Editorial

We are delighted to present the 8th volume of the *European Investment Law and Arbitration Review* (*EILA Rev*).

When we launched EILARev in 2016 we intended to cover a very wide range of issues of European investment law and investment treaty law. The European Union was taking a more active role in policy-and rule-making in this juncture of EU Law and investment law and arbitration and there was rather a lacuna in scholarship. We saw this as an area where there was little coherent and open debate since most commentators were taking opposing positions in respect of investment treaty arbitration: one group wanted the end of it and return to state or (new permanent multilateral) international courts; the other groups wanted enhancements and better checks and balances of the existing arbitration system. Many were keen to forecast the end of ISDS (or at least the gradual end of investment treaty arbitration).

In the last eight years, UNCITRAL launched its Working Group III with a wide mandate to explore reforms of ISDS, ICSID drafted and adopted modernised rules for arbitration and mediation and the Energy Charter Treaty drafted a modernised treaty to address various ISDS related concerns and to address environmental concerns about climate change. While the EU and most EU Member States have engaged in termination of intra-EU BITs with the hope to also stop all intra-EU ISDS cases.

In 2018 the Court of Justice of the European Union ("CJEU") issued the *Achmea* judgment, declaring the incompatibility of investor-State arbitration clauses in BITs between EU Member States with EU law. The CJEU subsequently issued two further decisions that widened *Achmea's* scope of application to the Energy Charter Treaty and ad hoc investment arbitration agreements (*Komstroy* and *PL Holdings*).

Still, since the *Achmea* judgment, at least 65 investment tribunals had to decide on their jurisdiction because of challenges raised by a party seeking to persuade the tribunal to decline jurisdiction and follow the *Achmea* decision. It appears that only the tribunal in *Green Power v. Spain* has sustained the *Achmea* (intra-EU) objection and declined jurisdiction. Notwithstanding the approach taken by arbitration tribunals, the application of the *Achmea*, *Komstroy*, and *PL Holdings* judgments by the courts of several Member States has jeopardized the enforcement of awards issued in intra-EU disputes within the EU. This is not merely a European issue. There are also several attempts to enforce intra-EU awards in the United States and courts in the U.S. will be issuing judgments in late 2023. There are also similar cases in the UK and Australia.

In addition to this legal, but also ideological debate, the war ("Russian special military operation") in Ukraine continues in its second year, human loss and environmental destruction ("ecocide") are ongoing, energy prices have risen significantly, and energy transition is slowing down. However, the international arbitration is acutely aware of human rights, ESG and rule of law concerns.

This issue of EILARev is reflective of the state of affairs in the world and Europe. The first article in this volume by Belen Olmos Giupponi critically analyzes the effectiveness and scope of "green conditionality" within the Sustainable Development Chapters of EU Trade and Investment Agreements. It examines the incorporation of environmental provisions in these agreements, evaluates their role in promoting sustainable development objectives, and explores the implications of dispute settlement and international arbitration mechanisms.

In the next article Marcin Menkes touches on rule of law through the prism of monetary transfer provisions in light of international investment law. In light of the economic sanctions imposed on Russia in response to the 2022 aggression against Ukraine, and Russian retaliatory measures, it is argued that we may expect a wave of monetary transfer claims against Russia, once the country rejoins international community. The article presents the debate and makes suggestions for balancing public and private interests in this sensitive area against considerations of monetary sovereignty and the legality of economic sanctions.

Boris Praštalo in the next article also addresses issues of rule law by addressing corruption in international arbitration following the *MOL v Croatia* decision. He concludes that the tribunals could have conducted the arbitral proceedings differently in recognition of the difficulties that arise in proving allegations of corruption as well as the negative impact that corruption exerts beyond the parties to the dispute.

In the final piece in the articles section Ahan Gadkari analyses the legal implications of contracts between foreign investors and insurgents or rebels during time of civil war. Should such contract be valid and enforceable and what about contracts made by de facto governments? This article examines numerous circumstances to determine if the non-attribution rule applies.

We also ran an Essay Competition, a tradition for EILARev. We have selected two very strong pieces. Daniel Pap in his winning essay focuses on the European Court of Human Rights as an alternative to ISDS in the European Union. Gülnur Ceylan came a close second with an essay on the Taxation-Based Claims in Investment Arbitration.

The case section starts with Hugo Varenne and Núria Casas Cano's note on the latest twist in the *Komstroy* saga in the Paris Court of Appeal second annulment decision which addressed the definition of "Investment" under the ECT. Trojan Shipley discusses Opinion 1/20 and the fate of the ECT modernisation process. Dilber Devitre and Prabhjot focus on the Swiss Federal Supreme Court decision upholding interim and final award in the *Yukos v Russian Federation*. Next Daniel Quintero Botero discusses *Westmoreland v Canada* as a precedent against the transferability of treaty claims. In the penultimate note, Matthew Peter Daminato discusses *Adamakopoulos v Cyprus* with particular focus on the majority decision in respect of Article 25(1) ICSID Convention. Finally. Alexander Dünkelsbühler addresses the ICJ's Judgment in *Certain Iranian Assets*: and its likely impact on investment disputes arising out of economic sanctions.

The focus section on EFILA covers the 8th Annual EFILA Conference Keynote by Wendy Miles KC. The topic was the Role of Law in Promoting, Facilitating and Protecting Investment in Net Zero. Then we cover the 7th Annual EFILA Conference Keynote by Anne van Aaken on Europe as an Investment Destination and the role of economics, politics and law. Finally, Guofang Xue provides a report of the 8th Annual EFILA lecture on ESG Investment Strategy.

Finally, the book review section covers two books, both reviewed by Nikos Lavranos: First, Charles N. Brower's, *Judging Iran – A memoir of The Hague, the White House and Life on the Front Line of International Justice* and second, Moritz Keller (ed), *EU Investment Protection Law – Chapter 8 of CETA, the Vietnam and Singapore Free Trade Agreements and EU Regulations 1219/2012, 913/2014 and 2019/452 – Article-by-Article Commentary.* They are both substantial contributions to our discipline.

This is yet another rich issue with a very diverse group of contributors from around the world and manifests why the review has attracted so much attention, not only by scholars but also from national courts and arbitral tribunals.

We wish to express our wonderful editorial team, led by the Co-Managing Editors Trisha Mitra and Samuel Pape who are supported by our editors Mark McCloskey, Peter Burgess and Szilard Gaspar-Szilagyi and our Editorial Board.

Last, not least, we also indebted to Lindy Melman and Marie Sheldon of Brill/Martinus Nijhoff for their support and enthusiasm in developing and producing this Review. This is, however, the final issue with Brill and from 2024 we will have a new publisher for the Review. A specific announcement about this exciting new collaboration will be made by the beginning of 2024.

In order to produce next year yet again a substantial and intriguing volume, we invite unpublished, high-quality submissions (both long and short articles as well as case notes) that fall within the scope of the Review. The Call for

Papers and the house style requirements are published on the Review's website: https://efila.org/eila-review/.

In addition, we will also run again an Essay Competition. All information regarding the 2024 Essay Competition will be published on the Review's website: https://efila.org/eila-review/.

Prof. Loukas Mistelis (Co-Editor-in-Chief)
Prof. Nikos Lavranos (Co-Editor-in-Chief)