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C Baltag, A Stanič
The Future of Investment Treaty Arbitration in the EU, (Kluwer Law International, 2020), ISBN: 9789403512938, €170 (hardback)

*Trisha Mitra**

1 Introduction

Investment treaty arbitration in the EU is under attack, its very existence under threat. The decision by the Court of Justice of the European Union (CJEU) in *Slovak Republic* v. *Achmea BV* (*Achmea*)[1] was seen by many as the culmination of the debate regarding the compatibility between EU law and investment treaty arbitration; a debate started years ago by the European Commission (EC). However, many questions remain and become ever so important as investor state dispute settlement (ISDS) reform discussions occur in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.

Different players in the system – the CJEU, the EC, States, arbitral tribunals and national courts (both inside and outside the EU) – are grappling with these multifarious issues and will have to provide definitive answers to complex questions. What they have decided, and shall decide, will determine the future of ISDS in the EU. The release of this comprehensive book, edited by Crina Baltag and Ana Stanič, therefore cannot have come at a more crucial time.

In the subsequent sections, this book review provides a brief summary of each Chapter of the book as well as its contribution to the theme of the future of ISDS in the EU.

2 Back to the Basics

Chapter 1 recalls the goals underpinning the current investment protection regime. Professor Christoph Schreuer studies the factors that are crucial for a foreign investor to make an investment, including the existence of international investment agreements (IIAs). The Chapter reminds readers that IIAs create

* Associate, Shearman & Sterling LLP. The contents of this book review do not reflect the views of Shearman & Sterling LLP or its clients.

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

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(i) international standards for the protection of foreign investments, which are essential in the face of the vast police powers of a host State, and (ii) mechanisms to remedy breaches of these investment protections.

Local courts and diplomatic protection suffer from multiple drawbacks. At the worst of times, investment disputes have even led to international armed conflicts in the late 19th and early 20th centuries (for example, during the Suez Canal crisis and after the Cuban revolution leading up to the Cuban missile crisis). Investment treaty arbitration is therefore not only an effective, but also a peaceful alternative.

Lastly, the Chapter makes an interesting point about the gap in investment treaties between the European and African countries at the heart of the mass migration crisis, which could potentially be a solution to the issue by incentivising foreign investment into the African countries to aid economic development.

3 Decrypting the Effects of *Achmea* on the ECT

Chapter 2 analyses the impact of *Achmea* on intra-EU disputes arising out of the Energy Charter Treaty (ECT) as well as on investment in the energy sector in the EU. Kim Talus and Katariina Särkänne summarize the decision in *Achmea* and the differing interpretations taken by the EC and arbitral tribunals. The EC believes that *Achmea* aims at ending all intra-EU investment arbitrations. Arbitral tribunals, however, have rejected jurisdictional challenges based on *Achmea* and have taken care to distinguish between intra-EU bilateral investment treaty (BIT) and ECT arbitrations. National courts too have differing approaches to enforcing intra-EU awards, for example, the *Bundesgerichtshof* (the German Federal Court of Justice) with respect to the *Achmea* award and the Svea Court of Appeal with respect to the *PL Holdings* award.[2]

Next, the Chapter analyses the all-important question of the impact of *Achmea* on ECT arbitrations from a treaty conflict standpoint and whether an amendment to the ECT is a possible solution to resolve conflicts between it and EU law. The Chapter concludes with a look at how the ongoing uncertainty may affect future investment in the EU energy sector.

Chapter 3 carries the discussion forward by taking an in-depth look at the ECT. Crina Baltag and Stefan Dudas trace the history and purpose of the ECT

2 *See*, Bundesgerichtshof, Beschluss vom 31. Oktober 2018, ZB 2/15; Svea Hövrätt, *PL Holdings* v. *Poland*, Mål nr T 8538-17 T 12033-17, DOM 2019-02-22.

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and the background to the ECT modernization discussions. The Chapter then considers the impact of the *Achmea* decision as well as the subsequent Declarations of the Member States dated 15 January 2019 on the ECT. Arbitral tribunals have thus far unanimously rejected the *Achmea* objection in ECT cases. The authors study the tribunals' reasoning, including the decision in *Eskosol* v. *Italy* where the tribunal addressed the Member States' Declaration in addition to the *Achmea* objection.[3]

Lastly, the Chapter looks at the future of investment protection in the EU in the context of ongoing ECT modernization discussions.

4 *Achmea* and the Future

Chapter 4 examines *Achmea* and the subsequent efforts by Member States to terminate their intra-EU BITs from a public international law as well as an EU law angle. Drawing from US constitutional law jurisprudence, Epaminontas Triantafilou and David Pusztai note that *Achmea* could have been decided differently if the CJEU had applied the 'as-applied' challenge instead of the 'facial' challenge. The Chapter then analyzes the incongruence between EU law and international law in relation to the legal norms addressed in *Achmea*, namely 'inapplicability', 'incompatibility', 'preclusion' and 'validity of offer'. The Chapter also takes a closer look at the Draft Termination Agreement of 24 October 2019[4] and its procedural and substantive effect on the investment protection framework in the EU.

Chapter 5 is dedicated to examining the investment protection framework under EU law. Emilie Gonin and Ronan O'Reilly review the existing protections available to investors under (i) the main fundamental freedoms under the Treaty on the Functioning of the European Union, namely, freedom of establishment and freedom of movement of capital, (ii) the Charter of Fundamental Rights, namely, freedom to conduct a business, protection of private property, prohibition of discrimination and rights to an effective remedy and to a fair trial, and (iii) the general principles of EU law, namely, legal certainty and

3 *See Eskosol S.p.A. in liquidazione* v. *Italian Republic,* ICSID Case No. ARB/15/50, Decision on Termination and Intra-EU Objection, 7 May 2019 <https://www.italaw.com/sites/default/files/case-documents/italaw10512.pdf> accessed on 5 July 2020.

4 The author understands that because of the date of publication of the book, many – but not all – Chapters were able to include the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020 in their analysis.

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legitimate expectation, proportionality and non-discrimination. The Chapter also details the three avenues for dispute settlement available to investors to enforce their rights under EU law: (i) infringement proceedings against the Member State, (ii) a request for preliminary ruling from the CJEU, and (iii) an action for damages before national courts.

5 Enforcing Awards in a Post *Achmea* World

Chapter 6, authored by Carlos Lapuerta & Jack Stirzaker, offers a fresh perspective on EU state aid law in the context of compliance with the *Micula*[5] and the Spanish renewable energy awards. State aid is primarily an issue related to EU competition law. This Chapter examines two questions: (i) do awards on damages distort competition in the market? and (ii) by not allowing compliance with the awards on damages, are Member States essentially being allowed to make windfalls off the back of "illegal" state aid, despite the fact that the investment protection was historically offered as an incentive to foreign investors? An insightful reasoning follows to justify the authors' view that the *Micula* award did not distort competition, with comparisons to other cases where the EC found that the transaction had not distorted competition. On the second question, the authors argue that the EC's implementation of state aid law would allow Member States to offer regulatory incentives to attract investment, like the Spanish Royal Decree 661/2007, and yet not have to pay awards on damages if the regulatory regime is modified in contravention of the IIAs (in the *Novenergia* enforcement proceedings, Spain has claimed that the Royal Decree was illegal state aid).[6]

In Chapter 7, James Hope & Therese Åkerlund provide an overview of the six intra-EU awards currently under challenge before Swedish courts. These are the awards in: *PL Holdings* v. *Poland*, *NovEnergia* v. *Spain*, *Foresight Luxembourg Solar* v. *Spain*, *Greentech* v. *Italy*, *CEF Energia* v. *Italy* and *Micula* v. *Romania*. The Respondent State in each of these cases has sought to set aside or challenge the enforcement of the awards relying on *Achmea*.

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5 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania* [*I*], ICSID Case No. ARB/05/20, Final Award, 11 December 2013 <https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf> accessed on 5 July 2020.

6 *See Novenergia II – Energy & Environment* (*SCA*) v. *Spain*, Civil Action No. 1:18-cv-1148, 16 October 2018, 'Respondent the Spain's Memorandum of Law in Support of Motion to Dismiss and to Deny Petition to Confirm Foreign Arbitral Award', United States District Court for the District of Columbia, pp. 1–2, 8, 30, 31.

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The *Achmea* decision has sparked discussions on whether Switzerland (which is not an EU Member State) would become the seat of choice for intra-EU arbitrations as well as the court of choice for the enforcement of intra-EU awards.

In Chapter 8, Nathalie Voser & Sebastiano Nessi explore the nuanced relationship between Swiss law and EU law. This forms the basis for an analysis of two questions: (i) whether *Achmea* affects the validity of an arbitration agreement in an intra-EU dispute seated in Switzerland, and (ii) whether *Achmea* affects the arbitrability of intra-EU disputes seated in Switzerland. The authors review Chapter 12 of the Swiss Private International Law Act (PILA) as well as national court jurisprudence to conclude in the negative to both questions. The Chapter also helpfully examines other relevant issues: whether tribunals seated in Switzerland have a duty to issue awards that can be enforced in the EU, whether the PILA allows Member States to raise jurisdictional objections based on *Achmea* and whether tribunals can re-examine their decision on jurisdiction based on *Achmea*.

Chapter 9, authored by Ana Stanič, takes a practical look at enforcement of intra-EU awards post *Achmea*. The Chapter first examines the temporal scope of the *Achmea* decision, which the EC as well as Member States believe has retroactive effect. It then reviews the enforcement mechanism under the New York Convention as well as the ICSID Convention and, in the case of the former, the potential grounds for refusal of enforcement. The author also examines the approach taken by English, Swedish, Swiss and US courts thus far and concludes by enumerating tips for strengthening the chances of successful enforcement of such awards.

The title of Chapter 10 ('How Do You Solve a Problem Like *Achmea*?: The Enforcement of Intra-EU Investment Agreement Awards in US Courts') is a possible "Sound of Music" reference – which is apt since, like the von Trapps, the US courts are navigating a treacherous path of enforcement post *Achmea*! The author, Jennifer Thornton, first describes the approach of the US District Court for the District of Columbia (US DDC) to the *Achmea* objection while confirming the *Micula* award.[7] She undertakes a close scrutiny of the scope of the "full faith and credit analysis" contemplated in 22 U.S.C. § 1650a and the decision of the Second Circuit in *Mobil Cerro Negro* v. *Bolivarian Republic of Venezuela*[8] on that issue. Taking the view that the "full faith and credit analysis" allows US courts to undertake a limited inquiry into the jurisdictional basis of an ICSID award, the author comments that the US DDC's hands-off approach

7 *See Micula* v. *Government of Romania*, No. 17-CV-02332 (APM), 2019 WL 4305533 (DDC, 11 September 2019).

8 *See Mobil Cerro Negro, Ltd.* v. *Bolivarian Republic of Venezuela,* 863 F.3d 96, 124 (2d Cir. 2017).

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was not appropriate. However, the author believes that even the correct test would have led to the same result in *Micula*. There are now other intra-EU awards pending enforcement before the US courts, most of these arise under the ECT. The Chapter considers the effect of the argument that the ECT tribunals lacked jurisdiction on US courts. Lastly, the Chapter reflects on the likely outcome of intra-EU awards under Chapter 2 of the Federal Arbitration Act, which implements the New York Convention in the US.

Chapter 11 considers the implications of *Achmea* on enforcement before courts in Singapore. Alvin Yeo and Swee Yen Koh hypothesize the likely issues that the Singaporean courts will wish to address if (i) in an arbitration seated in Singapore, a jurisdictional objection based on *Achmea* was raised, including compatibility within the meaning of Article 30 of the Vienna Convention on the Law of Treaties and whether the arbitration agreement in the Netherlands-Slovakia BIT qualifies as *lex specialis*, (ii) a contention that *Achmea* contravenes Singapore's public policy is raised in an attempt to set aside or resist enforcement of an award. The possible impact of *Achmea* on a future ASEAN dispute resolution mechanism is also considered.

Lastly, the authors examine the provisions of the EU-Singapore Investment Protection Agreement and comment on Opinion 1/17 of the CJEU, which has implications for extra-EU investment treaties such as the EU-Singapore Investment Protection Agreement.

6 ISDS Reform

China's increasing presence in global trade and investment plus the ongoing discussions on the EU-China Comprehensive Agreement on Investment[9] make it worthwhile to study China's attitude towards ISDS. Through Chapter 12, Wei Sun traces the three generations of China's IIAs and the foray of Chinese arbitral institutions into administering international investment disputes. The Chapter then considers China's contributions to the discussion on ISDS reform occurring at UNCITRAL Working Group III. China has signalled its support to a number of reform options: a permanent appellate mechanism, code of conduct for arbitrators (China supports the system of party-appointed arbitrators), mediation in place of arbitration, pre-arbitration consultation between the disputing parties and transparency in third party funding. These

9 *See* European Commission, 'EU-China Comprehensive Agreement on investment', 13 February 2020 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115> accessed on 15 June 2020.

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reform options have a context: the significant rise in Chinese investments in foreign countries and China's need to protect them.

The final chapter is a look into the EU's ISDS reform policy from the horse's mouth. Colin Brown (the Deputy Head of Unit F.2 – Dispute Settlement and Legal Aspects of Trade Policy in the Directorate General for Trade of the EC) recounts the discussions among Member States, the European Parliament and the EC that have framed the EU's investment and trade policy. These also give a background to the EU's proposal to set up a multilateral investment court (MIC), one of its main reform suggestions in the UNCITRAL Working Group III discussions. The Chapter then explains in great detail the policy rationale for a standing MIC.

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