Investment Protection in an Integrated Europe – The Non-Enforcement of Intra-EU Investment Arbitration Awards as the Ultimate Test Case for Strasbourg's Deference Doctrines

Over the past years, there has been increasing attention for the potential roles of the European Court of Human Rights (ECtHR) in the field of arbitration. In several recent judgments, the Court has reconfirmed its authority to review judgments rendered by domestic courts in proceedings concerning the annulment or enforcement of arbitral awards.[1] Consequently, commentators have wondered whether the ECtHR may also take sides in one of the most contentious debates in the field of investment protection in the EU: the implications of the *Achmea* judgment[2] of the Court of Justice of the European Union (CJEU) in light of the obligations of the EU Member States under public international law.[3] Robert Spano, former president of the ECtHR, recently argued that the refusal of an EU Member State court to enforce a final intra-EU ICSID award that was rendered prior to the delivery of the *Achmea* judgment may violate that Member State's obligations under the European Convention on Human Rights (ECHR).[4]

The non-enforcement of an arbitral award can raise issues under the ECHR, and in particular under Article 1 of Protocol 1, which provides,

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1 *See* e.g., ECtHR, *BTS Holding AS v. Slovakia*, 55617/17, 30 Jun. 2022. In the field of sports arbitration, *see* e.g., ECtHR, *Semenya v. Switzerland*, 10934/21, 11 Jul. 2023 (this case has meanwhile been referred to the Grand Chamber).

2 CJEU, *Slovakia v. Achmea BV*, C-284/16, 6 Mar. 2018, establishing that investor-state arbitration clauses in intra-EU investment treaties are incompatible with EU law.

3 *See* Josep Maria Julià & Enrique Linares, *Could the Strasbourg Court be a Trump Card in the Enforcement of Arbitration Awards in Intra-EU ECT Disputes?* (Kluwer Arbitration Blog 3 Apr. 2020); Gordon Nardell & Laura Rees-Evans, *The Role of the ECtHR in the Protection of International Arbitral Awards: Insights from BTS Holding v. Slovakia* (Kluwer Arbitration Blog 12 Oct. 2022). *See also* Gordon Nardell & Laura Rees-Evans, *The Agreement Terminating intra-EU BITs: Are Its Provisions on 'New' and 'Pending' Arbitration Proceedings compatible With Investors Fundamental Rights?*, 37 Arb. Int'l 197 (2020), doi: 10.1093/arbint/aiaa046; Raphaël Maurel, *PL Holdings Case: The Investor Ordered to Pay the Expropriating State's Costs, a New Consequence of Achmea*, 7 Eur. Papers 1131 (2023).

4 Robert Spano, *Intra EU BITs and Achmea – On a Collision Course with Strasbourg?* (9th EFILA Annual Lecture 9 Nov. 2023 – available on YouTube). Spano estimates, however, that in such a case, a Chamber of the Court would find no violation, after which the case would likely be referred to the Grand Chamber.

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inter alia, that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'.[5] The Court has developed a relatively settled framework for determining if a refusal to enforce an award constitutes a breach of this provision. It has repeatedly ruled that a claim under an arbitral award can qualify as a possession if that claim is 'sufficiently established to be enforceable'.[6] A refusal by a Member State court to enforce such a claim can constitute an interference, which, in order to be compatible with the Convention, needs to be lawful, justified by a legitimate aim, and proportionate.[7]

The intra-EU issue would raise difficult questions at various stages of this framework, which may not be well suited to resolve the conundrum that would be put before the Court in this context. Ultimately, the case before the ECtHR would likely turn on whether the Court is willing to assess a domestic court's application of the *Achmea* judgment in light of the relevant Member State's obligations under public international law. The Court's approach to this question will be guided by the framework it has developed for evaluating the non-enforcement of arbitral awards under Article 1 of Protocol 1, but also, and possibly more importantly, by several fundamental principles which have shaped the Court's vision of its own supervisory role. These include, in particular, certain notions of deference which the Court has developed in order to demarcate its own powers of review from those of other institutions that share its responsibility for the protection of human rights within an integrated Europe.

1 STRASBOURG DEFERENCE TO DOMESTIC COURTS

Deference is a structural feature of the Convention machinery. Since the entry into force of Protocol 15 in 2021, the preamble to the Convention provides that the Member States bear the primary responsibility to secure Convention rights and freedoms, in accordance with the principle of subsidiarity.[8] One aspect of this subsidiarity is that the Court's involvement is normally only triggered once all domestic remedies have been exhausted, i.e., when the highest domestic courts

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5 In addition, complaints based on Art. 6 (the right to a fair trial) may be raised. *See* generally, Ursula Kriebaum, *The European Court of Human Rights and Arbitration*, in *Cambridge Companion of International Commercial and Investment Arbitration* 66 (Stefan Kröll, Andrea Bjorklund & Franco Ferrari eds, CUP 2023).

6 ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 13427/87, 9 Dec. 1994, para. 59; ECtHR, *BTS Holding v. Slovakia*, paras 49–50. The Court has also held that the protection of Art. 1 Protocol 1 is triggered if the applicant has 'at least a "legitimate expectation" of obtaining effective enjoyment of a property right'. ECtHR [GC], *Kopecký v. Slovakia*, 44912/98, 28 Sep. 2004, para. 35(c); ECtHR [GC], *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. United Kingdom*, 44302/02, 30 Aug. 2007, para. 61.

7 *See* for an overview of case law, Stephen Fietta & James Upcher, *Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?*, 29 Arb. Int'l 187, 208–213 (2013), doi: 10.1093/arbitration/29.2.187.

8 The text that was added by Protocol 15 reflected standing case law of the ECtHR.

have had the opportunity to express themselves on the matter. Another aspect of subsidiarity results in a limitation of the Court's intensity of review: in a variety of contexts, the Court will not fully repeat assessments already undertaken at the national level but it will defer, to some extent, to the domestic decision-makers.

This applies, for instance, to determinations of domestic law. According to standing case law of the ECtHR, it is primarily for domestic courts to interpret and apply domestic law, including when domestic law 'refers to international law or agreements'.[9] A dispute about the non-enforcement of an intra-EU award by an EU Member State court may trigger this deference to domestic courts at various stages of the analysis to be undertaken by the Strasbourg Court.

When asked to review a domestic court's refusal to enforce an arbitral award, the Court will first determine whether the award falls within the scope of Article 1 of Protocol 1. The Court has repeatedly stated that this is the case if the award-holder has a claim that is 'sufficiently established to be enforceable'. The Court's case law on this somewhat ambiguous criterion does not clarify whether it sets conditions for the claim, the award, or both.[10] In the case of *BTS Holding v. Slovakia*, which concerned the enforcement of an ICC award pursuant to the New York Convention, the Court held that a claim can qualify as a possession if it 'is sufficiently established to be enforceable, for example by virtue of an arbitration award'.[11] This formulation suggests that the claim needs to be 'sufficiently established', and that an award recognizing this claim can produce that effect. In other words, the arbitral award is what renders the claim sufficiently established to be enforceable.[12]

This does not mean, however, that any arbitral award has the capacity to turn a claim into a possession. The Court's case law merges several distinct elements that may be looked at to verify whether an award renders a claim sufficiently established to be enforceable. First of all, the Court reviews the contents of the award at issue to assess whether it contains a precise payment order.[13] A second aspect of the analysis concerns the finality of the award. The Court ascertains whether the award is 'final and binding' and whether setting aside proceedings are (still) available.[14] In respect of

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9 ECtHR [GC], *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 30 Jun. 2005, 45036/98, para. 143.

10 In *Stran Greek Refineries v. Greece*, the Court focused its inquiry on whether 'the arbitration award had given rise to a debt in [the applicants'] favour that was sufficiently established to be enforceable'.

11 *BTS Holding v. Slovakia*, para. 49.

12 This approach fits with the Court's usage of the same formula when qualifying court judgments under Art. 1 of Protocol 1. *See* e.g., ECtHR, *Burdov v. Russia*, 59498/00, 7 May 2002, para. 40; ECtHR [GC], *Kotov v. Russia*, 54522/00, 3 Apr. 2012, para. 90.

13 *Stran Greek Refineries v. Greece*, para. 61; *BTS Holding v. Slovakia*, para. 50. *See also Burdov v. Russia*, para. 40, noting that the court decisions at issue 'provided the applicant with enforceable claims and not simply a general right to receive support from the State'.

14 *Stran Greek Refineries v. Greece*, para. 61. The case of *Stran Greek* concerned a legislative intervention that occurred whilst the annulment proceedings were still pending at the Court of Cassation. In these

international awards, these elements may be assessed independently of the domestic law of the country in which enforcement is sought.[15]

However, the Court has also looked at the requirements for enforcement under the domestic law of the enforcing state.[16] In *BTS v. Slovakia*, the Court noted that 'by operation of the New York Convention and the respective provisions of [Slovakian arbitration law], foreign arbitration awards are in principle enforceable in Slovakia'.[17] The Court assessed which factors can be invoked to oppose enforcement under Slovakian law. Such aspects of enforceability can raise difficult questions, because it is precisely the domestic courts' determination that an award is not enforceable which will cause the dispute to be brought before the ECtHR.[18] In other words, the notion of enforceability can blur the question of whether a possession exists and the question of whether a refusal by domestic courts to enforce an award is lawful and justified. If the domestic law of the state where enforcement is sought is relevant to the first question, this means that an award may qualify as a possession in some Member States but not in others.

In this context, a distinction may be drawn between ICSID and New York Convention awards. The ICSID Convention establishes an autonomous system of recognition and enforcement that operates independently of domestic law.[19] The New York Convention, by contrast, leaves Member States more flexibility at the enforcement stage. Under Article V of that Convention, enforcement may be refused on the grounds that the arbitration agreement was invalid or that enforcement would be contrary to public policy. EU Member State courts have annulled intra-EU awards for lack of a valid arbitration agreement or on grounds of public policy,[20] and can be expected to refuse enforcement for similar reasons.[21]

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specific circumstances, the ECtHR considered that the award qualified as a possession even though the annulment proceedings were not yet completed. *See also BTS v. Slovakia*, para. 50.

15 It should also be noted that the concept of 'possession' has an 'autonomous meaning' which is 'independent from the formal classification in domestic law'. ECtHR [GC], *Beyeler v. Italy*, 33202/96, 5 Jan. 2000, para. 100; ECtHR [GC], *Broniowski v. Poland*, 31443/96, 22 Jun. 2004, para. 129.

16 *Stran Greek Refineries v. Greece*, para. 61.

17 *BTS Holding v. Slovakia*, para. 52.

18 *See also* ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, 12742/87, 29 Nov. 1991, para. 51, in which the Court held that it would be 'unduly formalistic' to deduce from the retroactive annulment of a permit by a domestic court that no possession had ever existed.

19 *See* Arts 53 and 54 of the ICSID Convention. *Schreuer's Commentary on the ICSID Convention* 1473, 1499 (Stephan Schill et al. eds, CUP 3d ed. 2022).

20 German Supreme Court, *Slovakia v. Achmea BV*, I ZB 2/15, 31 Oct. 2018; Court of Appeal of Paris, *Poland v. Strabag SE* et al., 48/2022, 19 Apr. 2022; *Poland v. Slot Group AS* et al., 49/2022, 19 Apr. 2022 (ruling that the tribunal had wrongly assumed jurisdiction); Swedish Supreme Court, *Poland v. PL Holdings sarl*, T 1569-19, 14 Dec. 2022 (ruling that the award was incompatible with public policy).

21 *See* District Court of Amsterdam, *Poland v. LC Corp BV*, C/13/721410, 8 Mar. 2023, para. 4.10, noting that Dutch courts are obliged to deny any legal effect to any future award resulting from a pending intra-EU arbitration seated in London.

Whilst the enforcement system of the ICSID Convention is clearly distinct from that of the New York Convention, this difference has received little attention in the assessments of intra-EU awards by the CJEU and, in its wake, Member State courts. The CJEU considers that its *Achmea* case law applies to intra-EU ICSID awards as it does to other intra-EU awards.[22] Accordingly, Member States have refused the enforcement of ICSID awards on the basis of that case law, finding that an intra-EU award interferes with the respondent state's immunity from jurisdiction or that the enforcement of an intra-EU award (including ICSID ones) would be incompatible with public policy.[23]

Consequently, the ECtHR will likely be confronted with the argument that under the domestic law of the relevant Member State, an intra-EU award is not enforceable, and that it cannot be qualified as a possession in the sense of Article 1 of Protocol 1. The Court will need to decide whether to entertain this argument at the first stage of its analysis, which will determine whether the intra-EU objection is capable of depriving an award of its status of possession, or whether it should be approached as an interference with an existing property right.

In *BTS v. Slovakia*, the Court reviewed the findings of the domestic courts on the existence of a valid arbitration agreement in the context of its assessment of whether the interference was lawful, i.e., after having established that a possession existed.[24] This approach suggests that a distinction can be drawn between the question of whether a certain category of awards is in principle enforceable in the relevant Member State and the question of whether the domestic court's grounds for not recognizing a specific award were lawful and justified.

If the ECtHR decides that a possession exists, it subsequently reviews whether there has been an interference,[25] and if so, if that interference was lawful and proportionate to a legitimate aim pursued by the interference.[26] The Court's examination of the lawfulness of the interference is limited to verifying whether the

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22 CJEU, *European Commission v. European Food* et al., C-638/19 P, 25 Jan. 2022, paras 137–145.

23 Court of Cassation of Luxembourg, *Romania v. Micula*, 116/2022, 14 Jul. 2022. *See also* the judgments of the German Supreme Court of 27 Jul. 2023 in the cases of *Mainstream*, *RWE*, and *Uniper*. These judgments concerned pending arbitrations, but they confirmed that intra-EU ICSID awards cannot be enforced in Germany.

24 *BTS v. Slovakia*, paras 66–67.

25 *BTS v. Slovakia*, para. 64. The duty of a court in one Member State to enforce an award issued against another Member State could also be approached as a positive obligation incumbent on the state where enforcement is sought. The applicable criteria would nonetheless substantially be the same. *See Broniowski v. Poland*, paras 143–144.

26 According to standing case law, the three sentences of Art. 1 Protocol 1 comprise 'three distinct rules', albeit that the second and third rule should 'be construed in the light of the general principle enunciated in the first rule'; ECtHR [Plenary], *James and Others v. United Kingdom*, 21 Feb. 1986, 8793/79, para. 37. In *BTS v. Slovakia*, para. 64, the Court held that the non-enforcement of an award did not trigger the second or third rule. By contrast, the annulment of an award could possibly be conceptualized as a deprivation of a possession.

domestic court did not engage in a 'manifestly erroneous application of the impugned legal provisions' or reach 'arbitrary conclusions'.[27] In other words, the Court will review the lawfulness of a domestic court's refusal to enforce an award under a deferential standard of review. As to the question of whether the interference was justified, the Court will assess whether a 'fair balance' was struck between the public interest served by the interference and the individual's entitlement to protection of fundamental rights.[28] This assessment is in principle also undertaken through the lens of a deferential standard of review, as the respondent state enjoys a margin of appreciation in determining how to strike this balance.[29]

2 STRASBOURG DEFERENCE TO THE EUROPEAN UNION

In a dispute about the enforcement of an intra-EU award, the respondent Member State will ask for deference also on the basis of the so-called *Bosphorus* presumption. Under this presumption, the ECtHR adapts the intensity of its review when Member States act in accordance with obligations resulting from their membership of an international organization, as long as that organization ensures a protection of human rights that is 'at least equivalent' to the one provided by the ECHR, both in substantive and procedural terms.[30] In such circumstances, the Court presumes that the relevant Member State 'has not departed from the requirements of the Convention'.[31]

The *Bosphorus* presumption acknowledges 'the interests of international cooperation',[32] and seeks to avoid a situation in which a Member State would have to choose between compliance with Convention obligations and other international obligations. With regard to the EU, the Court has held that the substantive protection offered by EU law and the supervisory mechanisms of the EU provide 'equivalent' protection to that of the Convention.[33] In doing so, the ECtHR has been said to acknowledge 'the legitimacy and specificity of the European Union integration project'.[34]

The application of the *Bosphorus* presumption in a specific case is subject to two conditions: the Member State must not have had any discretion when implementing its obligations under EU law, and the full potential of the supervisory mechanism

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27 *BTS v. Slovakia*, para. 65.
28 ECtHR [Plenary], *Sporrong and Lönnroth*, 7151/75, 23 Sep. 1982, para. 69.
29 *Bosphorus v. Ireland*, para. 149; *Broniowski v. Poland*, para. 144.
30 *Bosphorus v. Ireland*, paras 155–156.
31 *Ibid*., para. 156.
32 ECtHR, *Michaud v. France*, 12323/11, 6 Dec. 2012, para. 104.
33 ECtHR [GC], *Avotiņš v. Latvia*, 23 May 2016, 17502/07, 23 May 2016, paras 102–104. The Court noted that this assessment applied to the former 'first pillar' of EU law.
34 Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 ICLQ 217, 230 (2007), doi: 10.1093/iclq/lei163.

available under EU law must have been deployed.[35] In the context of the enforcement of intra-EU awards, these conditions may raise some questions, although it seems to follow from the CJEU's case law that Member States courts have no discretion to enforce intra-EU awards,[36] and that this position will not be reversed by the CJEU on grounds of fundamental rights.[37]

The question of the non-enforcement of intra-EU awards touches upon the core of the potential tension between the Convention and EU law that the *Bosphorus* presumption seeks to address. In devising this doctrine, the Court 'acted out of comity and deference towards the CJEU', acknowledging that 'the CJEU has a monopoly to declare EU action invalid'.[38] The non-enforcement of intra-EU awards, however, does not result from EU action that has been reviewed and upheld by the CJEU, but rather from a decision made by the CJEU itself. Moreover, if Strasbourg would find a breach of the Convention, this would put the Member States precisely in the situation that the *Bosphorus* presumption seeks to avoid, i.e., where they would need to choose between their obligations under the Convention on the one hand and EU law on the other. This would be the case regardless of any remedies that the Strasbourg Court would grant.

3 THE LIMITS OF DEFERENCE

Notions of judicial deference have analytical value only if they have limits, because unlimited deference simply replaces the entire assessment to be undertaken by the reviewing court. In other words, deference is only compatible with meaningful review if there is a possibility that the Court finds a violation even when applying a deferential standard of review. For that reason, the Strasbourg Court often repeats that the margin of appreciation granted to domestic authorities 'goes hand in hand with a European supervision' by the Court.[39] In addition, the ECtHR has formulated a variety of specific standards of review applicable in specific circumstances. For

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35 *Avotiņš v. Latvia*, para. 105. *See* for a broader discussion of the implication of the *Avotiņš* judgment for the relationship between the ECtHR and the CJEU, Lize Glas & Jasper Krommendijk, *From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts*, 17 HRLR 567 (2017), doi: 10.1093/hrlr/ngw047; Paul Gragl, *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case*, 13 Eur. Const. L. Rev. 551 (2017), doi: 10.1017/S1574019617000165.

36 CJEU, *DA v. Romatsa* et al., C-333/19, 21 Sep. 2022, paras 42–43.

37 *See* for the required involvement of the CJEU before the *Bosphorus* presumption applies, *Michaud v. France*, para. 115; *Avotiņš v. Latvia*, paras 109–111. The CJEU made some remarks on the fundamental rights of intra-EU investors in CJEU, *Poland v. PL Holdings*, C-109/20, 26 Oct. 2021, para. 68.The Court has not addressed in any detail the relevance of obligations of Member States under the ICSID Convention, although this may still happen. *See* CJEU, *Commission v. United Kingdom*, C-516/22, Opinion of Advocate General Emiliou, 9 Nov. 2023, para. 106.

38 Tobias Lock, *The European Court of Justice and International Courts* 197 (OUP 2015).

39 ECtHR [Plenary], *Handyside v. United Kingdom*, 5493/72, 7 Dec. 1976, para. 49.

instance, the Court's deference to domestic courts in matters of domestic law finds its limits where domestic decisions are 'flawed by arbitrariness or otherwise manifestly unreasonable'.[40]

Similarly, the *Bosphorus* presumption does not fully exclude a review by the Court of the impugned measure or decision. Even when the presumption applies, the Court will still assess whether in the particular circumstances of the case, the protection of Convention rights was not 'manifestly deficient'.[41] Commentators have noted, however, that the Court's case law sheds little light on the examination that the Court conducts in this context.[42] One indicator of manifest deficiency may be present if the Member State conduct in question disregarded prior case law of the ECtHR.[43] Another indication may be a failure of a domestic court, when giving effect to EU law, to address a 'serious and substantiated complaint' that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by EU law.[44]

The deference granted by the Strasbourg Court may also be circumscribed by applicable rules of public international law. Pursuant to Article 32 of the Convention, the ECtHR's jurisdiction is limited to the interpretation and application of the Convention, and the Court has confirmed that it is not competent 'to rule formally on compliance with domestic law, other international treaties or European Union law'.[45] At the same time, the Court has often confirmed that the Convention 'cannot be interpreted and applied in a vacuum'.[46] The ECtHR 'has never considered the provisions of the Convention to be the sole frame of reference for the interpretation of the rights and freedoms enshrined therein'.[47] Rather, the Court takes other relevant rules and principles of international into account, in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[48] Such rules

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40 ECtHR [GC], *Anheuser-Busch Inc v. Portugal*, 73049/01, 11 Jan. 2007, para. 83.

41 *Bosphorus v. Ireland*, para. 156.

42 Lock, *supra* n. 38, at 204. *See* for a detailed discussion of the Court's case law, Elisa Ravasi, *Human Rights Protection by the ECtHR and the ECJ. A Comparative Analysis in Light of the Equivalency Doctrine* 112–126 (Brill 2017).

43 The *Bosphorus* presumption was rebutted in ECtHR, *Bivolaru and Moldovan v. France*, 40324/16, 25 Mar. 2021. In that case, the Court considered of particular importance that the French courts had insufficiently taken account of the relevant case law of the ECtHR itself, *see* para. 126. *See also* para. 3 of the concurring opinion of Judge Ress in the *Bosphorus* case.

44 *Avotiņš v. Latvia*, para. 116. This point was made by the Court in the context of a complaint based on Art. 6 of the ECHR.

45 *Avotiņš v. Latvia*, para. 100. *See also* ECtHR [GC], *Behrami and Behrami v. France*, 2 May 2007, 71412/01, para. 122.

46 ECtHR [GC], *Savickis and Others v. Latvia*, 49270/11, 9 Jun. 2022, para. 103.

47 *Savickis v. Latvia*, para. 103.

48 *See* e.g., ECtHR [GC], *Al-Dulimi and Montana Management Inc v. Switzerland*, 21 Jun. 2006, 5809/08, para. 134; Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* 43–58 (OUP 2010). Kanstantsin Dzehtsiarou, *What is Law for the European Court of Human Rights?*, 49 Geo. J. Int'l L. 89, 106 (2018),(critically) notes that international law is used 'as an independent argument' by the ECtHR.

include, in particular, rules of international human rights law,[49] but may also include rules from other fields of international law.[50]

There is a significant strand of ECtHR case law on alleged conflicts between the Convention and other rules of international law, which the Court in principle seeks to avoid through a harmonious interpretation of the Convention.[51] The issue of the enforcement of intra-EU awards raises potentially an even more complex conundrum, as the dispute will focus on an alleged conflict between EU law, as interpreted by the CJEU, and other rules of international law, i.e., the ICSID Convention or the New York Convention and, potentially, the applicable investment treaty. The ECtHR may not consider itself well-placed to resolve such a dispute. At the same time, it seems likely that the Court, when assessing the non-enforcement of an international arbitral award, needs to consider the international legal framework governing that award's enforceability. This may mean that the Court, when interpreting and applying Article 1 of Protocol 1 of the Convention in a dispute concerning the non-enforcement of an intra-EU arbitral award, will have to decide whether its own understanding of applicable rules of public international law may restrict the deference it is willing to grant to the CJEU and to the Member State courts bound to follow the CJEU's rulings.

4 CONCLUDING REMARKS

The Strasbourg Court may be asked to assess the non-enforcement of intra-EU investment arbitration awards in a variety of different scenarios. Appeals to the ECtHR may result from the setting aside of an intra-EU award by the courts of the seat of arbitration or from the refusal by another Member State court to recognize and enforce such an award. The outcome of the Court's assessment may differ depending on the applicable international legal framework, the timing of various events relevant to the case, and the extent to which the Member State court seized with a request for enforcement has engaged in an assessment of the investor's rights

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49 ECtHR [GC], *Nada v. Switzerland*, 10593/08, 12 Sep. 2012, paras 169–170. *See also* ECtHR [Plenary], *Golder v. United Kingdom*, 21 Feb. 1975, 4451/70, para. 35.

50 *See* e.g., ECtHR [GC], *Fogarty v. United Kingdom*, 37112/97, 21 Nov. 2002, para. 35 (state immunity); *Tănase v. Moldova* [GC], 7/08, 27 Apr. 2010, paras 163, 176–177 (European Convention on Nationality); ECtHR, Tatar *v.* Romania, 67021/01, 27 Jan. 2009, para. 118; ECtHR, *Locascia and Others v. Italy*, 35648/10, para. 125 (Aarhus Convention); ECtHR, *Carlson v. Switzerland*, 49492/06, Judgment of 6 Nov. 2008, para. 76 (Hague Convention on the Civil Aspects of International Child Abduction). *See also* the list of examples in ECtHR [GC], *Demir and Baykara v. Turkey*, 34503/97, 12 Nov. 2008, paras 69–86. In that case, the Court went as far as to state that international instruments can reflect a consensus on 'common values', even if the respondent state is not a party. *See* (critically), Julian Arato, *Constitutional Transformation in the ECTHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 Brook. J. Int'l L. 349 (2012); Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66 ICLQ 557 (2017).

51 *Nada v. Switzerland*, para. 170.

under the ECHR. At the same time, in any such case, the Court will need to address the fundamental question of whether the refusal of a Member State to enforce an intra-EU award on the basis of the *Achmea* case law violates that Member State's obligations under the ECHR, interpreted in light of other relevant and applicable rules of public international law.

The ECtHR's approach to this question will be reflective of its understanding of the relationship between the Convention, EU law, and other rules of public international law. It will also be guided by the Court's understanding of its role within an integrated Europe, where different levels of human rights protection interact and sometimes conflict. Generally, the Court seeks to facilitate multi-level human rights protection through the application of sophisticated notions of deference towards Member State courts and towards the EU. Whether such deference is circumscribed by the ECtHR's understanding of relevant rules of public international law will be crucial to the outcome of any case concerning the non-enforcement of intra-EU awards, whilst it will also further develop the Court's vision of its own supervisory role.

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