

# **JUDICIAL PROTECTION AND INTERNATIONAL INVESTMENT ARBITRATION EU law perspective**

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**Panel 2: Judicial Protection and International Investment Arbitration in  
the Context of Bank Resolution**

**Petra NEMECKOVA**  
*Legal Service, European Commission*

*All views are personal.*

# INVESTOR-STATE ARBITRATION



- 1. ECJ jurisprudence vs arbitral tribunals**
- 2. Enforcement within and outside the Union borders**
- 3. A proactive response**

# 1. What the ECJ said

## Intra-EU cases – lack of jurisdiction

### C-284/16 Achmea

Investor-State arbitration clauses in international agreements concluded between the Member States of the European Union are contrary to the EU Treaties  
- Art. 19 TEU, Art 344 and 267 TFEU

### C-741/19 Komstroy

Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.

The ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties

### C-333/19 Romatsa

Any intra-EU arbitration award, including an ICSID award, rendered in violation of those findings, has to be set aside and, therefore, may not, in any event, be enforced in order to enable its beneficiaries to obtain payment of the damages which it awards them.

# 1. What the ECJ said

**Extra-EU cases – ok but no adverse effect on the autonomy of EU legal order**

**C-1/17 CETA**

**- intra-EU disputes out**

**- Extra-EU disputes :**

**DS tribunals possible but cannot have adverse effect on the autonomy of the EU legal order:**

**- DS tribunals cannot have the power to interpret or apply provisions of EU law other than those of the international agreement at stake**

**- DS tribunals cannot make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework**

**that could happen if the Tribunals were in a position to call into question the level of protection of a public interest that led to the introduction of specific restrictions by the Union with respect to all operators**

# 1. What the arbitral tribunals say

*“the decisions of earlier tribunals have been markedly inconsistent” [Eurus]*

**Electrabel:** EU law is to be treated as a ‘fact’ and is also to be classified as international law. In intra-EU disputes, ‘EU law would prevail over the ECT in case of any material inconsistency’.

**Eureko v. Slovak Republic:** The tribunal decided that it ‘can consider and apply EU law, if required, both as a matter of international law and as a matter of German law’ and it ‘does not have jurisdiction to rule on alleged breaches of EU law as such’.

**Novenergia, Masdar, Antin:** EU law is not applicable and irrelevant to the determination of the jurisdiction of the tribunal, also disregarded re the merits of the case

**Greenpower:** following *Achmea* and *Komstroy Judgment*, “this Tribunal considers that the offer of the Respondent, as an EU Member State, to arbitrate [...] a dispute with investors of another EU Member State which would, of necessity, require this Tribunal to interpret and apply the EU Treaties, is precluded. Therefore, there is no unilateral offer by the Respondent which the Claimants could accept.”

## 2. Enforcement

- **Within the Union borders: national courts consistently decline to enforce intra-EU awards**
- **Outside the Union borders: comity / deference / reciprocity**

### SWEDEN

- Svea Court of Appeal
- Supreme Court of Sweden (intra-EU awards against Poland and Spain)

### FRANCE

Paris Court of Appeal  
(intra-EU awards rendered against Poland)

### GERMANY

- Bundesgerichtshof – 27 July 2023
- Declaratory action possible under the ZPO ruling on the inadmissibility of the arbitration proceedings (that are in course)

### Enforcement cases brought before courts of 3<sup>rd</sup> countries entailing EU law questions

- USA, UK, Australia, Brazil, Israel, Switzerland
- questions of comity, deference, reciprocity

### 3. A proactive response

#### FIRST INSTRUMENTS

- State aid decisions
- Commission Communication on protection of intra-EU investment – 19 Jul'18
- 2019 Declarations on the legal consequences of *Achmea* and investment protection in the EU – 15 Jan'19

#### BIT Termination Treaty (2020)

- expressly removes the intra- EU BITs from the MS' legal orders

**Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty (2022)**