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THE INTRA-EU BIT DILEMMA AND THE ENFORCEMENT OF AWARDS OUTSIDE THE EU: A SOLUTION FOR INVESTORS AFTER THE CJEU SHUT THE DOOR TO THEIR CASES?

By
Denny Peixoto*

I. INTRODUCTION

Bilateral Investment Treaties ("BITs") are a recognized tool to incentivize the flow of investments through states by affording substantive protection to investors and their investments and establishing international investment arbitration as the investor-state dispute settlement mechanism.[1] Intra-EU BITs are BITs between members of the European Union ("EU").[2] Although BITs support the flow of foreign direct investment ("FDI")[3], the EU, by the post-2018 rulings of the Court of Justice of the European Union ("CJEU"), is determined to terminate intra-EU BITs.[4] Intra-EU BITs were introduced during the EU's expansion in 2004, and were an important step during the pre-accession of new members to the EU due to a feeling of "mistrust towards the legislative and judicial systems of these countries."[5] In 2018, the CJEU ruling in *Slovak Republic v. Achmea* determined that intra-EU BITs are incompatible with EU laws, signaling the decline of intra-EU BITs.[6] Since *Achmea*, other cases added to the CJEU's ruling, consolidating the idea that the EU is not an environment in which intra-EU BITs can flourish.

Foreign investors have their hands tied when it comes to seeking EU enforcement of awards based on intra-EU BITs. However, there is a possibility of an intra-EU BIT award being enforced in a jurisdiction outside the EU. The recognition and enforcement of intra-EU BITs in non-EU jurisdictions may be a powerful resource for foreign investors that are frustrated by the recent shift in the CJEU's jurisprudence.[7] The task of enforcing an award outside the EU is not easy. First, it demands an analysis of a jurisdiction in which the state has assets. Second, it demands a favorable jurisdiction to enforce an award that

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1. *See* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 3-4, 26 (2007).

2. *See* RUDOLF DOLZER ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 14 (2022).

3. *See* FRANCO FERRARI ET AL., INTERNATIONAL INVESTMENT ARBITRATION IN A NUTSHELL 1 (2020).

4. *See* DOLZER, *supra* note 2, at 14.

5. Fanou Maria, *Intra-EU Claims as an Objection to Jurisdiction*, JUS MUNDI, 2022, https://jusmundi.com/en/document/publication/en-intra-eu-claims-as-an-objection-to-jurisdiction#:~:text=An%20intra%2DEU%20BIT,State%20and%20a%20third%20State.

6. *See* DOLZER, *supra* note 2, at 14.

7. *See id.*

would not be recognized in the EU. This article focuses on the recognition and enforcement of intra-EU BIT awards outside the EU.

This article concludes that there are viable but scarce ways to circumvent the EU ban on intra-EU BITs by seeking enforcement in a jurisdiction outside the EU. However, any conclusion regarding enforcement will be fact-specific. In Section II, the article will present a background of intra-EU BITs, focusing on the paradigm cases. Section III explores the recognition and enforcement of intra-EU BITs in non-EU jurisdictions by introducing the provisions of the New York Convention and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention") and presenting real cases of investors seeking enforcement of intra-EU BIT awards outside the EU. Lastly, the article aims to answer whether the recognition and enforcement of intra-EU BITs outside the EU can be a valid option for investors.

II. BACKGROUND ON THE INTRA-EU BITS

A. The development of Intra-EU BITs

The origins of intra-EU BITs can be traced back to the Soviet Union's domination over Central Europe.[8] These treaties "were the first international legal instruments that provided liberalisation and protection for the eastward capital flow from Member States of the then European Economic Community."[9] The European Commission incentivized Central and Eastern European states to engage in such practice.[10] These agreements became the intra-EU BITs.[11]

The incorporation of intra-EU BITs into the European system created two distinctive situations.[12] First, a dual system of investor protection flourished: one provided by the EU Founding Treaties, and another based on the intra-EU BITs carried by Central and Eastern European states.[13] Second, the EU argued that these treaties interfere with EU general policies.[14] After the accession of these states to the EU, the European Commission

8. *See* Lénárd Sándor, *The Constitutional Dilemmas of Terminating Intra-EU BITs*, 3(1) CENT. EUR. J. OF COMPAR. L. 177, 179 (2022).

9. *Id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See* Sándor, *supra* note 8, at 179-80.

14. *See id.*

encouraged these states to terminate intra-EU BITs.[15] These shifts in the European Commission's opinions about intra-EU BITs created instability for foreign investors and their investments, culminating in the EU abolishing these treaties and denying enforcement within the EU in 2018, with the *Achmea* decision.[16]

B. The Fall of Intra-EU BIT: Slovak Republic v. Achmea BV (2018)

Slovak Republic v. Achmea BV was the first case in which the CJEU challenged an intra-EU BIT as a valid agreement.[17] The BIT, conducted between the Netherlands and Slovakia, allowed an investor from one state to bring an arbitration claim in the case of dispute with another state party of the BIT.[18] The CJEU ruled that the Treaty on the Function of the EU ("TFEU"), articles 267 and 344, preclude provisions in an international agreement such as article 8 of the BIT, which allowed international arbitration.[19]

Achmea, an enterprise from the Netherlands, established a subsidiary in Slovakia.[20] Later, Slovakia reversed its liberalization of the business and prohibited profit distribution.[21] Achmea brought an international arbitration action against Slovakia based on article 8, BIT, in Germany.[22] Slovakia objected to the tribunal's jurisdiction, alleging that article 8 was not compatible with the EU law, but the tribunal dismissed its claim.[23] In 2012, an award was rendered in Achmea's favor, and Slovakia sued before a German court seeking to set aside the award.[24] The German court decided to stay the proceedings and

15. *See* Sándor, *supra* note 8, at 179-80.

16. *See* Maria, *supra* note 5, ¶ 8.

17. *See* Sándor, *supra* note 8, at 178.

18. *See* Case C-284/16, Slovak Republic v. Achmea, (Mar. 6, 2018).

19. *See id.* ¶ 62. *See also* Treaty on the Functioning of the European Union art. 344 [hereinafter TFEU] ("The [CJEU] shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union"); *see also* TFEU art. 267 ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.").

20. *See Achmea*, C-284/16 ¶ 7.

21. *See id.* ¶ 8.

22. *See id.* ¶¶ 9-10. *See also* Neth.-Czech Rep. art. 8, Apr. 29, 1991, 2242 U.N.T.S. 205 [hereinafter Netherlands-Slovak Republic BIT] ("Each Contracting Party hereby consents to submit a dispute . . . to an arbitral tribunal.").

23. *See Achmea*, C-284/16 ¶ 11.

24. *See id.* ¶ 12.

request a preliminary ruling from the CJEU about the interpretation of articles 18, 267, and 344 of TFEU.[25]

In its ruling, the CJEU first noted that, under article 344 of the TFEU, "an international agreement cannot affect the allocation of powers fixed by the Treaties or . . . the autonomy of the EU legal system."[26] Second, the CJEU stated that article 267 of the TFEU guarantees a consistent interpretation of EU law[27] by creating the procedure of preliminary rulings and referrals to the CJEU from courts of member states.[28] Third, the CJEU reasoned that the arbitral tribunal that issued the award "cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of article 267 of the TFEU,"[29] and "is not therefore entitled to make a reference to the Court for a preliminary ruling."[30] These characteristics of the method chosen by the parties to solve international disputes could, in the CJEU's understanding, prevent these matters from the mandatory EU law.[31]

Accordingly, the CJEU ruled Article 8 of the intra-EU BIT between the Netherlands and Slovakia defied the principle of mutual trust between EU members, the autonomy of the EU laws[32], and therefore it is incompatible with the principle of cooperation.[33]

C. The Precedents After Achmea and the Change in the EU Practice

1. Vattenfall v. Germany (II) (2018)

After *Achmea*, other EU courts started interpreting its ruling. Some cases confirmed *Achmea*, consolidating the view that the EU is hostile to intra-EU BITs.[34] Others, such as

25. *See Achmea*, C-284/16 ¶¶ 1, 14, 23.

26. *Id.* ¶ 32.

27. *See id.* ¶ 37.

28. *See id.*

29. *Id.* ¶ 46.

30. *Achmea*, C-284/16 ¶ 49.

31. *See id.* ¶ 56.

32. *See id.* ¶ 59.

33. *See id.* ¶ 58.

34. *See* Case C-741/19, Republic of Moldova v. Komstroy LLC, (Sept. 2, 2021); Case C-109/20, Republic of Poland v. PL Holdings, (Oct. 26, 2021).

Vattenfall v. Germany, rejected *Achmea*'s ruling.[35] The award arose from Germany's objection to ICSID's jurisdiction based on the *Achmea* judgment.[36] The Tribunal rejected the supremacy of *Achmea*.[37] To reach this conclusion, the Tribunal considered (1) the applicable law; (2) the interpretation of the treaty involved; and (3) the conflict of laws.[38] First, the ICSID concluded that the applicable law regarding jurisdiction is the Energy Charter Treaty ("ECT") and the ICSID Convention interpreted based on the principles of international law established in the VCLT.[39] Furthermore, the ICSID concluded that *Achmea* could not be used to achieve a "harmonious interpretation of [a]rticle 26 ECT[40] that would exclude intra-EU investor-State arbitrations."[41]

Second, the ICSID ruled that article 26 of the ECT, interpreted under article 31 of the VLCT includes, without distinction, both EU and non-EU members.[42] This means that a contracting party to the ECT may be an EU member or not.[43] Third, the Tribunal ruled that "[a]rticle 16 ECT is *lex specialis* as a conflict of laws rule . . . [and] poses an insurmountable obstacle to [the] argument that EU law prevails over the ECT."[44]

Based on the reasons above, the ICSID rejected the application of the *Achmea* ruling, showing resistance by tribunals to recognize the end of the intra-EU BIT era. However, this was not a unanimous position. Other tribunals and courts later affirmed *Achmea*.

35. Vattenfall AB et. al v. Federal Republic of Germany (II), ICSID No. ARB/12/12 (2018).

36. *See Vattenfall AB*, ARB/12/12, ¶ 1.

37. *See id.* ¶ 232.

38. *See id.* ¶¶ 108, 169, 211.

39. *See id.* ¶ 166.

40. Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360 [hereinafter ECT] ("Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.").

41. *Vattenfall AB*, ARB/12/12, ¶ 167.

42. *See id.* ¶ 207.

43. *See id.*

44. *Id.* ¶ 229.

2. Moldova v. Komstroy (2021)

In *Komstroy*[45], the CJEU ruled that intra-EU arbitrations based on the ECT are not compatible with EU law.[46] Komstroy, the successor of Energoalians, a Ukrainian company, was in the electricity business in Moldova, which involved contracts with other businesses.[47] Energoalians tried to get payment from some of the companies it contracted with before Moldovan courts, but it was not successful.[48] The Moldovan government took steps that were considered breaches under the ECT, which motivated Komstroy to initiate the arbitration proceedings based on article 26(4)(b) of the ECT.[49] In 2013, an award was rendered in favor of Komstroy.[50] Moldova sued in a judicial court to annul the award based on public policy and stated that the arbitral tribunal should have declined jurisdiction.[51] The court stayed the proceedings and referred the case to the CJEU.[52]

The CJEU reasoned that the "EU law . . . stems from an independent source of law, . . . by its primacy over the laws of the Member States . . . [and] binding its Member States to each other."[53] CJEU noted that EU treaties intended to create a judicial system to guarantee uniformity when interpreting EU law.[54] Further, by stating that the ECT is an act of EU law, the CJEU concluded that "an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law."[55]

The CJEU used the same reasoning as *Achmea* when it stated that a matter involving EU members and EU law cannot be ruled on by an arbitral tribunal apart from the EU judicial system because of the danger of a lack of effectiveness of the law.[56] The

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45. *See Komstroy*, C-741/19.

46. *See* Clement Fouchard, Vanessa Thieffry, *CJEU Ruling in Moldova v. Komstroy: the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty (and a Restrictive Interpretation of the Notion of Protected Investment)*, KLUWER ARBITRATION BLOG (Sept. 7, 2021).

47. *See Komstroy*, C-741/19, ¶ 8.

48. *See id.* ¶¶ 9-11.

49. *See* ECT art. 26(4)(b) ("In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (b) a sole arbitrator or ad hoc arbitration tribunal.").

50. *See Komstroy*, C-741/19, ¶ 13.

51. *See id.* ¶¶ 14, 17.

52. *See id.* ¶ 19.

53. *Id.* ¶ 43.

54. *See id.* ¶ 45.

55. *Komstroy*, C-741/19, ¶ 50.

56. *See id.* ¶ 62.

Court found that, although in *Achmea* the issue involved a BIT, and in *Komstroy* it was a Multilateral Investment Treaty ("MIT"), the situations are similar because the ECT was intended to regulate bilateral relations.[57] Finally, CJEU reasoned that "although the ECT may require . . . Member States to comply with the arbitral mechanisms . . . in their relations with . . . third parties . . . the EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves."[58] The CJEU ruled in *Komstroy* that the ECT, article 26(2)(c), cannot be applied to disputes between an investor of a state and another member state in which the investor has investments.[59]

3. Poland v. PL Holdings (2021)

In 2021, the CJEU consolidated its position against the enforcement of intra-EU BIT awards in the EU. In *PL Holdings*[60], the Supreme Court of Sweden stayed the proceedings and requested a preliminary ruling regarding articles 267 and 344 of the TFEU to the CJEU.[61] The CJEU held that the arbitration clause in the BIT was contrary to EU law.[62]

The BIT was between Belgium, Luxembourg, and Poland.[63] PL Holdings, a company incorporated under Luxembourg law acquired the majority ownership of a bank in Poland,[64] had its voting rights revoked by Poland, which led the investor to initiate arbitration in the Stockholm Chamber of Commerce.[65] The arbitration award ruled that Poland should pay damages to PL Holdings.[66] Later, Poland brought an action in Swedish courts seeking to set aside the award for lack of tribunal's jurisdiction because the arbitration clause within the article 9 of the BIT was invalid and contrary to the EU law.[67]

57. *See Komstroy*, C-741/19, ¶ 64.

58. *Id.* ¶ 65.

59. *See id.* ¶ 66.

60. *See PL Holdings*, C-109/20.

61. *See id.* ¶¶ 1, 33.

62. *See id.*

63. *See id.* ¶ 3.

64. *See id.* ¶¶ 12-13.

65. *See PL Holdings*, C-109/20, ¶¶ 14-15.

66. *See id.* ¶ 21.

67. *See id.* ¶¶ 22-25.

In its preliminary ruling, the CJEU mentioned articles 4 and 7 of The Agreement for the Termination of BITs between the Member States of the EU as the basis for invalidating the arbitral proceedings between the parties.[68] This Agreement was made between some Member States of the EU based on the *Achmea* decision, and it stated that arbitration clauses of intra-EU BITs are inapplicable due to incompatibility with EU law.[69]

The CJEU restated the *Achmea* holding and held that articles 267 and 344 of the TFEU preclude (1) an investor from using an arbitration clause in an intra-EU BIT to bring proceedings against an EU member state; and (2) "[a] national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause."[70] Also, the Court relied on *Komstroy* to conclude that such an arbitration clause is against EU law because it challenges the jurisdiction of the EU judicial system.[71] Finally, the CJEU ruled that no limitation of temporal effects is possible if the award was rendered prior to the *Achmea* decision – 6 March 2018 – because in any case, it would represent a limitation of the effects of *Achmea* and EU law.[72]

4. The Agreement for the Termination of BITs between Members of the EU

After the *Achmea* decision, members of the EU signed a joint declaration in 2019 to show their commitment to terminating their intra-EU BITs.[73] This declaration led to the Agreement for the Termination of BITs between the Member States of the EU (The Agreement).[74] The Agreement has twenty-three parties and entered into force in August 2020.[75] Article 2 of the Agreement identifies the BITs that are terminated,[76] while article 4 establishes that arbitration clauses in the BITs are incompatible with and contrary to EU

68. *See PL Holdings*, C-109/20 ¶ 4.

69. *See id.*

70. *Id.* ¶¶ 44, 56.

71. *See id.* ¶ 45.

72. *See id.* ¶¶ 60, 62, 66.

73. *See* Sándor, *supra* note 8, at 178.

74. *See id*; *see also* Agreement for the Termination of BITs between Member States of the EU, May 5, 2020, EU Doc. A/T/BIT/en 1 [hereinafter EU Agreement to Terminate intra-EU BITs].

75. *See* European Commission, *EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties*, FINANCE.EC.EUROPA.EU, (May 5, 2020), https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en.

76. *See* EU Agreement to Terminate intra-EU BITs art. 2.

treaties and that such clauses cannot be used as a basis for arbitration.[77] Furthermore, article 6 determines that, despite article 4, the Agreement "shall not affect Concluded Arbitration Proceedings [or] . . . affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018."[78]

III. A SOLUTION TO INVESTORS: RECOGNITION AND ENFORCEMENT OF INTRA-EU BITS OUTSIDE THE EU

A. The New York Convention: Recognition and enforcement of awards[79]

After the rulings in *Achmea*, *Komstroy*, and *PL Holdings*, the EU closed its doors to intra-EU BITs, which was corroborated by the EU Agreement to Terminate intra-EU BITs.[80] Although the enforcement of intra-EU BIT awards in the EU is basically impossible, an investor may still try to recognize and enforce them in jurisdictions outside the EU. The first step is to assess the places where the respondent has assets. The second step is to analyze whether such jurisdiction is favorable to enforcing foreign awards.

An arbitral tribunal award has little practical value if not enforced by a national court.[81] The recognition and enforcement of awards are subject to the provisions of articles IV and V of the New York Convention.[82] Article IV presents the formal requirement that the investor must fulfill to seek enforcement of the award, which involves the supply of the original award and the original arbitration agreement.[83] This requirement does not mean that the investor must "demonstrate the existence of a formally or substantively valid arbitration agreement, applicable to the parties claims."[84] This is especially important in the context of the enforcement of an intra-EU BIT award because the investor does not need to prove that the intra-EU BIT is still valid between the parties.[85]

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77. *See* EU Agreement to Terminate intra-EU BITs art. 4.

78. *Id.* art. 6.

79. *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21.3 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

80. *See* EU Agreement to Terminate intra-EU BITs, *supra* note 74.

81. *See* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE 1121 (2019).

82. *See* New York Convention arts. IV-V.

83. *See id.*

84. VÁRADY, *supra* note 81, at 1157.

85. *See* EU Agreement to Terminate intra-EU BITs, *supra* note 74.

Article V of the New York Convention establishes the situations in which the recognition and enforcement of an award may be refused by a court.[86] The plain language of Article V(1) is clear that the court *may* refuse enforcement, rather than the court being obligated to do so.[87] Therefore, the court has the discretion to refuse the enforcement of foreign awards.

Second, the court may refuse enforcement based on article V(1) only "at the request of the party against whom it is invoked,"[88] which means that the court cannot act on its own regarding enforcement. However, article V(2) allows such action if the court "where recognition and enforcement is sought finds that: (a) The subject matter . . . is not capable of settlement by arbitration under the law of that country; or (b) [t]he recognition or enforcement . . . would be contrary to the public policy of that country."[89] Hence, the court may act voluntarily if the matter is not arbitrable in its country or if it is contrary to the public policy of its country. In any case, because article V(2)(a)-(b) depends on the public policy and matters within the own foreign state, the foreign court is not bound to deferential treatment towards the EU law and policies.

Article V(1) establishes the situations in which, at the request of the losing party, which has the burden of proof, the court may deny recognition and enforcement.[90] Here, article V(1)(a) and (e) are the relevant sections.

First, article V(1)(a) determines that the recognition and enforcement may be refused if there is proof that "the [arbitral] agreement is not valid under the law to which the parties have subjected it or . . . under the law of the country where the award was made."[91] Here, it could be argued that a foreign court may deny the enforcement of an intra-EU BIT award because it is against EU law, specifically articles 267 and 344 of the TFEU,[92] as ruled in *Achmea*, *Komstroy*, and *PL Holdings*. This interpretation is possible by understanding the last sentence of article V(1)(a)[93] as the EU law if the award was rendered in any EU state. Nonetheless, foreign courts have the discretion to enforce an award even in such case and to deny a deferential treatment to the EU courts, specifically the CJEU, and to the EU policies such as the Agreement to Terminate intra-EU BITs.[94]

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86. *See* New York Convention art. V(1).

87. *Id.*

88. *Id.*

89. *Id.* art. V(2).

90. *See* VÁRADY, *supra* note 81, at 1148.

91. New York Convention art. V(1)(a).

92. *See* TFEU, *supra* note 19.

93. *See* New York Convention art. V(1)(a) ("[T]he law of the country where the award was made.").

94. *See id.* art. V(1).

Second, article V(1)(e) allows a foreign state to deny recognition and enforcement if the award is not binding yet between the parties "or has been set aside or suspended by an . . . authority of the country in which . . . the award was made."[95] This represents a ticking clock situation for intra-EU BITs because if time has passed and the EU courts have already set aside or suspended the intra-EU BIT cases, or referred them to the CJEU, this could be used by a foreign court to deny recognition and enforcement of the intra-EU BIT award. Because *Achmea* was decided in 2018, it is probable that many EU courts have already decided issues regarding intra-EU BITs, which makes it more difficult for recognition and enforcement in a foreign state. Nonetheless, as mentioned above, Article V of the New York Convention gives the foreign courts the discretion to refuse recognition and enforcement but does not mandate that the courts act accordingly.[96]

Another relevant point that contemplates Article V subparagraphs (1) and (2) is the standard of review that the foreign court may have towards the arbitral tribunal that rendered the award: *de novo* or deferential.[97] Nothing in the plain language of article V indicates which standard of review should the court adopt, which [could or has] led to different treatment by foreign courts.[98]

B. The ICSID Convention: Recognition and enforcement of awards

Another possibility for the recognition and enforcement of the award from an intra-EU BIT is based on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").[99] However, the Convention is specific to ICSID awards and to state parties to the ICSID Convention, meaning that its application is more restrictive compared to the New York Convention. Article 53 of the ICSID Convention establishes that awards under the ICSID are binding, and the parties must comply with it "except to the extent that enforcement shall have been stayed."[100] Article 54 determines that the state party must recognize and enforce ICSID awards "as if it were a final judgment of a court in that State."[101]

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95. New York Convention art. V(1).

96. *See id.*

97. *See* VÁRADY, *supra* note 81, at 1157-58.

98. *See id.*; *see, e.g.*, Am. Constr. Mach. & Equip. Corp. Ltd. v. Mechanised Constr. of Pakistan Ltd. 659 F.Supp. 426, 429 (S.D.N.Y.) (adopting a deferential approach towards the arbitral tribunal to not substitute the award rendered by the arbitrators).

99. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

100. *See* ICSID Convention art. 54(1).

101. *Id.*

C. Practical application: The enforcement (or not) of intra-EU BIT awards outside the EU

1. Novenergia II v. Spain (2018)

In *Novenergia II v. Spain*, an award was rendered by the Stockholm Chamber of Commerce ("SCC") in 2018, holding Spain liable for the violation of article 10(1) of the ECT and granting the investor, Novenergia, damages of €53.3 million.[102] In the same year, the Svea Court of Appeal suspended the enforcement of the award upon Spain's request petitioned to the court.[103] In 2020, a Memorandum Opinion of the US District Court for the District of Columbia was rendered in which the court determined to stay the proceedings regarding the enforcement of the SCC award in the U.S. after Novenergia had petitioned the court to confirm the award under the New York Convention.[104]

The U.S. court decided to stay the enforcement mainly because of the case in the Svea Court of Appeals seeking to set aside the award.[105] The U.S. court reasoned that the outcome of the Swedish case may affect the case in the U.S. and "in the long run, a stay will still likely be shorter than the possible delay that would occur if this Court were to confirm the award and the [Svea Court of Appeal were to] . . . then set it aside."[106]

In December 2022, the Svea Court ruled in favor of Spain and held that the SCC arbitration award is against the general practice of the CJEU.[107]

In *Novenergia*, the ticking clock situation was decisive to the non-enforcement of the intra-EU BIT award in the U.S. because the existence of a prior judicial proceeding to set aside the award in Sweden justified the U.S. court to stay the proceedings to enforce the award.

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102. *See* Novenergia II v. The Kingdom of Spain, SCC Case No. 2015/063 ¶ 860 (2018).

103. *See* Svea Court of Appeal, 2018-05-16 4658-18 (Swed.), https://jusmundi.com/en/document/decision/sv-novenergia-ii-energy-environment-sca-grand-duchy-of-luxembourg-sicar-v-the-kingdom-of-spain-decision-of-the-svea-court-of-appeals-suspending-the-enforcement-of-the-award-until-further-notice-wednesday-16th-may-2018#decision_1596.

104. *See* Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain, No. 18-CV-01148 (TSC), 2020 WL 417794, at *1 (D.D.C. Jan. 27, 2020).

105. *See id*. at *2-3.

106. *Id*. at *4.

107. *See* Svea Court of Appeal, 2022-12-13 T 4658-18 43 (Swed.), https://jusmundi.com/en/document/pdf/decision/en-novenergia-ii-energy-environment-sca-grand-duchy-of-luxembourg-sicar-v-the-kingdom-of-spain-decision-of-the-svea-court-of-appeal-tuesday-13th-december-2022.

2. NextEra v. Spain (2019)

In *NextEra v. Spain*, an ICSID award was rendered in 2019 in favor of the investor, NextEra, and Spain was held liable to pay EUR 290.6 million for breach of article 10(1), ECT, regarding fair and equitable treatment.[108] In April 2020, in an annulment proceeding started by Spain, the Tribunal stayed the enforcement of the award.[109] In May 2020, the Tribunal rendered a decision terminating the stay, but did not mention the annulment proceedings.[110]

NextEra sought enforcement of the ICSID award in the U.S., and the U.S. District Court for the District of Columbia rendered a Memorandum Opinion in September 2020, determining the stay of proceedings in the U.S.[111] The court reasoned that judicial economy calls for a stay because the annulment proceedings in the ICSID were still pending and that it would be unwise to start analyzing EU provisions at this early stage.[112]

In March 2022, the ICSID rendered a decision dismissing Spain's application for annulment of the award for multiple reasons.[113] The Tribunal ruled that its "decision was based on a straightforward analysis of the ECT, the Vienna Convention, and the applicable rules and principles of international law"[114] and that this award was rendered two years prior to the CJEU judgment in *Komstroy*, which precludes the Tribunal from considering the CJEU's ruling.[115]

In February 2023, the U.S. District Court for the District of Columbia rendered another Memorandum Opinion after NextEra petitioned an injunction to prevent Spain from litigating in the Netherlands, which would enjoin NextEra from seeking an award's

108. *See* NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Award, ¶ 37 (May 31, 2019).

109. *See* NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Stay of Enforcement of the Award, ¶ 102 (Apr. 6, 2020).

110. *See* NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision Terminating the Stay of Enforcement of the Award, ¶ 16 (May 28, 2020).

111. *See* NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain, No. 19-CV-01618 (TSC), 2020 WL 5816238, at *2 (D.D.C. Sept. 30, 2020).

112. *See id.* at *3.

113. *See* NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Annulment, ¶ 533 (Mar. 18 2022).

114. *Id.* ¶ 229.

115. *See id.* ¶¶ 233-34.

confirmation.[116] The U.S. court granted in part NextEra's motion for injunction and a restraining order.[117]

The U.S. court explained that, while the motions were pending, Spain brought a judicial case in the Netherlands ("Dutch Action") in December 2022 seeking an order for NextEra to withdraw from the U.S. proceedings.[118] The U.S. court mentioned that it did not issue the temporary restraining order "[b]ecause Spain committed to not seek any relief in the Dutch Action."[119]

Moreover, the U.S. court, faced with the jurisdiction matter regarding the preliminary injunction, determined that the issue was whether Spain and NextEra had entered into an arbitration agreement.[120] The Court, relying on *Achmea* and *Komstroy*, reasoned that the CJEU ruled intra-EU BITs invalid, which includes the ECT.[121] The court highlighted that only one U.S. court engaged in a close analysis of *Achmea* and its jurisdiction implication under the Foreign Sovereign Immunities Act ("FSIA").[122]

The Court determined that Spain had the burden of proof to show that no arbitration agreement exists, but Spain only argued that "it could not have entered into the ECT's arbitration provisions because EU law—as retroactively clarified by the *Achmea* and *Komstroy* decisions—does not permit EU members to assign questions of EU law to arbitration in non-EU tribunals."[123] This argument has already been rejected by the D.C. Circuit.[124] The U.S. court, then, concluded that under the FSIA's arbitration exception, it has jurisdiction.[125]

Furthermore, the U.S. court granted the anti-suit injunction in favor of NextEra to enjoin Spain from seeking "to foreclose NextEra's opportunity to petition this court for the relief afforded by United States law."[126] Finally, the court balanced NextEra's likelihood

116. *See* NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain, No. 19-CV-01618 (TSC), 2023 WL 2016932, at *1 (D.D.C. Feb. 15, 2023).

117. *See id.*

118. *See NextEra Energy Glob. Holdings B.V.*, 2023 WL 2016932, at *2.

119. *Id.* at *3.

120. *See id.* at *4.

121. *See id.* at *5.

122. *See id. See also* Micula v. Gov't of Romania, 404 F.Supp.3d 265, 279 (D.C. Cir. 2019) (holding that the state did not prove its burden of showing that *Achmea* precluded the U.S. Court jurisdiction on the grounds of the FSIA's arbitration exception).

123. *NextEra Energy Glob. Holdings B.V.*, 2023 WL 2016932, at * 4.

124. *See*, *e.g.*, Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan, 590 F. Supp. 3d at 274.

125. *See NextEra Energy Glob. Holdings B.V.*, 2023 WL 2016932, at *7.

126. *Id.* at *10.

of being successful on the merits,[127] the risk of irreparable harm to the investor, and the public interest involved, all of which supported granting the injunction as a way to protect the U.S.'s lawful jurisdiction.[128] In essence, the U.S. court granted the NextEra motion in part to enjoin Spain from (1) seeking an injunction requiring NextEra to withdraw or suspend the U.S. proceedings to confirm the intra-EU BIT award and (2) pursuing any other judicial case that would obstruct the award's confirmation.[129]

As in *Novenergia*, here, the investors have a ticking clock problem regarding the enforcement of intra-EU BIT awards. However, unlike *Novenergia*, the enforcement is not precluded in this case because the investor successfully sought an injunction enjoining Spain from pursuing any other foreign litigation that could annul or set aside the award.

Novenergia and *NextEra* demonstrate that the recognition and enforcement of intra-EU BIT awards involves a race between the investor and the state. This race is exemplified by the state trying to guarantee as fast as possible a decision to set aside or, at minimum, a judicial case pending decision, and the investor trying to guarantee a decision to confirm and enforce an intra-EU BIT award.

The race to the ultimate goal of annulment or enforcement of an intra-EU BIT award is filled with motions seeking injunctions and anti-suit injunctions that speed up a party's position to the ultimate goal and slow down the other party in its endeavors.

IV. CONCLUSION

In the context of the EU, there is little, if any, solution to investors seeking to recognize and enforce intra-EU BIT awards. The only possible solution for these parties is to seek the enforcement of awards in jurisdictions outside the EU, which necessarily demands an analysis of the provisions of the New York Convention or the ICSID Convention. However, such a decision involves levels of complexity and high expenditure of resources in due diligence that, ultimately, does not necessarily warrant the risks. First, the investor has to search for jurisdictions in which the state has assets enough to cover the amount granted in damages in the intra-EU BIT award. Second, the investor must analyze the jurisdiction's legal framework and determine whether it would be more deferential to the arbitral tribunal's award or review *de novo*, opening the door to favorable considerations towards the CJEU rulings in *Achmea*, *Komstroy,* and *PL Holdings*.

Although the decisions above are highly complex and would demand time, the ticking clock situation involved in enforcing intra-EU BIT awards demands that the investors make those decisions quickly and without necessarily having all the elements of thoughtful decision-making. However, because of the states' aggressive behavior in trying to set aside the award in different jurisdictions, the investor cannot fall behind in this race and must take measures to enjoin the state from pursuing to set aside the award.

127. *See id.* at *13.

128. *See NextEra Energy Glob. Holdings B.V.*, 2023 WL 2016932, at *13-14.

129. *See id.* at *15.