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## European Union Law and International Arbitration at a Crossroads

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## ESSAY

### EUROPEAN UNION LAW AND INTERNATIONAL ARBITRATION AT A CROSSROADS

*George A. Bermann*<sup>+</sup>\*

I.	INTRODUCTION.....	967
I.	EU LAW AND INTERNATIONAL ARBITRATION: “PEACEFUL COEXISTENCE” .....	968
II.	THE SOURCES OF TENSION AND THEIR EVOLUTION .....	969
	A. EU Law as Private and Commercial Law .....	970
	B. European Union Public Policy .....	971
	C. “EU Law Autonomy” and its Meaning .....	974
	D. Opinion 2/13, Achmea, and Micula .....	976
III.	RECALIBRATION AS REMEDY .....	979

#### *I. INTRODUCTION*

It is no exaggeration to describe the relationship between the European Union and international arbitration as the most dramatic confrontation between two international legal regimes seen in a great many years. International law scholars commonly lament the “fragmentation” of international law,<sup>1</sup> i.e., the co-existence of multiple

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+ Please be aware that significant developments have occurred since this Essay was written. Therefore, this Essay only takes into consideration events occurring through January 1, 2019.

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1. See MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (Tomer Broude & Yuval Shany eds., 2011); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, in 271 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW: RECUEIL DES COURS 101-382 (1998); C. W. Jenks, *Conflict of Law-Making Treaties*, 30 BRIT. Y.B. OF INT’L L. 401 (1953); REGIME INTERACTION IN

international legal regimes whose competences overlap and whose policies may differ, resulting in a degree of regulatory disorder. However, seldom do these regimes actually “collide.” By contrast, the two international regimes in which we are interested this evening—international arbitration and the European Union—may be described, without hyperbole, as on a collision course. Arguably, the collision has already occurred.

The emergence of hostilities on this scale in recent years came about as something of a surprise to me. At Columbia and elsewhere, I have taught EU law and international arbitration law concurrently—in different courses, of course—for more decades than I care to count. Over that period, I have written and spoken about the EU and international arbitration as separate and distinct enterprises.<sup>2</sup> Rarely did teaching, writing or speaking of one necessitate, or even prompt, discussion of the other.

#### *I. EU LAW AND INTERNATIONAL ARBITRATION: “PEACEFUL COEXISTENCE”*

For this longstanding pattern, which has now come sharply to an end, there is one basic explanation. Put simply, neither regime viewed as within its domain matters that were of most central concern to the other. At the outset, the European Union’s preoccupations were construction of the internal market, adoption of a common external commercial policy (essentially over taxes and tariffs), and development of certain sectoral policies – agriculture, fisheries, competition law. In none of these did international arbitration have much of a role to play or much of a stake. Indeed, in none of these did even the more general notion of private international law (of which international arbitration has traditionally been a part) have a serious role to play. Thus, even when in 1968 the EU Member States entered into an arrangement harmonizing national laws on the exercise of personal jurisdiction and the recognition and enforcement of judgments in civil and commercial

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INTERNATIONAL LAW: FACING FRAGMENTATION (M. Young ed., 2012); M. Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *MOD. L. REV.* 1, 1–30 (2007); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties* (2002), 15 *LEIDEN J. OF INT’L L.* 553–79 (2002).

2. See George A. Bermann, *Reconciling European Union Law Demands with the Demands of International Arbitration*, 34 *Fordham INT’L L.J.* 1193 (2011); George A. Bermann, *Navigating EU Law and the Law of International Arbitration*, 28 *ARB. INT’L* 397, 397–446 (2012).

matters (“the Brussels Convention”),<sup>3</sup> they were required to do so entirely outside the framework of the then European Community Law, and the Brussels Convention itself even went on to include an “arbitration exception,” the contours of which have never been entirely clear.<sup>4</sup> Only belatedly, through the 1997 Amsterdam Treaty,<sup>5</sup> did private international law make its way to any measurable degree into the sphere of European Union law proper.

Conversely, international arbitration concerned itself very little, if at all, with what mattered most to the European Union. Except in the case of State-to-State disputes, international arbitration’s diet for years consisted almost entirely of private contract-based commercial disputes. European Union law could arise at best tangentially, perhaps as a defense to a contract claim, and even that did not often occur. What has happened?

## II. *THE SOURCES OF TENSION AND THEIR EVOLUTION*

The emergence of tensions (one might say hostilities) between the two international regimes that we are witnessing is widely attributed in current discourse to the advent of investor-State arbitration, and there is of course much truth to that perception. Subjecting investor-State disputes to treaty-based arbitration has represented a quantum shift in international arbitration’s profile, so much so that, as far as the EU is concerned, investor-State disputes have practically eclipsed the international commercial disputes with which international arbitration has traditionally been associated and which nevertheless still account for the vast majority of cases that go to arbitration. Investor-State arbitration is commonly viewed as an altogether different species, whose most politically salient feature is the unprecedented challenge that it poses to a State’s right to regulate.

Too often overlooked, in our preoccupation with investor-State arbitration as a challenge to the European Union and its law, are the

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3. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 31.

4. See *The Brussels Convention: the Arbitration Exception*, 7 *ARB. INT’L* 179, 179–86 (1991); Filip De Ly, *The Interface Between Arbitration And The Brussels Regulation*, 5 *AM. U. BUS. L. REV.* 485 (2018); B. Audit, *Arbitration and the Brussels Convention* 9 *ARB. INT’L* 1, 1–26 (1993).

5. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

less salient changes taking place, not on the international arbitration side, but rather on the EU law side of the equation. Although much less conspicuous than the advent of investor-State arbitration, developments in EU law have contributed significantly to the tensions that have erupted between the European Union and international arbitration regimes. I suggest that a full appreciation of the scope and magnitude of these tensions—and any hope for their mitigation—requires that changes in EU law, however much less dramatic, also be taken into consideration.

What exactly was that evolution? Three developments have occurred over the last couple of decades that warrant acknowledgment in this context. Two of these are relatively circumscribed. Allow me to quickly develop these two before turning to the third.

#### *A. EU Law as Private and Commercial Law*

The first is the EU's ambitious and intensive campaign to enact regulations and directives establishing new legal norms in a wide range of private law commercial relationships—relationships that, importantly, are the “stuff” of international commercial arbitration. So great was the volume and range of EU-level legislation in private law into which the European Union had not previously ventured—product liability,<sup>6</sup> protection of commercial agents,<sup>7</sup> regulation of legal practice,<sup>8</sup> cigarette packaging<sup>9</sup>—that the European Union finally saw fit to introduce into EU law a principle of subsidiarity, precisely in an attempt to stem the tide – a principle that may or may not have had the desired effect. With this legislation came an increase in rights that would be asserted not only in national court litigation, but also in commercial arbitration – and not only in the form of claims, but at least as often in the form of defenses.

In a second development, the European Union embarked on an equally vigorous campaign favoring private enforcement of EU competition law, again both by way of claim and by way of defense, and again in an arena—private legal relationships, contractual and otherwise—in which international commercial arbitration traditionally

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6. See Council Directive 85/374, 1985 O.J. (L 210) 29 (EC).

7. See Council Directive 86/653, 1986 O.J. (L 382) 17 (EC).

8. See Council Directive 98/5, 1998 O.J. (L 77) 36 (EC); Council Directive 77/249, 1977 O.J. (L 78) 17 (EC).

9. See Council Directive 2014/40/EU, 2014 O.J. (L 127) 1 (EU).

occupied a portion of center stage. There should never have been any doubt that violation of EU competition law might operate as a defense to a contract claim in arbitration, but the European Court of Justice's judgment in *Eco Swiss China Time Ltd. v. Benetton International NV*<sup>10</sup> laid any such doubt to rest, while at the same time giving rise to an assumption that a competition law violation could be invoked not only by way of a contract defense in arbitration but also by way of a freestanding claim.<sup>11</sup>

What do these two developments have in common and what have they produced? Of course they brought EU law a much greater salience in the world of international arbitration, but, importantly for our purpose, they also prompted the emergence of a powerful notion of "European Union public policy." The emergent notion of EU public policy cast EU law in a new and different light in international arbitration circles, just as it cast international arbitration in a new and different light in EU circles—both in ways that may not have been immediately apparent.

### *B. European Union Public Policy*

The notion of "public policy" is in itself of course nothing new. Across jurisdictions throughout the world, it denotes values that are deemed so fundamental to the health, morals and well-being of a social, political or economic order that they cannot be trumped by word, by deed, by party agreement, by a choice-of-law or choice-of-forum clause (including an arbitration clause), or even by the application of general conflict of law principles.

Perhaps not viewing the European Union as quite yet a polity—and certainly not yet a State—the European Court of Justice had not been quick to articulate a specific notion of EU public policy. For decades, the term did not even appear. But with the two EU law developments I have just mentioned—the enactment of a volume of legislation in or touching on private law fields and the encouragement of private enforcement of EU competition law, both matters of strong public interest—the notion of EU public policy came to the fore. In retrospect, it should have come as no great surprise that a notion of

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10. Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l NV*, 1999 E.C.R. I-3079.

11. See Robert B. Von Mehren, *The Eco-Swiss Case and International Arbitration*, 19 *ARB. INT'L*, 465 (2003).

public policy would eventually emerge on the EU level as well, but that it did.

The salience of EU public policy in international arbitration first became apparent in the aforementioned *Eco-Swiss* case. There, the Court, while acknowledging that competition law claims and defenses were arbitrable, announced, much as did the US Supreme Court in the *Mitsubishi* case,<sup>12</sup> that arbitral awards in competition law cases were nevertheless subject to special scrutiny on the merits.<sup>13</sup> If an arbitral tribunal failed to entertain a competition law claim or defense, a national court hearing a challenge to the resulting award was required—as a matter of EU public policy—to annul the resulting award, even if the competition law claim or defense was inexcusably never raised during the course of the arbitral proceedings.<sup>14</sup> While *Eco-Swiss* concerned a tribunal’s failure to apply a competition law defense altogether, it was soon widely understood by Member State courts as meaning that an award must equally be annulled if, while applying EU competition law, an arbitral tribunal applied it improperly.<sup>15</sup>

The European Court of Justice (“ECJ”) did not stop with competition law. It subsequently put claims and defenses based on EU consumer protection legislation in the same category.<sup>16</sup> Once again, tribunals were required to entertain these claims and defenses, and do so decently, even if neither party raised them in the course of the arbitral proceedings, and if they did not, annulment of the award would follow.<sup>17</sup>

There is of course nothing fundamentally antithetical between international arbitration and public policy. As we all know, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards makes violation of public policy a ground for refusing to recognize or enforce a foreign arbitral award,<sup>18</sup> and a ground that courts may, and arguably should, address, if necessary on their own

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12. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

13. Case C-126/97, *Eco Swiss China Time Ltd*, *supra* note 10, ¶ 40.

14. Case C-126/97, *Eco Swiss China Time Ltd*, *supra* note 10, ¶ 41.

15. Christoph Liebscher, *EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 785-827* (Gordon Blanke & Phillip Landolt eds., 2011).

16. Bernd Ulrich Graf & Arthur E. Appleton, *Elisa Marioa Mostaza Claro v. Centro Móvil Milenium: EU Consumer Law as a Defence against Arbitral Awards*, 25 *ASA BULL.* 28 (2007).

17. C-168/05, *Mostaza Claro v Centro Móvil Milenium SL*, 2006 E.C.R. I-10421.

18. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), June 10, 1958, 21.3 U.S.T. 2517, 330 U.N.T.S. 3.

motion. The UN Commission on International Trade Law (“UNCITRAL”) Model Law follows suit in connection with set aside actions, making violation of public policy a basis for the set aside of an award,<sup>19</sup> if necessary at the instance of a court acting *sua sponte*. In sum, the international arbitration regime acknowledges the paramount role of public policy and gives it full effect.

It is surely not the case that all of a jurisdiction’s legal norms rise to the level of public policy—only those that are, as commonly said, truly fundamental to the health, morals and well-being of a social, political or economic order. In principle, public policy encompasses only an exceedingly small subset of exceptionally fundamental norms within a given legal order.

In fact, the same considerations that led the ECJ to view competition law and consumer protection law norms as having public policy status may well lead it to consider any number of other domains as sharing that status. There is no obvious stopping point. Equally worrisome is the question of the standard of judgment by which a reviewing court determines the correctness or adequacy of an arbitral tribunal’s treatment of a competition law or consumer protection law claim or defense, or other claim or defense deemed to embody EU public policy. While most national courts suggested, in the wake of *Eco-Swiss*, that such review should be highly deferential,<sup>20</sup> permitting annulment only where the error that a tribunal made was “flagrant,” the Advocate-General of the ECJ actually argued that a national court’s substantive review of an award on a matter of EU public policy should be nothing less than *de novo*.<sup>21</sup>

The prospect of full judicial review on the merits of arbitral awards in these fields was understandably met in the international arbitration community with some alarm. It was also met with some concern in Member State courts which all, in varying degrees, considered support for international arbitration, including the finality of awards, to be an important public policy of their own, even if not one for the European Union.

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19. UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006, art. 17 I (1)(b)(2), December 11, 1985, 24 I.L.M. 1302.

20. Christoph Liebscher, *Chapter 23: EU Member State Court Application of Eco Swiss: Review of the Case Law and Future Prospects*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* 785 (G. Blanke & P. Landolt eds., 2011).

21. Case C-126/97, *Eco Swiss China Time Ltd*, *supra* note 10.



Thus far, I have identified two discrete and relatively recent developments in European Union law that combined to produce an expansive and highly robust conception of EU public policy—one that could not help but pose a serious challenge to the international arbitration legal order.

### C. “EU Law Autonomy” and its Meaning

But I referred to there being a third major development in EU law that has been brewing for a while and likewise represents a serious, perhaps even more serious, challenge to international arbitration. I refer, and it will come as no surprise, to the notion of the “autonomy” of EU law and the EU legal order. This, notion, like the notion of EU public policy, is not entirely new but, again like EU public policy, has recently achieved unprecedented resonance.

Autonomy of EU law initially arose in a context quite unlike the context we find ourselves in today. In its landmark judgment in *NV Algemene Transport-en Expeditie Onderneming van Gend v. Netherlands Inland Revenue Administration*, the ECJ proclaimed the EU to be “a new legal order of international law for the benefit of which the States have limited their sovereign rights.”<sup>22</sup> In *Costa v. ENEL*, the Court continued in the following vein: “By contrast with ordinary international treaties, the EEC Treaty has created its own legal system” that the Member States and their courts are bound to respect.<sup>23</sup> The Treaty Establishing the European Community (“TEC”), the Court posited, constituted “an independent source of law.”<sup>24</sup> The Court did not refer specifically in these or other early judgments to the “autonomy” of EU law, but that is clearly what it meant.

It is one thing for the ECJ to posit the autonomy of EU law vis-à-vis the law of its constituent parts. The US Supreme Court has essentially said the same thing in describing the relationship between federal and state law within the United States.<sup>25</sup> The autonomy posited in *van Gend en Loos* and *Costa* was an autonomy internal to the EU itself.

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22. Case C-26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1963 E.C.R. 1, ¶ 12.

23. Case C-6/64, *Flaminio Costa v E.N.E.L.*, 1964 E.C.R. 585, ¶ 593.

24. *Id.* at ¶ 594.

25. *Cohens v. Virginia*, 19 U.S. 264 (1821).

But it is quite a leap to go from the autonomy of EU law vis-à-vis the EU Member States to autonomy of EU law from the world's other legal orders. The notion of EU law's autonomy specifically on the international law plane surfaced in recent decades chiefly from a series of opinions rendered by the ECJ in reply to questions by the European Commission on whether the EU's entry into a given international treaty would be compatible with the EU's constitutive treaties. By way of example, in Opinion 2/13 on the conformity with EU law of the EU's prospective accession to the European Human Rights Convention, the Court reaffirmed what it had said in connection with the prospect of EU accession to other international treaties, namely that the EU could accede to a treaty providing for a court that would be responsible for interpreting that treaty and whose decisions would bind the EU institutions, including the Court of Justice – but that those decisions could have “no adverse effect on the autonomy of the EU legal order,”<sup>26</sup> meaning such a court “must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.”<sup>27</sup> For the ECJ to reserve to itself sole power to render authoritative interpretation of EU law is not in itself remarkable. I think most if not all national supreme courts assert sole power to render authoritative interpretation of national law. But the ECJ went further than that in at least two important respects.

First, the Court in these opinions reserved to itself not only the power to interpret EU law authoritatively, but the power to interpret EU law altogether. In Opinion 2/13 and on similar occasions, the Court asserted a monopoly over the interpretation of EU law altogether, authoritative or not. This is shown by the Court's repeated assertion that it cannot subject itself to the jurisdiction of an international court or tribunal if that body, as is invariably the case, is incapable as a matter of EU law of making preliminary references to the ECJ for authoritative interpretations of EU law when the need for interpretation arises.<sup>28</sup> The preliminary reference mechanism, said the Court, is “the keystone of the judicial system established by the Treaties.”<sup>29</sup> For that reason alone,

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26. Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms—Compatibility of the draft agreement with the EU and FEU Treaties, EU:C:2014:2454, ¶ 183 [hereinafter Opinion 2/13].

27. *Id.* at ¶ 184.

28. *Id.*

29. *Id.* at ¶ 198.

said the Court, accession of the EU to the ECHR would be “liable adversely to affect the specific characteristics of EU law and its autonomy.”<sup>30</sup>

I personally know of no legal system that purports to disallow foreign courts from interpreting and applying that legal system’s law in cases properly before them. Legal systems do not generally object to their law being given effect in courts of other jurisdictions. But to be more precise by way of example, what is a court or tribunal created under a bilateral or multilateral investment agreement to which the European Union is a Party to do when there arises, in a dispute that comes before it, a question of the interpretation or application of EU law? Advocate-General Wathelet argued in his Opinion in *Slowakische Republik v Achmea BV* that an investor-State tribunal sitting on the territory of an EU Member State qualifies as a Member State court or tribunal, within the meaning of the EU’s preliminary reference mechanism, and has standing to make preliminary references to the ECJ.<sup>31</sup> However, the Court in its *Achmea* judgment squarely rejected that proposition.<sup>32</sup>

#### *D. Opinion 2/13, Achmea, and Micula*

The question whether EU law autonomy bars an international court or tribunal from interpreting and applying EU law will take center stage in what is to be the ECJ’s Opinion 1/17 on the compatibility with EU law of the EU-Canada Comprehensive Economic and Trade Agreement (“CETA”).<sup>33</sup> At the hearing in that case on June 28, 2018, Belgium and Slovenia in particular questioned whether the dispute resolution system under CETA complies with the principle that the ECJ has exclusive jurisdiction to interpret EU law, precisely because tribunal established under CETA would not be in a position to refer questions of EU law to the Court.<sup>34</sup>

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30. *Id.* at ¶ 200.

31. Case C-284/16, *Slowakische Republik v Achmea BV*, 2018 ECLI:EU:C:2018:158, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194583&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=14061059> [<https://perma.cc/GQK9-C54N>].

32. *Id.* at ¶ 57, ¶¶ 45-49.

33. Comprehensive Economic and Trade Agreement, Can-EU, Oct. 30, 2016.

34. *Opinion 1/17 on CETA: Hearing Report*, INT’L LITIG. BLOG (July 3, 2018), <http://international-litigation-blog.com/opinion-1-17-ceta-hearing-report/> [<https://perma.cc/LF82-4TYU>].

Happily, the Commission and other Member States have argued in connection with Opinion 1/17 that the principle of autonomy of EU law necessarily has different implications in extra-EU situations as compared to intra-EU situations.<sup>35</sup> While one hopes that to be the case, one simply does not know exactly what the autonomy of EU law signifies in the application of international treaties to which the EU is a Party. Will it help that, under CETA Article 8.31, a tribunal “may consider, as appropriate, the domestic law of a Party as a matter of fact” or that it “shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party”?<sup>36</sup> Is a CETA tribunal a court, rather than an arbitral tribunal and will that make any difference so far as the effect of its rulings on EU law is concerned? We do not know the answers to these and other questions, and Opinion 1/17, as issued, may well not answer them.

Second, and this is quite important, the ECJ did not limit itself in Opinion 2/13, or other such opinions, to asserting an interpretive monopoly over EU law. It asserted exclusive authority not only to determine the meaning of EU law, but also the validity of EU law.<sup>37</sup> “Jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights,” it declared, “cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.”<sup>38</sup> To be sure, the Court in *Achmea* was at pains to distinguish between the intra-EU bilateral investment treaties (“BIT”) at issue in that case, on the one hand, and the EU’s own investment agreements, such as CETA, on the other. As for the latter, the Court reiterated what it had said in numerous opinions, namely that “the competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements

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35. *Id.*

36. Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, 2017 O.J. (L 11/23).

37. Opinion 2/13, ¶ 257.

38. Opinion 2/13, ¶ 257 (citing Opinion 1/09, Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties, ECLI:EU:C:2011:123, ¶¶ 78, 80, 89).

as regards the interpretation and application of their provisions,”<sup>39</sup> but it attached the following provocative proviso: “provided that the autonomy of the EU and its legal order is respected.”<sup>40</sup>

This proviso, which is found in numerous ECJ Opinions<sup>41</sup> declaring the EU’s accession to an international agreement to be incompatible with the autonomy of EU law, is to be taken seriously. As the EU becomes more and more an actor on the international stage – particularly in international investment law – the need to “unpack” the meaning of EU law “autonomy” is becoming increasingly urgent. What exactly does it mean?

We know for certain that the notion of EU law autonomy is meant to have jurisdictional consequences. Strictly speaking, *Achmea* was a jurisdictional ruling only, and we can hope that, as the Commission appears to have conceded at the hearing in Opinion 1/17, the proviso just quoted will not call into question the authority of CETA and other tribunals to interpret and apply EU law.

*Achmea* was not a substantive law ruling, and accordingly did not inquire into the authority of BIT tribunals, or any tribunal, to determine the validity of EU law instruments in cases that come before them. One can only hope that EU law public policy will not get in the way of the authority of CETA tribunals, and tribunals constituted under other investment treaties to which the EU is a party, to perform substantive review of EU law measures and eventually condemn them if condemnation is indeed warranted. I like to read the Commission’s own intervention in Opinion 1/17 as offering assurances to that effect.

But the very question brings us back to the matter of EU public policy on which I spent considerable time earlier in this Essay. And it brings me to a specific case that the storm surrounding *Achmea* has practically eclipsed: *Micula v. Romania*.<sup>42</sup> Like *Achmea*, *Micula* was an intra-EU dispute in which the Commission raised its usual challenge to arbitral jurisdiction.<sup>43</sup> But *Micula* represented more than a jurisdictional challenge by the European Union to the international

39. Opinion 1/09, Creation of a unified patent litigation system – European and Community Patents Court – Compatibility of the draft agreement with the Treaties, ECLI:EU:C:2011:123, ¶ 74.

40. Case C-284/16, Slowakische Republik, *supra* note 31, ¶ 57.

41. *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, 2002 O.J. (L 285) ¶¶ 21, 23, and 26.

42. 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, ICSID Case No. ARB/05/20, (Dec. 11, 2013).

43. *Id.*

arbitration regime; it represented a substantive challenge as well. In that case, the European Commission argued that the investment tribunal, to which the Micula's resorted pursuant to the Swedish-Romanian BIT when Romania withdrew its grant of state aid, could not properly condemn Romania for having done so, since the aid was illegal under EU law and Romania was obligated under EU law to withdraw it.<sup>44</sup> When the tribunal nevertheless issued an award against Romania for violating its treaty obligation of fair and equitable treatment and condemned it to pay damages,<sup>45</sup> the Commission forbade Romania to pay on the ground that any such payment would in itself constitute an illegal state aid.<sup>46</sup>

If, in the eyes of the EU institutions, EU public policy operates as a defense to what would otherwise be an intra-EU BIT violation for which Romania would be liable, might it also operate as a defense to what would otherwise be a treaty violation under CETA (or other new Free Trade Agreements) for which the EU itself might be liable? Even if it does not operate as a defense (as indeed it should not), might an EU Member State court nevertheless be compelled under EU law to deny such an award recognition or enforcement on EU public policy grounds?

The role of EU public policy under investment agreements like CETA may well depend on the nature of the tribunals that those agreements establish. It is to this day regrettably unclear whether those tribunals are to be understood as arbitral tribunals or as courts; whether their rulings are to be understood as international arbitral awards or as international court judgments; and whether those ruling can or cannot be denied effect in the European Union theatre on EU public policy grounds.

### *III. RECALIBRATION AS REMEDY*

It is no secret that the international arbitration world, and the international investment arbitration world in particular, is caught up these days in serious soul-searching. It is entirely too early to tell what shape investor-State dispute resolution will take after this period of introspection comes to an end. But whatever the reform that ultimately

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44. Commission Decision 2015/1470, 2015 O.J. (L. 232/43).

45. Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L., *supra* note 42.

46. Commission Decision 2015/1470, *supra* note 44.

emerges (and it is difficult to imagine that there will not be reform of some kind), the fact remains that the international arbitration community will have reexamined some of its most basic understandings. Whether or not the EU ends up with the multilateral investment court of the sort it has been championing, it is likely to view current reform efforts within the international arbitration community as having helped the EU law—international arbitration law interface to take a turn for the better.

How much room, if any, we well may ask, is there for the European Union, conversely, to relax in turn the demands it has made on international arbitration. Opportunities are there. Do the contours of European public policy, as a ground for challenging arbitral determination—whether in competition law, consumer protection law, or any other public policy field—stand to be more clearly delineated and cabined than they have been? Might, somehow, the notion of EU law autonomy, in whatever manifestations it may take, likewise be reined in? Might the EU relax its asserted monopoly over the interpretation and application of EU law? Might the EU clarify whether its compliance with the rulings of the tribunals established under the EU's own investment treaties, however those rulings might be denominated, are or are not subject to defeasance by EU public policy.

In short, some recalibration on the EU side of the EU-international arbitration equation is to my mind in order, just as some recalibration on the international arbitration side has been. Given the EU's positively central role in shaping today's international legal order, the efforts it might make in this direction stand to do a world of good.