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Report on the 7th Annual EFILA Conference 2022 on Whether the EU is Still an Attractive FDI Destination Post-*Achmea* and *Komstroy*

*Emma Iannini**

Abstract

The European Federation for Investment Law and Arbitration (EFILA) held its 7th Annual Conference on Thursday, 9 June 2022 in Amsterdam. Over a series of four expert panels and a keynote speech delivered by Prof. Dr. Anne van Aaken (Hamburg University), panelists discussed the future of FDI in Europe in the wake of “anti-ISDS” decisions of the CJEU such as *Slovak Republic v Achmea* and *Republic of Moldova v Komstroy*.

1 Introduction

Prof. Loukas Mistelis of Queen Mary University of London and the Chair of EFILA’s Executive Board, delivered opening remarks.¹ Prof. Mistelis welcomed the audience by noting the “mixed” signals for FDI in Europe at the moment, which include the *Achmea*,² *Komstroy*,³ and *PL Holdings*⁴ decisions as well as the war in Ukraine. As Europe finds itself in 2022 “further away” from achieving the dream of an integrated, federal, and peaceful EU than its founders may have expected, Mistelis noted, the time is ripe for a conversation on whether the EU is still an attractive Foreign Direct Investment (FDI) destination.

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1 Founded in 2015, EFILA is a Brussels-based think-tank that aims to promote knowledge of all aspects of EU and international investment law, including arbitration. It serves as a platform for fact and merit-based discussions on European and international law investment issues, see for more information: www.efila.org.

2 CJEU Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

3 CJEU Case C-741/19 *Komstroy* ECLI:EU:C:2021:655.

4 CJEU Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875.

2 First Morning Panel

The first morning panel, centered around the theme of “New directions in Investment Protection” in the EU, was chaired by George Burn, Partner at Bryan Cave Leighton Paisner in London. In kick-off remarks, Burn shared news from a “government source” that the UK is committed to terminating its *intra*-EU BITs, which would end the prospect of investors “circuiting” their EU investments through the UK to qualify for BIT protection.

Next, Dr. Crina Baltag, Associate Professor at Stockholm University, gave an overview of the “anti-ISDS” CJEU jurisprudence from 2018 to present, noting that the *Komstroy*⁵ decision has set a “double-standard” for *intra*-EU versus *extra*-EU investors under the ECT.

Also on the panel, Kees de Visser, Investment Manager and Senior Legal Counsel at Omni Bridgeway in Amsterdam, set forth a litigation funder’s perspective on *Achmea*,⁶ *Komstroy*,⁷ and other recent decisions of the CJEU. De Visser called the decisions “not very positive” and explained that his advice would be to “stay away” from funding *intra*-EU ISDS cases, as prospects for enforcement, even outside the EU, seemed “nearly impossible”.

Prof. Dr. Joost Pauwelyn, of the Graduate Institute in Geneva, spoke of the need to “move beyond ISDS” and examined the EU’s FDI policy more broadly, including the EU’s strategic move from “free” to “managed trade”. In this regard, he mentioned the EU’s focus on investment facilitation as well as increased screening of FDI coming into the EU.⁸ He also broadened the focused by discussing recent development at the WTO.

Dr José Angel Rueda, Partner at Cuatrecasas in Madrid, offered his view that the CJEU’s recent decisions have not made the EU an attractive place for investment, especially in certain Central and Eastern European Member States that have been critiqued for democratic backsliding.

⁵ See (n 3).

⁶ See (n 2).

⁷ See (n 3).

⁸ See in particular the EU’s FDI screening Regulation which entered into force in October 2020, Regulation (EU) 2019/452 [2019] OJEU L 79 I/1.

3 Second Morning Panel

The second panel of the day contemplated the options that remain for investors after the ISDS-ban in the EU and was chaired by Dr. Moritz Keller, Partner at Clifford Chance in Frankfurt.

Lorraine de Germiny, Partner at LALIVE (London), remarked that the future “is not promising” for investors in the 55 currently pending intra-EU ISDS proceedings, 16 of which are based on intra-EU BITS.

Gordon Nardell QC, barrister and arbitrator at Twenty Essex in London, suggested that in response to the CJEU’s ban on intra-EU ISDS, investors could perhaps access similar remedies before the European Court of Human Rights in Strasbourg. However, Nardell noted that the ECtHR requires investors to demonstrate a “right to future income” in order to be awarded an “equitable sum” of quantum, as opposed to DCF or other versions of the income method commonly employed by tribunals in ISDS.

Mirjam van de Hel-Koedoot, Partner at Nauta Dutilh in Amsterdam, agreed with many of the other panelists that in the wake of *Achmea*, *Komstroy*, and *PL Holdings*, there exists a “vacuum of protection of intra-EU investment”. Calling the different EU national law regimes’ substantive protections “scattered” and “unclear”, van de Hel-Koedoot observed that it is very difficult for investors in this new and uncertain environment to know where and how to access the remedies formerly provided to them in intra-EU BITS.

Alejandro Garcia, Partner at Stewarts in London, added that it is still possible for intra-EU investors to seek enforcement of their ISDS awards in the United States, which has less strict rules than many EU jurisdictions on seizing sovereign assets.

4 Keynote Panel

Prof. Dr. Anne van Aaken’s keynote approached the conference’s topic from perspectives outside of EU and public international law. van Aaken observed that many factors other than the availability of ISDS influence FDI levels in the EU, including labor productivity, the availability of natural resources, corporate tax rates, free trade agreements, infrastructure and regulatory transparency.

Overall, van Aaken concluded that the EU “fares well on both economic and institutional factors” affecting FDI, but it “can and should do better”. Her primary concerns regarding future investments in the EU are the war in Ukraine,

political instability caused by Rule of Law backsliding,⁹ populist national-ism propelled by high migration levels, and other complications caused by the green energy transition.

5 Third Afternoon Panel

In the third panel responding to van Aalen's keynote, Dr. Patricia Nacimiento, Partner at Herbert Smith Freehills in Frankfurt, agreed with van Aaken that the "rule of law is a guiding principle that must be used everywhere" and that it is generally underappreciated how much ISDS has established respected principles of public international law globally.

Ben Love, Partner at Boies Schiller Flexner in New York City, remarked that the EU's proposal for a Multilateral Investment Court (MIC)¹⁰ is "overrated" and would be an "increasingly political" institution as opposed to the supranational and impartial scheme of ISDS, which ironically was first championed by many EU Member States.

Finally, Rogier Schellaars, Partner at Van Doorne in Amsterdam, observed that "game theory" can perhaps shed light on the EU's recent behavior towards ISDS.

6 Fourth Afternoon Panel

In the fourth and final panel of the conference, chaired by Dr. Isabelle van Damme, Partner at Van Bael & Bellis in Brussels, panelists reflected upon the Russia-Ukraine War and its effects on ISDS in the EU and elsewhere.

Alex Yanos, Partner at Alston & Bird in New York City, contended that though at "first blush" Russian BITs may "appear very robust", many contain only "very limited" dispute resolution clauses; in his view, the Hungary-Russia and Sweden-Russia BIT contain the broadest and best arbitration clauses.

9 See on the Rule of Law backsliding: DV Kochenov and N Lavranos, 'Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' [2021] Hague J Rule Law, 1 <https://link.springer.com/content/pdf/10.1007/s40803-021-00153-7.pdf> accessed on 7 July 2022.

10 See in particular Ch. Brower, 'Doomed to Failure: Why the EU Investment Court System is Destined to Fail Both Foreign Investors and Host States – 3rd Annual EFILA Conference Keynote' [2018] 3 EILA Rev 319.

Dr. Alexandra Diehl, Partner at White & Case in Frankfurt, commented on the jurisdictional issues that investors have faced asserting claims against Russia under BITs for property rights violations committed during or resulting from the annexation of Crimea in 2014.¹¹

Prof. Dr. Berk Demirkol of IA Chambers in New York City offered the view that Russian investors may file arbitration claims against Western States over sanctions, but any awards issued in their favor might be annulled for reasons of public policy by national courts.

Finally, Egishe Dzhazoyan of King & Spalding in London, provided an update on the status of a bill pending in the Russian Duma that would place companies understood to be “under control by unfriendly jurisdictions” (e.g., the United States, all EU Member States and other “Western” countries) under external Russian management. Dzhazoyan explained that the bill has “passed a first reading in the Duma”, but believes it might only be adopted in September of this year.¹²

7 Young EFILA Launch

Finally, Secretary General of EFILA, Prof. Nikos Lavranos, formally announced the launch of Young EFILA, an informal network for Europe-focused investment treaty arbitration practitioners and academics under 40 years of age.¹³ Currently, the leadership of Young EFILA consists of Stephanie Collins (Gibson Dunn) and Emma Iannini (King & Spalding). Young EFILA has already attracted more than 40 young investment treaty arbitration experts.

In the coming months, Young EFILA will focus on developing its blog, holding training programmes on ISDS, public international law and arbitration for judges in Europe, a mentorship initiative and the “Young EFILA Academy”. Young EFILA hopes to promote the Rule of Law, respect for human and property rights, access to remedy, collegiality, due process and justice across Europe.

11 See e.g., F Krumbiegel, ‘The Applicability of the Russia-Ukraine Bilateral Investment Treaty to Crimea in the Light of the Duty of Non-recognition in International Law’ [2021] 38(5) *Journal of International Arbitration* 645.

12 See further: King & Spalding, ‘Russia’s Recent Actions Against Foreign Investors Will Give Rise to Claims Under International Investment Treaties’, 7 April 2022, <https://www.kslaw.com/news-and-insights/russias-recent-actions-against-foreign-investors-will-give-rise-to-claims-under-international-investment-treaties> accessed on 7 July 2022.

13 See for more information on Young EFILA: <https://efila.org/young-efila/>.

The launch event took place in Amsterdam on the eve of the Annual EFILA Conference and included an Oxford-style debate of the motion “*After Achmea, Komstroy and PL Holdings*, the EU is still an attractive investment destination”.

The debaters were: Krystle Baptista Serna, KB Arbitration, Naomi Briercliffe, Allen & Overy, Georgios Fasfalis, Linklaters, Merryl Lawry-White, Debevoise, Isabel San Martin, Lalive, Richard Trinick, Three Crowns.

The tribunal hearing the motion consisted of: Prof. Gerard Meijer (Partner, Linklaters), Dr. Crina Baltag (Stockholm University) and Mrs Nynke M. Hupkens-Sipma (Director Legal Affairs at Achmea).

The result of the Oxford-style debate was against the motion.