges may face diverse forms of harassment for daring to approach the CJEU under the preliminary reference mechanism – from tarnishing media campaigns and threats by government officials[36] to disciplinary proceedings aimed at intimidating them.[37] Such policy overtly threatens judicial independence and induces public mistrust in the court system.

Politically motivated infringement proceedings?

It has been alleged that by 2011 the European Commission hoped to quietly pressure EU member states to repeal intra-EU BITs, which in itself speaks of a political agenda.[38] However, as there was some resistance, in 2015 the European Commission decided to show its teeth and launch infringement procedures against Austria, the Netherlands, Romania, Slovakia and Sweden in an attempt to force them to comply with this new policy.

The European Commission's press release dedicated to these infringement proceedings merits unpacking for it paints an even more biased picture of BITs than the Commission's earlier statements.[39] It is noteworthy that the European Commission makes general remarks about intra-EU BITs. It alleges that at the time these were concluded investors might have 'felt wary about investing in [East European] countries' because of 'historical political reasons'.[40] Thus, the BITs provided assurances for investment protection. Nevertheless, these BITs have served their purpose:

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34 R Vassileva, 'Autonomous interpretation of uniform commercial law: the east–west European divide' (2018) 29(6) European Business Law Review 885–906, 902.

35 A Kornezov, 'Ten years of preliminary references – a critical review and appraisal' (2017) Evropejski praven pregled.

36 Bulgarian Judges Association, 'Open letter to Parliament, the Supreme Judicial Council and the European Commission' (*Clubz* 4 April 2018).

37 P Bard, 'The sanctity of preliminary references: an analysis of the CJEU Decision C-564/19 IS' (*Verfassungsblog* 26 November 2021).

38 A Ross, 'Killing off intra-EU BITs: how the European Commission plans to level the playing field for investors' (*Global Arbitration Review* 17 October 2011).

39 European Commission (n 2 above).

40 Ibid.

> Since enlargement, such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules …[41]

Sadly, the European Commission's point is nothing more than a political statement. Mere EU membership provides limited comfort to international investors and observers of the investment climate. For example, the Investment Climate Statements, country reports prepared by the State Department of the United States, tell a more nuanced story. In 2022, 'unpredictable decision-making', 'low institutional quality' and 'corruption' were deemed as 'factors eroding investor confidence' in Romania,[42] and 'rule of law' and 'endemic corruption' troubled investors looking into opportunities in Bulgaria.[43] The Worldwide Governance Indicators by the World Bank, which measure six categories, including the rule of law, in more than 200 countries and which are released every five years, show profound divides within the EU. In the World Bank's latest 2021 release, some EU members were placed in the highest percentiles in the area of the rule of law,[44] while others were placed slightly above the median percentile having similar scores to developing countries.[45]

In the same press release dedicated to the infringement procedures mentioned above, the European Commission also asserts that intra-EU BITs confer rights on a bilateral basis, which would allegedly lead to 'discrimination based on nationality', which, in turn, is 'incompatible with EU law'.[46] Without substantive analysis of the BITs in force, such statements may appear as unsubstantiated assumptions. Moreover, modern BITs normally contain most favoured nation (MFN) clauses binding states to provide investors with treatment no less favourable than the treatment under other investment treaties.

More importantly, there is no guarantee that national courts would not engage in discriminatory practices – this is a serious risk both in EU members experiencing rule of law backsliding and EU members having historic rule of law deficiencies. It is difficult to imagine that a captured court in a country with rule of law deficiencies will take a stand against abuses of power by the executive or the legislative

41 Ibid.

42 State Department of the United States, 'Investment Climate Statements: Romania' (State Department of the United States 2022).

43 State Department of the United States, 'Investment Climate Statements: Bulgaria' (State Department of the United States 2022).

44 Finland was placed in the 100th percentile; Denmark in the 99th; the Netherlands in the 95th. See World Bank, 'Worldwide governance indicators: interactive data access tool' (World Bank 2021).

45 Bulgaria was placed in the 53rd percentile with a score comparable to China's. See ibid.

46 Ibid.

branch, which may be at the origin of breaches of investors' rights (see section 4 'The aftermath' below).

For the sake of clarity, it should be noted that in literature on the rule of law, rule of law backsliding is regarded as a distinct issue from the inability to achieve the rule of law:

> These are states in which the rule of law had in fact been achieved and is now being systematically dismantled, which is a different sort of problem from not being able to achieve the rule of law in the first place. Backsliding implies that a country was once better, and then regressed.[47]

Irrespective of the diagnosis, however, the outcome for those willing to litigate to defend their investor rights will be similar – they may find themselves in a captured court incapable of delivering justice.

Mishandling rule of law deficiencies and backsliding

To this end, the European Commission's attack against intra-EU investment arbitration seems to disregard the serious threats to the rule of law in many EU member states. Even worse, there are ample concerns that the European Commission itself has contributed to this sad state of affairs in the EU through its omissions and reluctance to serve as a proper guardian of the treaties, often prioritising political considerations over legal obligations.[48] First, the European Commission can be criticised for turning a blind eye to rule of law deficiencies in the EU accession process. Second, it has failed to put a halt to the rule of law backsliding in member states which had allegedly achieved the rule of law at the time of accession.

The politicised accession process

Because of the European Commission's political optimism, the EU has admitted countries which do not respect the rule of law as members. It should be clarified that with the fifth wave of enlargement,[49] the EU accession process was transformed from political to politico-legal in view of concerns about the young, fragile East European democracies – the benefits of EU membership were made an incentive to conform with accession criteria, including the rule of law. This is known as pre-accession conditionality. Nevertheless, critics assert that:

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47 L Pech and K L Scheppele, 'Illiberalism within: rule of law backsliding in the EU' (2017) 19(3) Cambridge Yearbook of European Legal Studies 3–47, 11–12.

48 Art 17(1) TEU specifies that the European Commission 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'.

49 Estonia, Latvia, Lithuania, Poland, Chechia, Hungary, Slovakia, Slovenia, Cyprus and Malta acceded to the EU in 2004.

> the application of the principle of pre-accession conditionality was marked by resounding failure, if it was applied at all.[50]

The problem became more visible in the sixth wave of enlargement (2007) as the European Commission unequivocally recognised that Bulgaria and Romania did not fulfil the accession criteria on the rule of law. That is why it included unprecedented safeguard clauses in these countries' Accession Treaty.[51] By 2008, the European Commission was still unconvinced that Bulgaria and Romania had made satisfactory progress – that is why it put the countries under a special mechanism, known as the cooperation and verification mechanism (CVM), which was supposed to help Bulgaria and Romania catch up with other EU member states in the area of rule of law.[52] Fifteen years of experience with this mechanism show its lack of effectiveness and point to the disturbing conclusion that so many years after EU accession, Bulgaria and Romania still do not fulfil the accession criteria on the rule of law.[53] In fact, in 2020, the European Parliament adopted a striking resolution on the rule of law decay in Bulgaria.[54] It stressed that it:

> deeply regret[ted] the fact that the developments in Bulgaria have led to a significant deterioration in respect for the principles of rule of law, democracy and fundamental rights, including the independence of the judiciary, separation of powers, the fight against corruption and freedom of the media.[55]

Failure to curtail backsliding

Not only has the European Commission engaged in dual standards in the accession process, thus enabling countries which have not achieved the rule of law to accede to the EU, but it has also shown lack of sober judgment in using the available tools to curtail rule of law backsliding in countries such as Poland and Hungary. The rule of law crises in these EU member states have been deemed to threaten 'the very fabric of EU constitutionalism'.[56]

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50 D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008) 300.

51 Arts 37–39 of the Accession Treaty [2005] OJ L 157.

52 On the origin and development of the CVM, see R Vassileva, 'Threats to the rule of law: the pitfalls of the cooperation and verification mechanism' (2020) 26(3) European Public Law 741–768.

53 Ibid. Sadly, the mechanism was terminated in 2023 for political reasons.

54 P9_TA(2020)026; European Parliament Resolution of 8 October 2020 on the Rule of Law and Fundamental Rights in Bulgaria.

55 Ibid s X(1).

56 D Kochenov, 'Article 7: a commentary on a much talked-about "dead" provision' in A von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 129.

For years, those concerned about the dire situation in Poland and Hungary waited for the European Commission to activate article 7 TEU. In 2013, this provision was referred to as a 'nuclear option' by the then President of the European Commission José Manuel Barroso who worried about 'challenges to the rule of law' in EU members in his state of the union speech.[57] Article 7(1) is known as the preventative limb of article 7 TEU, allowing EU institutions to establish 'a clear risk of a serious breach' by a member state of the values referred to in article 2 TEU. The European Commission, nonetheless, chose to delay triggering article 7(1) by relying on mechanisms with less bite, such as infringement procedures, and the newly developed Rule of Law Framework. The latter mechanism, which supposedly helps assess whether a member state has threatened the rule of law to such extent that article 7 TEU should be activated, was a political compromise.[58] It has been argued that the Rule of Law Framework did not achieve anything – therefore it

> considerably undermined not only the legitimacy of the [EU] Commission, but also that of the entire rule of law oversight mechanism.[59]

Moreover, the European Commission engaged in dual standards in similar circumstances delivering a further blow to its own credibility. In 2017, it triggered article 7(1) TEU against Poland, citing among others 'grave concerns as regards judicial independence', but not against Hungary.[60] Rule of law scholars quickly saw political biases:

> ... [the] diagnosis that Poland is worse than Hungary is surprising considering the easily available and multiple studies documenting *many years of systematic attacks* on the rule of law in Hungary.[61]

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57 President of the European Commission, 'State of the Union Address', Plenary Session of the European Parliament, Speech/13/683 (European Commission 11 September 2013).

58 European Commission, 'A New EU Framework to Strengthen the Rule of Law', COM(2014)158 final (11 March 2014).

59 G Halmai, 'The possibility and desirability of rule of law conditionality' (2019) 11 Hague Journal on the Rule of Law 171–188.

60 European Commission, 'Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law', COM(2017) 835 final (20 December 2017).

61 K L Scheppele and L Pech, 'Why Poland and not Hungary?' (*Verfassungsblog* 8 March 2018).

Indeed, in the case of Hungary, article 7(1) TEU was activated by the European Parliament in the end, and not without pressures from civil society.[62]

Critics encouraged the European Commission to look for mechanisms with more bite than article 7 TEU since it had become a 'dead provision' because of the delay in its application.[63] When the much-anticipated EU Conditionality Regulation, which ties the state of the rule of law to EU funds,[64] entered into force, however, the European Commission took steps to delay its application, which led to a highly critical resolution by the European Parliament threatening to sue the European Commission before the CJEU due to its refusal to comply with the regulation.[65] Surely, this raises further concerns that the European Commission's decisions prioritised political considerations over concerns for rule of law backsliding.

More recently, the European Parliament and critics alike were disappointed that the European Commission missed an opportunity to promote the rule of law in Poland via the country's national recovery plan, which could have been used as an incentive to persuade the country to comply with the CJEU's and ECtHR's case law against it.[66] The EU's Recovery and Resilience Facility purports to mitigate the economic and social impact of the coronavirus pandemic – under this initiative, EU member states which have been severely hit by the pandemic can submit recovery plans to the European Commission to obtain funding in the form of loans and grants. It was hoped that the European Commission would use its leverage to encourage reforms on a national level. Nevertheless, in Poland's case, the European

62 European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union is Founded, P8_TA(2018)0340: on the background of the Sargentini report which informed the European Parliament's vote, see N Köves, 'The Sargentini Report – its background and what it means for Hungary and for the EU' (Heinrich Böll Stiftung 18 September 2018).

63 Kochenov (n 56 above) 127.

64 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I, 1–10.

65 European Parliament Resolution of 25 March 2021 on the Application of Regulation (EU, Euratom) 2020/2092, the Rule-of-Law Conditionality Mechanism, P9_TA(2021)0103, para 14.

66 European Parliament Resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan, P9_TA(2022)0240, paras 1–14.

Commission 'cede[d] its crucial leverage' despite 'meek assurances about improvements to its rule-of-law situation'.[67]

Overall, in view of the grim picture of the rule of law in some member states of the EU, it is certainly striking that the European Commission insists that investors defend their rights in national courts whose independence cannot be guaranteed despite the available tools at the EU level. Instead of fighting discrimination, this policy potentially fosters abuses of human rights, which can hardly promote trust among the investor community – after all, judicial independence is an inherent feature of the right to a fair trial and, more broadly, the rule of law.

THE CJEU, INVESTMENT ARBITRATION AND THE AUTONOMY OF THE EU'S LEGAL ORDER

While the European Commission, as an executive body, is entitled to make political decisions – the Juncker Commission explicitly prioritised the 'political' over the 'technocratic'[68] – it is striking that the CJEU has supported its position on investment arbitration. Sadly, it seems that the CJEU has used the occasion primarily to serve its own agenda – it has given precedence to the defence of its own illusory territory over the cardinal value of the rule of law.

As mentioned in the introduction, the CJEU's main argument against intra-EU investment arbitration is the protection of the autonomy of the EU's legal order. The CJEU first advanced this view in *Achmea*:

> … the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law.[69]

The choice of legal 'weapon' against intra-EU investment arbitration merits unpacking for there is no reference to a principle of autonomy of the EU's legal order in primary EU legislation. While it has gained ground to the extent that some claim that it forms part of '*extra-Treaty primary law*',[70] one should not forget that it developed in the ECJ's case law thanks to the court's activism.

After explaining how the principle of autonomy appeared on the EU's legal stage thanks to the ECJ's bold, yet self-serving interpretation moves, this section highlights how its application in *Achmea* illustrates

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67 W Sadurski, 'The European Commission cedes its crucial leverage vis-à-vis the rule of law in Poland' (*Verfassungsblog* 6 June 2022).

68 H Kassim and B Laffan, 'The Juncker presidency: the "political" commission in practice' (2019) 57(S1) Journal of Common Market Studies 49–61.

69 C-284/16 *Slowakische Republik v Achmea BV*, 6 March 2018, para 33.

70 Shuibhne (n 4 above) 20.

the heavy politicisation of this principle, which leads to tension with article 2 TEU.

A bold or a self-serving court?

It has been emphasised that:

> The question of the legal status of norms of European Union law within the legal order of the Member States of the European Union is an evergreen in European legal studies.[71]

It is often forgotten, however, that the EU's legal order that we know today was shaped by judicial activism.

The remarkable evolution of ECJ's jurisdiction

The ECJ was originally modelled after the French Conseil d'Etat.[72] The Conseil d'Etat, in its judicial role, ensures that the French Government stays faithful to legislation – similarly, the ECJ, as seen by the Treaty of Rome of 1957, was initially conceived as a court which would keep check on the powers of supranational institutions.[73] It has been asserted:

> The preliminary ruling mechanism did not authorize the ECJ to review the compatibility of national law with European law ...[74]

This was a role meant for the European Commission under its infringement proceedings prerogative (article 89 of the Treaty of Rome).

Nevertheless, through bold interpretation of article 177 of the Treaty of Rome, which then defined ECJ powers to render preliminary rulings, the ECJ self-increased its jurisdiction. Namely, from the 1960s onwards, the ECJ started creating tools which not only helped it to transform the EU legal system, but also to encourage national courts to monitor compliance with EU law on a national level.[75] One of these tools is the principle of 'direct effect' which emerged from the *Van Gend En Loos v Administratie der Belastingen* judgment.[76] It provides that: 'Union law may provide rights and obligations to individuals, as well as Member States, which may be enforceable before national courts.'[77]

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71 B de Witte, 'Direct effect, primacy and the nature of the legal order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* 3rd edn (Oxford University Press 2021) 187.

72 K J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 6.

73 Ibid.

74 Ibid 10.

75 Ibid 17.

76 Case 26/62 *Van Gend En Loos v Administratie der Belastingen*, 5 February 1963.

77 K Davies, *Understanding European Union Law* (Routledge 2019) xxviii.

A second tool in the rich arsenal, which the ECJ developed for itself, is the doctrine of supremacy which emerged from the *Costa v ENEL* judgment.[78] According to this principle, 'where Union law and national law conflict, Union law will take precedence'.[79] In *Costa* itself, the ECJ stressed that 'domestic legal provisions, however framed' could not override EU law.[80] Professor Weatherill has highlighted the rigidity of this formulation: 'Even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm.'[81] The *Van Gend En Loos* and *Costa* judgments are seen as the harbingers of the 'new legal order' which the ECJ committed to developing and protecting.[82]

The role of the principle of autonomy

In the above context, one can better appreciate that, initially, the principle of autonomy had an 'internal dimension' aiming to shield the developing EU legal order from national challenges.[83] From the 1990s onwards, however, the ECJ started developing the 'external dimension' of this principle whose purpose is to defend the EU's mature legal order from international interferences.[84] The rationale behind the principle of autonomy is the uniform interpretation of EU law:

> ... no other court may be given jurisdiction to interpret EU law in a manner which would be binding on the European Union or its institutions.[85]

It has been contended, however, that this relatively new external dimension of autonomy is heavily politicised.[86]

Finally, the Treaty of Lisbon, which entered into force in 2009, broadened the jurisdiction of the CJEU in primary EU legislation.[87] Yet, the CJEU's bold interpretation moves continued. While arbitration lawyers have already accused the CJEU of 'legal imperialism',[88] some constitutional lawyers also argue that this court could indeed be

78 Case 6/64 *Flaminio Costa v ENEL*, 15 July 1964.
79 Davies (n 77 above) xxxiii.
80 *Flaminio Costa v ENEL* (n 78 above) para 3.
81 S Weatherill, *Law and Integration in the European Union* (Oxford University Press 1995) 106.
82 Alter (n 72 above) 186.
83 Koutrakos (n 9 above) 44.
84 Ibid.
85 T Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) 80.
86 Koutrakos (n 9 above) 42.
87 Pech (n 13 above) 316–317.
88 Müller (n 7 above).

'selfish'.[89] What once appeared to be bold interpretation moves may now also be seen as self-serving manoeuvres since the ultimate result is that the CJEU prioritises the protection and even expansion of its jurisdiction over the defence of foundational values, such as the rule of law.

Achmea: did politics enter the courtroom?

In this context, *Achmea* can be seen as one the culminations of the politicisation of the principle of autonomy in CJEU case law. The case concerns a dispute between a Dutch insurance company, Achmea, and the Slovak Republic. Achmea offered private sickness insurance via a subsidiary on the Slovak market, but subsequently suffered damage after the Slovak Government changed policy and took measures to reverse the liberalisation of the Slovak insurance market. Achmea instituted arbitration proceedings in Germany pursuant to the Netherlands–Czechoslovakia BIT signed in 1991. An arbitral award was rendered in 2012, but the Slovak Government sought to set it aside in Germany – the German court made a preliminary reference inquiring about the compatibility of articles 267 (the preliminary reference prerogative) and 344 TEU (the monopoly on the application and interpretation of EU treaties) with the BIT in question.

There are particularities of context which indicate that the CJEU's conclusions may have been politically motivated. Notably, leading arbitrators, such as Emmanuel Gaillard, have accused the CJEU of succumbing to lobbying:

> It is hardly credible that such a decision was not influenced by NGOs after they vehemently criticised the investor–state dispute settlement system in place for the last decade. The court would have found other ways to deal with the issue before it if it had not been for their lobbying.[90]

While the CJEU is not bound by the opinions of Advocate Generals, it is also thought-provoking that in the *Achmea* case Advocate General Wathelet expressed profoundly different views from the court.[91] He argued that 'no arbitral award can be enforced without the assistance of the State'.[92] Essentially, at the enforcement stage, national courts can review the compliance of the award with EU law. In case they do

89 B de Witte, 'A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing 2014) 46.

90 E Gaillard, 'The myth of harmony in international arbitration' (*Lalive Lecture* 5 July 2018)

91 Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16 *Slowakische Republik v Achmea BV*.

92 Ibid para 238.

not, the European Commission can initiate infringement procedures against the member state in question.

More importantly, Wathelet diplomatically referred to the inexplicable radical change in attitude demanded by the European Commission. He reminded that in earlier case law concerning the compatibility of arbitral awards with EU law, neither the European Commission nor member states showed concern about the arbitrability of the matters in question.[93] Meanwhile, in those earlier cases, the CJEU did not consider the arbitrability of the dispute, but directly answered the questions raised by national courts.[94]

Indeed, while the European Commission or EU member states are entitled to change their political views, it may, at first glance, appear striking that the CJEU played along by hiding behind a seemingly sophisticated European constitutional wrapping. The CJEU ruled that the BIT in question had 'an adverse effect on the autonomy of EU law'.[95] It was troubled that the jurisdiction of the arbitral tribunal envisaged by the BIT related to the interpretation of EU law while the arbitral tribunal was not part of the judicial system of the EU. Thus, in the eyes of the court, the BIT called into question the principles of mutual trust and sincere cooperation.[96] The CJEU clarifies:

> EU law is thus based on the *fundamental premise* that each Member State shares with all the other Member States, and recognises that they share with it, a set of *common values* on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of *mutual trust* between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the *principle of sincere cooperation* set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.[97]

Critics have deemed that the CJEU's legal reasoning in *Achmea* is 'formalistic' and 'hostile to the harmonious co-existence between EU and international law'.[98] They have also asserted that:

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93 Ibid paras 242–243; Wathelet refers to C-536/13 *Gazprom*, 3 May 2015 and C-567/14 *Genentech*, 7 July 2016.

94 *Gazprom* and *Genentech* (n 93 above).

95 C-284/16 *Slowakische Republik v Achmea BV*, 6 March 2018, para 59.

96 Ibid para 58.

97 Ibid para 34; emphasis added.

98 Koutrakos (n 9 above) 42.

> In essence, the judgment may appear to suggest that every time an EU law issue pertains to a dispute before any international tribunal, the autonomy of the EU legal order would be at stake and the Court's *exclusive* jurisdiction should be triggered.[99]

Below we argue that the reasoning can be criticised from a rule of law standpoint, too. The 'fundamental premise' that EU members share the same values is an ideal that member states aspire to – mere joining the EU does not guarantee that member states enforce these values in practice. If one can draw a parallel with contract law – the mere signing of a contract neither means that the promissor intends to perform it, nor that it will perform it. The good faith of the promissor is evaluated based on facts rather than based on presumptions. To this end, it is important to stress that the ECtHR has warned that there should be limits to mutual trust in EU law when fundamental rights are at stake in order to respect the European Convention on Human Rights (ECHR).[100] Thus, for instance, mutual recognition should not be applied 'automatically and mechanically'.[101]

Overall, if there are serious grounds to suspect that an EU member state does not respect the principle of sincere cooperation, insisting on the enforcement of the principle of mutual trust may be deemed to undermine article 2 TEU.

The CJEU's stance and the rule of law

It is well-established that:

> primacy of EU law is a legal reality only to the extent that national courts accept the role allocated to them by the ECJ, and the practice shows that this acceptance, so far, is selective and generally based on the national courts' own constitutional terms.[102]

Beyond the tension between national constitutions and EU law, the primacy of EU law may be ignored for an array of mundane issues with which young democracies struggle and which would not be familiar to constitutionalists analysing mature democracies – from disinterest in EU law by national judges to court capture (see section 2 above).

Sadly, the protection of the CJEU's jurisdiction and its pretence for purity of interpretation of EU law is illusory. An impartial and lawfully composed arbitral tribunal is better placed to apply EU law in good faith than incompetent, partial or corrupt national judges. Yet, in practice, the CJEU often prefers maintaining appearances rather than protecting fundamental rights and defending judicial independence.

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99 Ibid 51.

100 *Avotiņš v Latvia* Application no 17502/07, 23 May 2016, para 114.

101 Ibid para 116.

102 de Witte (n 71 above) 227.

The sad reality: procedure often trumps substantive human rights

The CJEU has already faced burning criticism by rule of law scholars Professor Kochenov and Professor Bard for its

> astonishingly short-sighted approach chronically valuing procedural EU law above the essence of substantive human rights.[103]

These academics lament the advancement of diverse standards of judicial independence depending on context by the CJEU,[104] which not only dilute and undermine the conception of judicial independence itself, but which are also lower than the gold standard stemming from the ECHR – namely the 'tribunal established by law' one envisaged in article 6 of the ECHR and further developed in ECtHR case law.[105]

Indeed, some cases which are not directly related to *Achmea*, are revealing of the values of the EU order which the CJEU purports to develop. One of the most striking examples showing how far the CJEU is willing to go to defend mutual trust at the expense of the protection of fundamental rights and judicial independence is *L and P*,[106] which concerned a preliminary reference by a Dutch court in relation to the execution of a European arrest warrant issued by Polish authorities. At the material time, the rule of law crisis in Poland was clearly identified by the European Commission, too (section 2 above). Despite this, the CJEU held that the existence of 'systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State' does not affect the execution of every request for extradition for this would mean extending the limitations placed on mutual trust beyond exceptional circumstances.[107]

Legitimising non-judges

Relatedly, *Getin Noble Bank* may be seen as an illustration of the CJEU's unhealthy obsession with the promotion of judicial dialogue via preliminary references.[108] The court held that 'irrespective of composition', '[i]n so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed'[109]

103 D Kochenov and P Bard, 'Kirchberg salami lost in Bosphorus: the multiplication of judicial independence standards and the future of the rule of law in Europe' (2022) Journal of Common Market Studies 150–165, 159.

104 The CJEU has considered judicial independence in different contexts – in relation to European arrest warrants, judicial appointments, disciplinary proceedings against judges, etc.

105 Kochenov and Bard (n 103 above); for the ECtHR's standard, see *Astradsson v Iceland*, Application no 26374/18, 12 March 2019.

106 Joined Cases C-354/20 PPU and C-412/20 PPU *L and P*, 17 December 2020.

107 Ibid paras 41–43.

108 C-132/20 *Getin Noble Bank*, 29 March 2022.

109 Ibid para 69.

that requirements, such as 'established by law', applying the rule of law, and being independent, are met.[110] Even more problematic is the conclusion that such a statement can only be rebutted:

> where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law.[111]

In this case, the CJEU gladly accepted a request for a preliminary reference by a Polish supreme court judge appointed by a procedure marked by manifest irregularities identified by the CJEU itself in C-824/18,[112] despite protests by the Polish ombudsman who intervened in the case to argue that the judge in question was not 'a "court or tribunal" within the meaning of EU law'.[113]

The 'non-judge' in question was clearly abusing the preliminary reference procedure to attack the independent Polish judges who had ruled at the appeal level – he asked provocative questions, including whether a judge appointed during communism could be deemed independent. His request was clearly part of a political agenda seeking to legitimise the 'non-judges' appointed by the Polish Government as part of its controversial law reform aimed at capturing the courts. As put by Professor Pech:

> the fake judges [that the Polish Government] unlawfully put in place can … seek to legitimise themselves by seeing their (bogus) requests for a preliminary ruling heard and decided by the ECJ.[114]

What can the above cases tell us about the future of investment disputes taken to national courts? The fact that the CJEU is willing to sacrifice fundamental rights in a sensitive area, such as criminal law, at the altar of the presumption of mutual trust gives a taste of what fruit preliminary references in relation to investment disputes taken to courts in countries with severe rule of law deficiencies might bear in the future. For instance, if an independent judge in a country with rule of law deficiencies relies on the preliminary reference procedure to ask if a seemingly captured lower court was a tribunal established by law, one can reasonably assume that mutual trust will prevail. Meanwhile, the CJEU may be tempted to legitimise other 'non-judges' in the future by declaring their requests for preliminary rulings

110 Ibid para 66.

111 Ibid para 72.

112 C-824/18, *AB, CD, EF GH, IJ v Krajowa Rada Sądownictwa*, 2 March 2021.

113 C-132/20 *Getin Noble Bank*, 29 March 2022, para 62.

114 L Pech, 'Polish ruling party's "fake judges" before the European Court of Justice: some comments on (decided) Case C-824/18 AB and (pending) Case C-132/20 Getin Noble Bank' (*EU Law Analysis* 7 March 2021).

admissible. It is questionable if these perspectives may inspire trust in the EU's legal order amidst the investment community. Rather, it is clear that litigating before national courts is not a viable alternative to investment arbitration. As explained in the introduction, the main role of BITs is to reduce political risk and to provide aggrieved parties with an impartial mechanism for dispute resolution in lieu of non-independent local courts.

THE AFTERMATH

Achmea served as a basis for subsequent case law throwing down bolder gauntlets to investment arbitration. In its *Komstroy* judgment of 2021,[115] the CJEU demonstrated its activism yet again – while the dispute in question did not concern EU member states, it used the opportunity to elaborate further on *Achmea*'s implications and held that the arbitration system under the Energy Charter Treaty (ECT) was incompatible with EU law.[116] In *Commission v European Food SA and Others*,[117] the CJEU set aside a judgment by the General Court to overtly expose the ICSID Convention as incompatible with EU law.[118]

Meanwhile, *Achmea* also provided an impetus for an even more aggressive attack against intra-EU investment arbitration by the European Commission which pushed EU member states to sign an Agreement for the Termination of Bilateral Investment Treaties, which essentially puts an end to intra-EU investment arbitration.[119] Not only is *Achmea* explicitly mentioned in the Agreement's preamble, but it is also emphasised that:

> investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties.[120]

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115 C-741/19 *République de Moldavie v Komstroy LLC*, 2 September 2021.

116 Ibid para 66. This judgment was handed down at a time when the European Commission was already tired of trying to negotiate the modernisation of the ECT in view of climate policy considerations. Subsequently, in 2023, the Commission put forward a proposal for the EU's withdrawal from the ECT based on a number of policy grounds, including the protection of the autonomy of the EU's legal order. The EU formally withdrew from the ECT in 2024. See European Commission, 'Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty', COM(2023) 447 final (7 July 2023). See also Council of the EU, 'Energy Charter Treaty: Council gives final green light to EU's withdrawal' (Website of the Council of the EU 30 May 2024).

117 Case C-638/19 *P Commission v European Food SA and Others*, 25 January 2022.

118 Ibid para 142 and subsequent.

119 [2020] OJ L 169, 1–4.

120 Ibid emphasis added.

Furthermore, it is noteworthy that the preamble reminds that:

> every Member State must ensure that its courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection …[121]

This section discusses several cases from Croatia and Bulgaria, which gave rise to ICSID and ECtHR proceedings, to show how detrimental the consequences of the EU's policies vis-à-vis intra-EU investment arbitration may be for investors in the future. It is worth noting that both of these countries face challenges in the area of judicial independence years after their EU accession. According to the findings of the 2023 EU Justice Scoreboard, 38 per cent of Croatians rate the independence of national courts as 'fairly bad' while 35 per cent rate it as 'very bad'.[122] Meanwhile, 31 per cent of Bulgarians rate the independence of national courts as 'fairly bad' and 27 per cent of them rate it as 'very bad'.[123] Beyond subjective perceptions of context, the concrete court decisions that gave rise to the above-mentioned proceedings may be criticised for being politically motivated and for disregarding the principle of the rule of law.

Lessons from ICSID and the Croatian Swiss franc saga

The unravelling of the Swiss franc controversy in Croatia is one of the fascinating examples which show that investment arbitration can indeed be a safety valve when national governments take politically motivated decisions inflicting severe damage on investors, or when national courts hand down controversial judgments depriving investors of any remedy. In fact, these cases also reveal that investors may rely on ICSID arbitration as a last resort, after having exhausted all or most remedies at the national level and after having exposed the incapacity of the justice system to defend investor rights.

This section briefly outlines the huge challenge which the Swiss franc controversy dealt in Central and East European (CEE) countries and then explains why, at the end, ICSID arbitration was the only effective defence against Croatia's radical policies.

The Swiss franc controversy

The Swiss franc controversy emerged as a result of the decision by the Swiss National Bank (SNB) to unpeg the Swiss franc from the euro

121 Ibid.

122 See Eurobarometer, 'Flash Eurobarometer 519: perceived independence of the national justice systems in the EU among the general public' (*Eurobarometer* June 2023).

123 Ibid.

in 2015.[124] This caused a significant appreciation of the Swiss franc which, in turn, affected hundreds of thousands of citizens in CEE countries who had taken out loans, including mortgages, denominated in Swiss francs or loans denominated in the local currency with a currency clause in Swiss francs.[125] Taking out loans in Swiss francs was popular in these jurisdictions for many reasons, including the lower interest rates on such mortgages compared to the interest rates on mortgages in euros or in the local currency. Following SNB's decision, these borrowers experienced financial shock – many of them were threatened with losing their housing and were driven to psychological despair.

Yet, it is interesting that different countries reacted to this challenge in distinct ways. This can be explained with the uncertainty regarding the *nature* of the issues which arose due to the unpegging of the Swiss franc. For some, what happened is a failure of financial regulation – the European Central Bank (ECB), for instance, had been warning about the dangers of accumulation of foreign-denominated loans for years.[126] Others considered solutions in general contract law (change of circumstances, mistake, negotiations in good faith, etc) and consumer law (unfair terms).[127]

The initial chaotic response by national institutions showed that the answers were not clear cut. In Serbia, for instance, the central bank quickly intervened in early 2015 with a decision obliging banks to offer borrowers four options – two of them involved the conversion of the loans in question into euros and two of them involved offering better conditions on the same loans.[128] In Bulgaria, by contrast, the central bank remained silent – instead the Commission for the Protection of Consumers looked for compromise solutions.[129]

The solution crafted by Croatia may be viewed as radical because lenders were delivered blows by both the Croatian Parliament and the Croatian court system. In 2015, the Croatian Parliament enacted legislative amendments allowing borrowers to convert their loans into euros *retroactively* despite severe warnings by the ECB that such

124 For an overview, see R Vassileva, 'Monetary appreciation and foreign currency mortgages: lessons from the 2015 Swiss franc surge' (2020) 28(1) European Review of Private Law 173–200, 174–175.

125 For estimates, see E Miscenic, 'Currency clauses in CHF credit agreements: a "small wheel" in the Swiss loans' mechanism' (2020) 9(6) Journal of European Consumer and Market Law 226–235, 234.

126 Vassileva (n 124 above) 181.

127 Ibid 176–182.

128 National Bank of Serbia, 'Decision on measures to preserve the financial stability related to loans indexed in foreign currencies' (*National Bank of Serbia* 24 February 2015).

129 Vassileva (n 124 above) 182.

an approach not only violates the principles of legal certainty and legitimate expectations, but may also affect the financial stability of the country.[130] The ECB was especially worried that Croatia attributed losses of more than €1.1 billion to the banks.[131] Moreover, one may suspect that this solution was meant to make up for failures of Croatia's central bank to take adequate measures to reverse the accumulation of such loans. In January 2015, when the SNB unpegged the Swiss franc, the public stance of the Croatian National Bank itself could be deemed a case of Pontius Pilate washing his hands – it issued a statement presenting various policy options but concluded that the choice between such options was 'primarily … *political* … due to the nature of such decisions'.[132] Affected banks and other interested parties tried to challenge the retroactive conversion before Croatia's constitutional court, which, however, declared the requests for constitutional review inadmissible citing 'social justice' as a primordial value of Croatia's Constitution and attacking the ECB's stance.[133]

The second blow to banks was delivered via litigation initiated by consumers. It should be noted that in many CEE countries, borrowers sought relief before national courts in view of the Unfair Terms Directive, arguing that the indexation clauses in their agreements constituted unfair terms, individually or in class action suits.[134] A detailed account of the nine-year long saga before the Croatian courts is beyond the scope of this article;[135] however, it is worth pointing out that the aftermath is that the interest rates in these foreign-denominated loans were deemed to be unfair terms, so they were struck out. Hence, in addition to the retroactive conversion, the loans ended up being 'free' for borrowers, inflicting further losses on the lenders.

ICSID as the only hope for justice

Undoubtedly, challenges which have *huge social repercussions* invite political solutions. However, what is specific about the Croatian case is that the country did not seek a balanced solution considering the

130 European Central Bank, Opinion on the Conversion of Swiss Franc Loans CON/2015/32 (18 September 2015) 4–5.

131 Ibid 5.

132 Croatian National Bank, 'Some facts about loans in Swiss francs and some options for government intervention' Press Release 21 January 2015, 12, emphasis added.

133 Constitutional Court, 4 April 2017, U-I-3685/2015 et al. Constitutional Court, 4 April 2017, U-I-4455/2015.

134 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

135 For details, see E Miscenic, 'Croatian case "Franak": effective or "defective" protection of consumer rights?' (2016) Harmonius Journal of Legal and Social Studies in South East Europe 184–209. See also Miscenic (n 125 above).

interests of both lenders and borrowers – rather it imposed all negative consequences on all the foreign banks, thus attempting to transfer the hot potato abroad. Moreover, the national constitutional court supported the Government's radical policies regarding retroactive conversion, while violating the principle of legal certainty, which is a key facet of the rule of law.

Relatedly, the legal reasoning in the court judgments ultimately declaring that the indexation clauses in the loan agreements constituted unfair terms may be questioned, too. Scholars have already pointed out that these judgments show prejudices against banks, including a lack of understanding of how banks find foreign currencies on the interbank market, unrealistic expectations that banks should run on empathy rather than financial logic, and idealistic hopes that banks should acquaint their customers with simulations in academic papers.[136]

It is thus not surprising that many of these banks initiated proceedings against Croatia before ICSID stepping on intra-EU BITs. Three of these cases have already been discontinued – *OTP Bank plc v Republic of Croatia invoking the Croatia-Hungary BIT*,[137] and *Erste Group Bank AG and Others v Republic of Croatia*[138] and *UniCredit Bank Austria AG and Zagrebačka Banka dd v Republic of Croatia*,[139] both of which invoke the Austria–Croatia BIT. At the time of writing of this article, three of them are still pending – *Adria Group BV and Adria Group Holding BV v Republic of Croatia*[140] invoking the Croatia–Netherlands BIT, *Société Générale SA v Republic of Croatia*[141]

136 Vassileva (n 124 above) 188–189 and 192; For example, the Commercial Court of Zagreb held that banks could have foreseen the appreciation of the Swiss franc as early as 1997 because of a paper published on the website of the International Monetary Fund (IMF), which discussed the possible effects of the European Monetary Union on Switzerland and in which the appreciation of the Swiss franc was one of the scenarios examined. According to the court, this proved that banks as well as their parent banks knew of the existence of such forecasts, but did not inform their customers of such scenarios when they took out their loans. See Commercial Court of Zagreb, 4 July 2013, P-1401/12, at 138–140: 'such claims by the court are purely speculative because the paper has a formal disclaimer that it does not present the views of the IMF. Moreover, the scenarios advanced by the authors are based on simulations – the paper stipulates that all simulations represent deviations from the baseline forecast in the IMF's World Economic Outlook 1996.' See D Laxton and E Prasad, 'Possible effects of European monetary union on Switzerland: a case study of policy dilemmas caused by low inflation and the nominal interest rate floor' (1997) IMF Working Paper No 97/23, 1 and 20.

137 ICSID Case No ARB/20/43.

138 ICSID Case No ARB/17/49.

139 ICSID Case No ARB/16/31.

140 ICSID Case No ARB/20/6.

141 ICSID Case No ARB/19/33.

invoking the Croatia–France BIT, *Addiko Bank AG* and *Addiko Bank dd v Republic of Croatia*[142] invoking the Croatia–Austria BIT.

The first three cases were discontinued pursuant to ICSID's (former) arbitration rule 43(1), which provides:

> If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

It is important to note that while the parties to these disputes did not choose to embody their settlement as an award as allowed by (former) arbitration rule 43(2), it is very likely that a confidential settlement on the financial terms of the discontinuance of proceedings was reached elsewhere.

In this light, the Croatian Minister of Finance has made public statements that 'the agreement reached [with the claimants] did not imply any further costs to the government'.[143] He also has stressed that the banks agreed to discontinue the proceedings because they 'recognized the government's efforts to improve the business environment and further align national legislation with EU standards and directives, as well as the steps taken towards adopting the euro'.[144]

However, to those acquainted with governments' tactical manoeuvres following ICSID settlements, this appears like a mere face-saving campaign designed to appease the general public given the strong anti-bank sentiment that had developed in light of the Swiss franc controversy.[145] An investor with a solid claim against a government would surely not be charitable, especially so late in the proceedings. Moreover, nothing prevents compensation to be made by a third party, thus avoiding the possibility of leaving traces of payment in the national budget which could lead to public backlash in such politically sensitive situations. As regards the motivation of the investors to settle, considering the timing, one may suspect that article 9 on 'Structured dialogue for pending arbitration proceedings' of the Agreement for the

142 ICSID Case No ARB/17/37.

143 Croatian Government, 'Croatia and six banks reach deal over CHF loan-related arbitration proceedings' (*Website of the Government of Croatia* 3 February 2021).

144 Ibid.

145 On concealed ICSID settlements and states' traditional tactical manoeuvres aimed at deceiving the public about the outcomes in ICSID cases, see generally R Vassileva, 'Investment arbitration and the rule of law: how transparency impacts on domestic accountability' in M Andenas and M Heidemann (eds), *From Assignments to Unfair Terms in Commercial Contracts and Arbitration* (Routledge 2024) 46–77.

Termination of Bilateral Investment Treaties was used by the Croatian Government as an arm-twisting tool.

Finally, as visible in the procedural details of the pending cases, Croatia has disputed ICSID's jurisdiction following the *Achmea* judgment.[146] Enforcing an ICSID award in a post-*Achmea* environment may already prove difficult. Thus, one may wonder if these investors would not be motivated to seek settlements in view of article 9 of the Agreement for the Termination of Bilateral Investment Treaties, too. Whatever the development, however, in all these cases investment arbitration was the last ray of hope for investors who were affected by imbalanced political decisions by the executive and who were left without effective remedies by the courts of an EU member state whose decisions seem politically motivated.

Lessons from the ECtHR

Without the possibility of recourse to investment arbitration, intra-EU investors will be in the shoes of local investors. The only remedy against arbitrary violations of their rights by national courts is an application to the ECtHR. Depending on circumstances, investors may argue a breach of their right to property[147] and/or a breach of their right to a fair trial (lack of due process).[148] However, the mounting criticism that the ECtHR tampers with admissibility when confronted with politically sensitive cases, the ECtHR's notoriously slow examination of applications, as well as its propensity to hand down judgments with a Pontius Pilate effect raise doubts as to whether an application to the ECtHR constitutes an effective remedy at all.

Admissibility hurdles and slow justice

The ECtHR has already been denounced for using admissibility as a façade for politically motivated decisions – it seems that the political considerations, including geopolitical imperatives, may be prioritised over flagrant human rights violations, and that this issue is not isolated.[149] Moreover, the recent entry into force of protocol 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms[150] has made it easier for judges to declare a

146 Procedural details on *Adria*; Procedural details on *Société Générale*; Procedural details on *Addiko*.

147 Art 1 of protocol 1 ECHR.

148 Art 6(1) ECHR, known as the civil limb of the right to a fair trial.

149 See, for instance, L Spencer, 'The ECtHR and post-coup Turkey: losing ground or losing credibility?' (*Verfassungsblog* 17 July 2018); B Thavard, 'The admissibility hurdle: an evolving façade for politically motivated application rejections by the ECtHR' (*Verfassungsblog* 27 May 2021).

150 On 1 August 2021.

case inadmissible. For instance, in article 35(3)(b) of the ECHR, the safeguard principle stipulating that 'no case may be rejected … which has not been duly considered by a domestic tribunal' was deleted. The current version of the article states that an application may be deemed inadmissible if the court establishes that 'the applicant has not suffered a significant disadvantage'.

Yet, decisions on admissibility are taken by a single judge who is not obliged to provide proper legal reasoning for their decision – such decisions are not subject to appeal, either.[151] Furthermore, the new criterion of 'a significant disadvantage' not only potentially delivers a blow to victims who were denied access to justice on a national level, but also seems malleable. Hence, it is not surprising that the reform implemented by protocol 15 has been criticised for undermining human rights.[152]

Beyond the admissibility hurdle, applicants are confronted with slow justice. Marketing materials published by the ECtHR diplomatically say that '[i]t is not possible to say how long it will take the Court, on average, to examine an application'.[153] Two pivotal cases from Bulgaria – *Capital Bank v Bulgaria*[154] and *Korporativna Targovska Banka v Bulgaria*[155] – concerning arbitrary withdrawals of banking licences by Bulgaria both took six to seven years to examine on the merits. Another case concerning a similar arbitrary expropriation of a bank – *International Bank for Commerce and Development v Bulgaria*[156] – took 11 years to examine.

Lessons from a case which gave rise to both ECtHR and ICSID proceedings

Korporativna Targovska Banka v Bulgaria is particularly interesting because it is illustrative of Bulgaria's long-standing rule of law challenges. The ECtHR admits that the case is almost identical to the other two earlier cases mentioned above – '[the bank's] situation was

151 Art ECHR; according to art 52A of the Rules of Court, such decision only contains 'summary reasoning'. In practice, the ECtHR has developed a habit of issuing 'single-judge rejections that are threadbare, with little to no reasoning included'. See J M Loveland, 'European Court of Human Rights single-judge decisions (still) deny justice and risk weakening UN treaty body system' (*Strasbourg Observers* 10 November 2020).

152 N Vogiatzis, 'The admissibility criterion under article 35(3)(b) ECHR: a "significant disadvantage" to human rights protection?' (2016) 65(1) International and Comparative Law Quarterly 185–211.

153 ECtHR's Public Relations Unit, 'Your application to the ECHR: how to apply and how your application is processed' 7.

154 Application no 49429/99, 24 November 2005.

155 Applications nos 46564/15 and 68140/16, 30 August 2022.

156 Application no 7031/05, 2 June 2016.

thus effectively the same as those of the applicant banks [in *Capital Bank* and *International Bank for Commerce and Development*]'.[157] Namely, 'the withdrawal of the licence was not surrounded by any safeguards against arbitrariness'.[158] Three similar cases seem to indicate a systemic problem in Bulgaria's justice system, which the country has failed to address.

In the *Korporativna Targovska Banka* judgment, the ECtHR established a dual violation of article 6(1) of the ECHR and a violation of article 1 of protocol 1 to the ECHR because Bulgarian courts neither allowed the bank's directors, nor its shareholders, nor its depositors to appeal against the licence withdrawal by Bulgaria's central bank, contrary to the established ECtHR case law against Bulgaria. Regrettably, however, the ECtHR assumed the role of a Pontius Pilate when it came to the remedy. In the eyes of the court, proceedings examining the legality of the licence withdrawal had to be reopened if the applicant requested them,[159] thus subjecting the applicant's fate to the whims of the same national court that had deprived it of any remedy and that has a history of stubbornly violating the ECHR on the same facts, most probably because of political considerations.

Even more importantly for our study, the facts of *Korporativna Targovska Banka* also gave rise to ICSID arbitration proceedings – *State General Reserve Fund of the Sultanate of Oman v Republic of Bulgaria*.[160] Specifically, the largest shareholder in the bank was a Bulgarian entity, so it could contest the arbitrary decisions by Bulgarian courts only before the ECtHR, while the second largest entity was the sovereign wealth fund of Oman which could step onto the Bulgaria–Oman BIT and initiate proceedings before ICSID.

While both the ECtHR and the ICSID proceedings were initiated in the same year (2015), there are notable differences between how they unravelled. First, the ICSID proceedings were completed faster – in 2019 – while the judgment in the *Korporativna Targovska Banka* case was handed down only in 2022.[161] Second, while the procedural details do not overtly mention this, the fact that *State General Reserve Fund* ended with an award before hearings were even conducted indicate that the case was discontinued pursuant to (former) arbitration rule 43(2)

157 Applications nos 46564/15 and 68140/16, 30 August 2022, para 187.
158 Ibid.
159 Ibid para 201.
160 ICSID Case No ARB/15/43.
161 Ibid.

on 'Settlement and discontinuance'.[162] Third, following the conclusion of the ICSID proceedings, Bulgaria engaged in a large-scale marketing campaign trying to deceive the public that the arbitral tribunal had decided in its favour while the tribunal had not ruled on the merits at all, as visible from the excerpts that were subsequently published on ICSID's website.[163] It seems likely that a confidential settlement was reached between the ICSID claimant and Bulgaria elsewhere. In other words, while it is very likely that the ICSID claimant has already received compensation for the damage it suffered as a result of the arbitrary actions of Bulgarian institutions, the applicants in *Korporativna Targovska Banka* are still litigating before Bulgaria's compromised national courts following the ECtHR's judgment paving the way to the reopening of the proceedings examining the legality of licence withdrawal.

The important divergences in outcome between the ECtHR and the ICSID proceedings in this case illustrate why the ECtHR may not effectively protect investor rights. They also seem to give a foretaste of what lies ahead. In the future, intra-EU investors may share the same ill fate as local investors in countries with rule of law deficiencies – this prospect on its own may deter investment. Moreover, to ensure equality, non-discrimination and access to justice, which are intrinsic facets of the rule of law, one cannot be satisfied with levelling the playing field by subjecting investors to the same ill treatment as local investors. Rather, it seems that there is a palpable need to craft solutions that provide effective protection against institutional arbitrariness and deprivation of property rights to all investors, irrespective of their nationality.

CONCLUSIONS AND RECOMMENDATIONS

The concerted attack against intra-EU investment arbitration by EU institutions ignores the complex political reality in the EU. It delivers a blow to the EU's own rule of law by leaving the rights of EU investors in the hands of national, albeit EU, courts whose impartiality and freedom from *political* interferences may be questioned.

While the European Commission argues that its policy aimed at putting an end to intra-EU arbitration counters discrimination and levels the playing field, the ultimate effect is the opposite. The European Commission has, unfortunately, shown that it gives precedence to

162 Ibid; rule 43(2) stated: 'If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.'

163 See Excerpts of Award in ICSID Case No ARB/15/43.

political rather than legal considerations in the accession process, and has a history of supporting the accession of EU member states which do not fulfil the criteria on the rule of law. Moreover, it has failed to prevent and curtail rule of law backsliding and assaults on judicial independence in some EU members.

In parallel, the CJEU, which utilised the principle of the anatomy of EU's legal order as a weapon against intra-EU arbitration, not only has a track record of opportunistically self-increasing its jurisdiction, but also seems to prioritise procedural EU law over substantive human rights, going as far as legitimising and empowering judges not appointed according to law. This neither fosters compliance with article 2 TEU, nor promotes confidence amongst the investment community that investor–state disputes will be handled by an impartial tribunal.

Moreover, an examination of ICSID cases concerning CEE countries shows that investors often opt for investment arbitration as a last resort, after having exhausted all national remedies and after having been confronted with biased national courts. Absent such recourse to investment arbitration, intra-EU investors will only be left with the opportunity to submit applications to the ECtHR, which, as explained above, does not necessarily constitute an effective remedy against arbitrariness.

Hence, it seems high time to consider developing impartial adjudicative mechanisms for intra-EU disputes or even disputes between local investors and their state, instead of dooming these investors to confront compromised national EU courts. Such mechanisms do not have to rival EU's legal order.

The need for a new roof immune from political interference

Critical voices from within the arbitration community have already raised awareness of the necessity to find a new roof for intra-EU investment arbitration. It has been suggested that it can take the shape of 'specialised courts within the judiciary' of EU member states.[164] Alternatively, one can envisage a 'European investment court', which is either a chamber at the EU's General Court, or a separate EU court.[165] Both of these ideas, however, suffer from shortcomings from a rule of law lens.

One of the main ways in which rogue states compromise judicial independence is by appointing and promoting (non-)judges through captured judicial councils or flawed procedures – as seen in section 3

164 E Leikin et al, 'The future of intra-EU investment protection: an urgent call for a new roof and a level playing field' (*Kluwer Arbitration Blog* 7 November 2020).

165 As noted above, since 2015, the European Commission has been working towards establishing a MIC which will adjudicate disputes between EU members and third parties.

above, the CJEU does not shy away from legitimising non-judges by accepting to examine preliminary references from them. Meanwhile, the European Commission struggles to curtail the implementation of national policies aimed at capturing the judiciary which compromise the fairness of trials.

Even if specialised investment courts are set up in EU member states, they will not be immune from capture and political interference in states facing rule of law deficiencies. Hence, the idea of a European investment court, part of the EU's legal order, is more appealing. However, care should be taken as to how such a body is conceived to avoid the promotion of dual standards which undermine article 2 TEU.

Designing a new home for intra-EU investment arbitration

While the design of such a new home for investment arbitration requires careful study and attention going beyond the scope of this article, several recommendations can be made considering our findings. First, such a body, be it a separate court or a chamber of the EU's General Court, should respect the principle of equality before the law.[166] Namely, one should prevent a situation in which a local investor in a state with rule of law deficiencies is forced to appeal before compromised national courts and then be stuck in proceedings at the ECtHR for nearly a decade (as seen in section 4), while intra-EU investors in the same problematic state benefit from better protection in a specialised chamber or court at the EU level. If a new home is built, it should have jurisdiction to examine individual complaints against EU member states by EU citizens/EU legal entities, irrespective of their nationality.

Second, it seems that a separate court rather than a chamber at the EU's General Court is the better way forward because it can be built from scratch. It has already been pointed out that '[m]ost investor–state disputes are highly sophisticated, both legally and technically, and need specialist knowledge in the respective field'.[167] While undoubtedly one cannot have the same expectations about specialist knowledge vis-á-vis judges as vis-á-vis arbitrators, one can set more specific requirements about the credentials and experience of judges in

166 In steady case law, the CJEU has held: 'Equality before the law, set out in Article 20 of the Charter, is a general principle of European Union law which requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified.' Case C-101/12, *Herbert Schaible v Land Baden-Württemberg*, 17 October 2013, para 76. See also Case C-540/16, *Spika*, 12 July 2018, para 35.

167 Uzelac (n 25 above) 24.

such a specialised body than the rather broad requirements for CJEU judges.[168]

Finally, it is vital to dispel worries about judicial independence at the supranational level, too. For instance, it should be remembered that by virtue of article 26(4) of the ECHR the national judge elected in respect of the state being sued always sits in the chamber examining the case at the ECtHR, which raises doubts about conflicts of interest and even about the possibility of political interference.[169] Relatedly, the Statute of the Court of Justice of the European Union does not allow the challenging of a judge on the basis of their nationality.[170] However, the CJEU has already faced criticism for 'attracting political appointees'.[171] Moreover, some member states have been denounced for prioritising 'personal connections to the appointing executive and party credentials' when selecting their candidates.[172] These particularities of appointing judges do not inspire much trust. To alleviate fears of conflict of interest, especially given the nature of investment disputes and the size of claims, the procedural rules of a new body adjudicating disputes between investors and states should provide opportunities for parties to demand the recusal of judges based on nationality.

168 The requirements of art 253 of the Treaty on the Functioning of the European Union for the qualifications of judges are rather vague: such candidates should 'possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence'.

169 In early 2023, Turkish political refugees raised concerns about the perceived biases of the Turkish national judge at the ECtHR.

170 The last paragraph of art 18 stipulates: 'A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the court or from the chamber of a Judge of the nationality of that party.'

171 A H Zhang, 'The faceless court' (2016) 38(1) University of Pennsylvania Journal of International Law 71–135.

172 Ibid.