ELTE LAW JOURNAL

2022/1

ELTE LJ

ELTE LAW
EÖTVÖS LORÁND UNIVERSITY

ELTE

LAW JOURNAL

2022/1
ELTE LJ

Budapest, 2022

EÖTVÖS UNIVERSITY PRESS

ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

Contact • eltelawjournal@ajk.elte.hu
Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary
For submission check out our submission guide at www.eltelawjournal.hu

Recommended abbreviation for citations: ELTE LJ

DOI: 10.54148/ELTELJ.2022.1

ISSN 2064 4965

Editorial work • Eötvös University Press
H-1088 Budapest, Múzeum krt. 4.

EÖTVÖS UNIVERSITY PRESS www.eotvoskiado.hu

Executive Publisher: the Executive Director of Eötvös University Press
Layout: Andrea Balázs
Cover: Ildikó Kmotrik
Printed by: Multiszolg Ltd

Contents

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European Democracy: A Reconstruction through Dismantling Misconceptions**

Abstract

The democratisation of Europe requires the Europeanisation of democratic thought. This contribution joins that project from a legal perspective. It substantiates art 2 and 10 TEU by engaging with common arguments that deny the European Union's democratic character. It consists in a conceptual reconstruction that reflects European facticity as well as normativity to find a way between apology and utopia. This contribution concludes that the true problem of European democracy does not lie at the Union level, but elsewhere, namely in hybrid Member States.

Keywords: Democracy, demoicracy, democratisation, citizenship, European Union, political equality, trilogues

The authors of the EU Treaties determined that the Union should operate as a representative democracy (art 10 para 1 TEU). To understand the meaning and the implications of this choice we must analyse and carefully dissect the concept of democracy. This analysis should not be apologetic but recognise the normativity of law. First, I will address how representative institutions can exist without a European *demos* (I). Then, I will consider how elections without electoral equality can result in a representative parliament, how executive councils can be a representative legislature, and how trilogues can bring democratic legislation (II). I will conclude on what I perceive as the Union's greatest democratic challenge, namely hybrid Member States (III).

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** This contribution is based on my forthcoming book *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022, Berlin). It has fed my lecture at ELTE on 22 September 2021. I am grateful to Dean Pál Sonnevend for the invitation. Translation by Naomi Shulman, academic support by Lea Berger.

DOI: 10.54148/ELTELJ.2022.1.5

I In Whose Name?

From an etymological point of view, democracy means the rule of the people. The European Treaties, however, postulate neither a European people nor a European nation.[1] Nevertheless, the authors of the Treaties define the Union as a representative democracy. Are they walking a conceptually and politically misguided path? Are they building pseudo-democratic institutions in what amounts to a society that is only nominally democratic?

Another interpretation strikes me as more plausible: the authors of the Treaties succeeded in what Peter Badura, already in 1964, identified as the key to a democratic future, namely, freeing democracy, including its theory, from the framework of the nation-state.[2] To achieve this the authors of the Treaties did not demolish the existing edifice of democratic institutions, theories, and doctrines. Rather, they created openings in this existing edifice, allowing for an expansion able to house twenty-seven nation-state democracies under a new roof. This new edifice spanning almost an entire continent affords democratic life a new dimension. This is reflected in art 2 TEU which postulates a Union founded on democracy.

To build a European democracy, the authors of the Treaties rely on existing national institutions and traditional conceptions. Thus, while they do not postulate a European people, they speak of the 'peoples of Europe' (art 1 para 2 TEU), even describing them as the peoples of the Union ('its peoples', art 3 para 1 TEU).

The EU Treaty assigns the peoples of the Member States a central role in European democracy. It values national democracy. According to the EU Treaty, it is the peoples who as democratic subjects legitimise the Union by ratifying the Treaties, accessions, and financial resources (art 48 f. TEU, art 311 TFEU) and by participating, through their governments, in the European Council and the Council (art 10 para 2 subpara 2). The strong role of the national parliaments and the councils plays an important part in securing democracy in the EU: it counters a concern already articulated by Kant that a centralised continental government could prove to be particularly despotic.[3]

The concept of a people continues playing a major role in European discourse, albeit under a new guise. This is already evident from the fact that the authors of the Treaties employ this term not in the singular but in the plural. This implies a conceptual

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[1] A European demos is nonetheless postulated by Advocate General Eleanore Sharpston, CJEU Joined cases C-715/17, C-718/17 and C-719/17 *European Commission v Poland and others*, Opinion of AG Sharpston, EU:C:2019:917, para 253 (reacting to the Brexit vote).

[2] Peter Badura, 'Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften' (1966) 23 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 34–104, 38; Martin Nettesheim, 'Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie' in Hartmut Bauer, Peter M. Huber and Karl-Peter Sommermann (eds), *Demokratie in Europa* (Mohr Siebeck 2005, Tübingen) 143–189.

[3] Immanuel Kant, 'Zum ewigen Frieden (1795)' in Karl Vorländer (ed), *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik* (Meiner 1964, Hamburg) 128–129.

transformation. That shift is reflected in the terminological proposal of a *demoicracy*, a democracy of peoples.[4] By no means is the understanding of democracy as *demoicracy* new, nor does it fail the concept of democracy. Constitutional thought of other continental democracies, in the US and in India, contain similar plural understandings of the 'people'.[5] The nation-state has never been the only edifice to house democracy.

However, the concept of the democracy of peoples, *demoicracy*, is helpful but insufficient. It alone does not explain the democratic structures of the EU Treaty. To stay with the metaphor of the house, *demoicracy* captures only the lateral openings but does not capture the new building with its additional common floor.

The authors of the Treaties do not base the Union's democratic legitimation on the peoples alone. They also based it on Union citizenship. This recourse to citizenship is neither unprecedented nor does it conflict with the concept of democratic legitimacy. In one of his most famous essays Peter Häberle conceptualises German democracy as a 'citizens' democracy' and precisely not as a 'people's democracy'.[6] That fits with the Treaties' setup: Title II of the EU Treaty, the 'Provisions on Democratic Principles' begins with provisions on Union citizenship in art 9 TEU. The establishment of transnational citizenship through the Treaties as the democratic basis of public authority constitutes, next to *demoicracy*, a further breakthrough. Art 10 TEU commits the Union to representative democracy and determines that 'citizens are directly represented […] in the European Parliament'.

The authors of the Treaties based the democratic legitimacy of the Union's institutions on the peoples of the Member States *and* the citizens of the Union.[7] Art 10 para 2 TEU establishes two strands of democratic representation, one embodied by the European Council and the Council, and another by the European Parliament, which Union citizens elect directly. This can be called dual legitimation.[8] The EU derives its democratic legitimacy not solely from one source but from the interplay between different institutions. Accordingly, the democratic legitimation of the Union's institutions is complex. This pluralistic structure is not marred by the fact that it is ultimately the same individuals

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[4] Kalypso Nicolaïdis, 'The New Constitution as European "Demoi-cracy"?' (2004) 7 Critical Review of International Social and Political Philosophy 76–93, DOI: https://doi.org/10.1080/1369823042000235985; Francis Cheneval and Frank Schimmelfennig, 'The Case for Demoicracy in the European Union' (2013) 51 Journal of Common Market Studies 334–350, DOI: 10.1111/j.1468-5965.2012.02262.x.

[5] Philipp Dann and Arun K. Thiruvengadam, 'Comparing Constitutional Democracy in the European Union and India. An Introduction' in Philipp Dann, Arun K. Thiruvengadam (eds), *Democratic Constitutionalism in India and the European Union Comparing the Law of Democracy in Continental Polities* (Elgar 2021, Cheltenham, Northampton) 1–40, 2.

[6] Peter Häberle, 'Die offene Gesellschaft der Verfassungsinterpreten' (1975) 30 JuristenZeitung 297–304, 302.

[7] Stefan Oeter, 'Föderalismus und Demokratie' in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundlagen* (Springer 2009, Berlin) 73–120, 92, DOI: https://doi.org/10.1007/978-3-540-73810-7_3.

[8] Probably the first to do so was Winfried Kluth, *Die demokratische Legitimation der Europäischen Union. Eine Analyse der These vom Demokratiedefizit der Europäischen Union aus gemeineuropäischer Verfassungsperspektive* (Duncker & Humblot 1995, Berlin) 67 ff.

who vote, once as nationals and once as citizens of the Union:[9] what is decisive is that democratic mediations go through different institutions and procedures, reflecting multiple roles and identities.[10]

Among the two democratic strands, the strand that brings together the twenty-seven national systems is thicker: think of the national ratification of the Treaties and of the European Council's key role. However, giving the Member States such a central role in European democracy requires the Union to oversee the Member States' own democratic credentials. The CJEU attended to this question regarding two extremely sensitive issues: Brexit and the disputes between the Spanish central state and the Catalan separatists.[11] Indeed, protecting democracy in some Member States has become the perhaps most difficult task of the Union.[12]

As important as the national strand is, it is not sufficient. Only a few voices, such as the party 'Alternative for Germany', advocate a Union constituted solely of councils, that is, a Union without the European Parliament.[13] The authors of the Treaties, however, assign the Parliament a constitutive role, placing it at the apex of the Union's institutions. Both art 10 TEU and art 13 TEU list it even before the European Council.

The Union's representative institutions represent the peoples and the citizens of the Union. Do they therefore represent a democratic 'we'? This question is as important as that of a European people. While many authors do not require the existence of a people for a democracy, they do demand a collective identity in the sense of a 'we', since they postulate collective self-determination as democracy's ultimate aim.[14]

There is no indication that the authors of the Treaties conditioned European democracy on a European 'we'. That seems realistic: although there are self-reflexive processes in European society, hardly anyone claims that there is a European 'we' of collective self-

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[9] Ingolf Pernice, 'Europäisches und nationales Verfassungsrecht' (2001) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 148–415, 176; Jelena von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union. Theorie und Praxis der dualen Legitimationsstruktur europäischer Hoheitsgewalt* (Springer 2014, Heidelberg) 463, DOI: https://doi.org/10.1007/978-3-642-23917-5.

[10] Jürgen Habermas, 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts. Ein Essay zur Verfassung Europas' (2012) 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1–44, 18 ff.

[11] CJEU Case C-621/18 *Wightman et al.,* EU:C:2018:999, para 66; Case C-502/19 *Junqueras Vies,* EU:C:2019:1115, para 63.

[12] See the contributions of Beáta Bakó, Stanislaw Biernat, Armin von Bogdandy, Piotr Bogdanowicz, Matteo Bonelli, Iris Canor, Catherine Dupré, Agnieszka Frackowiak-Adamska, Pawel Filipek, Julia Kirchmayr, Justyna Łacny, Artur Nowak-Far, Jörg Polakiewicz, Giacomo Rugge, Wojciech Sadowski, Matthias Schmidt, Werner Schroeder, Pál Sonnevend, Dimitri Spieker, Maciej Taborowski, Joseph Weiler, Marcin Wiacek, in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021, Berlin).

[13] Nikolas Klausmann, 'Nur Populismus? AfD will das Europäische Parlament "abschaffen"' Polis Blog, 23.05.2019.

[14] Christoph Möllers, *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr Siebeck 2005, Tübingen) 28 ff.

determination. The 'We the People' of the American Constitution is on the minds, but not in the text. The EU Treaty begins with His Majesty the King of the Belgians, followed by Her Majesty the Queen of Denmark.

Conceptualising democracy as collective self-determination implies declaring the Union as incapable of democracy. Such a view exists in European society and fuels its self-critical attitude. To be sure, collective self-determination is an honourable theoretical idea. But it is not useful for interpreting art 2 TEU and art 10 TEU, since it fails to elaborate the political decision underlying these provisions.

It is to be stressed that by deciding against democracy as self-determination, the authors of the Treaties did not fail democracy. There are numerous respectable theories that present democracy not as collective self-determination but instead as the process of a pluralistic society.[15] Importantly, the authors of the Treaties do not enshrine a minimalist concept of democracy.[16] Art 2 TEU demands that Union acts comply with the principles of pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. This is a more complex formulation of democracy than self-determination, and one more appropriate to the complexities of European society.

The Union's institutions do not represent a European people or a European 'we', but they do represent the twenty-seven Member States and the almost 450 million individuals who are simultaneously nationals and Union citizens. The institutions do not decide for them in the sense of a 'we', but in their name. The liberal idea of representation triumphs over identity politics. The Union's institutions do not embody the citizens, but rather serve their interests (art 13 para 1 TEU).

II Democratic Representation

Pursuant to art 10 para 2 TEU, the European Parliament, the European Council and the Council provide democratic representation. But with regard to the European Parliament the authors of the Treaties opted for unequal elections and, with the Councils, set the executive fox to keep the democratic geese. Are these betrayals of the Member States' constitutional traditions? A complex concept of democracy shows a way between apology and utopia.[17] Hans Kelsen blazed this trail by identifying compromise as the heart of democracy.

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[15] Harold J. Laski, *The Foundations of Sovereignty* (Harcourt Brace & Co. 1921, London) 251–267.

[16] Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp 1973, Frankfurt am Main) 169 ff.

[17] Fritz W. Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Universitätsverlag 1970, Constance); Daniel Innerarity, *Democracy in Europe. A Political Philosophy of the EU* (Palgrave Macmillan 2018, London) 61 ff., DOI: https://doi.org/10.1007/978-3-319-72197-2.

This entails 'favouring that which binds over that which divides those who are to be brought together'.[18]

1 Unequal Voting Rights

Those who doubt the representative nature of the European Parliament speak with the authoritative voice of the German Constitutional Court's Second Senate in its Lisbon judgment. The Second Senate held that the authors of the Treaties committed a conceptual error by calling this institution a parliament. The Senate maintained it is nothing but 'a governmental body representing the peoples bound together by Treaty'.[19] I have already rebutted the underlying doctrine that a parliament must necessarily represent a people (I). However, the Senate's disqualification of the European Parliament also rests on the fact that not every vote in its election carries the same weight.

Pursuant to art 14 para 3 TEU, the members of the European Parliament are elected by direct universal suffrage in a free and secret ballot, but they are not elected by equal suffrage. Like in the United States, the inequality first results from the fact that the elections take place under different Member State laws. The Treaty mandate in art 223 para 1 TFEU to enact a uniform law has not been fulfilled.[20]

But the disqualification results above all from the decision set down in art 14 para 2 TEU that representation in the European Parliament shall be 'degressively proportional'. Degressive proportionality means that the populous Member States send proportionally fewer representatives than the less populous ones. On average, one seat in the European Parliament represents about 630,000 citizens. Yet the spread between the two extremes is wide: each of the 96 German seats represents about 860,000 inhabitants of this most populous Member State, while each of the 6 Maltese seats represents about 77,000 inhabitants. The value of a German vote compared to a Maltese vote is reminiscent of the value of a vote from the third estate compared to one from the first estate under the undemocratic Prussian three-class electoral system of the late 19th century.

No one promotes the current electoral law for the European Parliament as a model of democratic parliamentarism: there is much room for improvement.[21] But the authors of the

[18] Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd edn, J.C.B. Mohr 1929, Tübingen) 57; idem. Kelsen, *The Essence and Value of Democracy*, edited by Nadia Urbinati and Carlo Invernizzi Accetti, translated by Brian Graf (Rowman & Littlefield 2013, Lanham) 70.

[19] BVerfGE 129, 300 – Five Per Cent Threshold for European Elections, para 81.

[20] On the reasons Sergio Alonso de León, 'Four Decades of the European Electoral Act: a Look Back and a Look Ahead to an Unfulfilled Ambition' (2017) 42 European Law Review 353–368.

[21] Felix Arndt, 'Ausrechnen statt aushandeln: Rationalitätsgewinne durch ein formalisiertes Modell für die Bestimmung der Zusammensetzung des Europäischen Parlaments' (2008) 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 247–279.

Treaties did not opt for Hegel's model of representation by estates[22] or for Maltese class rule over the Germans. What the German Constitutional Court's Second Senate failed to recognise in absolutising the outcome equality of votes, is that the requirement of electoral equality emerged to counteract privileging upper classes, that is, to neutralise differences in social influence.[23] But the numerical overrepresentation of the populations of small Member States does not mirror class rule. Rather, as in other democratic federations, it mirrors pluralism and the protection of minorities, both principles enshrined in art 2 TEU.[24] These reasons also explain and justify the overrepresentation of the Danish and Sorbian minorities under the German Basic Law.[25] There are good democratic reasons against absolutising the equality of a vote's impact, which is why the European settlement has the blessing of all Member States.[26]

2 The Executive Fox among the Democratic Geese

The democratic legitimation of the European political process has a second strand, which begins with elections in the Member States and passes through the European Council and the Council. The representatives in these two bodies are not appointed by the Member States' parliaments, as is the case with the Austrian Federal Council and, until 1913, the US Senate (art 35 of the Austrian Federal Constitutional Act, art I s 3 of the US Constitution, amended by the 17th amendment). Since they are composed of members of the Member State governments, these institutions resemble the German *Bundesrat*, with one essential difference: art 10 para 2 TEU declares that the European Council and the Council are representative bodies. The Basic Law includes no such declaration.

Because the two councils are composed of representatives from the national *executive* branches, art 10 para 2 TEU seems to set the executive fox among the democratic geese. This metaphor comes to mind if one understands representative institutions in opposition to executive bodies. Such an understanding is particularly present in constitutional traditions in which democratic parliaments had to establish themselves against monarchical

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[22] Georg Wilhelm Friedrich Hegel, 'Grundlinien der Philosophie des Rechts' in Eva Moldenhauer and Karl Markus Michel (eds), *Werke in zwanzig Bänden mit Registerband*. Bd 7 (first published 1821, Suhrkamp 1970, Frankfurt am Main) § 301.

[23] Martin Morlok, 'Art. 38 GG' in Horst Dreier (ed), *Grundgesetz Kommentar* Bd 2 (Mohr Siebeck 2015, Tübingen) 1053–1134, para 57, 99.

[24] Jürgen Habermas, 'Zur Prinzipienkonkurrenz von Bürgergleichheit und Staatengleichheit im supranationalen Gemeinwesen. Eine Notiz aus Anlass der Frage nach der Legitimität der ungleichen Repräsentation der Bürger im Europäischen Parlament' (2014) 53 Der Staat 167–192, DOI: https://doi.org/10.3790/staa.53.2.167; Christopher Lord and Johannes Pollak, 'Unequal But Democratic? Equality According to Karlsruhe' (2013) 20 Journal of European Public Policy 190–205, DOI: https://doi.org/10.1080/13501763.2013.746116.

[25] § 6 para 3 cl 2 of the Federal Electoral Act; § 3 para 1 cl 2 of the Electoral Act of Schleswig-Holstein; § 3 para 1 cl 2 of the Electoral Act of Brandenburg; Sara Pennicino, 'Elections' in Rainer Grote and others (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2017, Oxford) para 17.

[26] The unanimous European Council Decision 2018/937 of 28 June 2018 establishing the composition of the European Parliament determines the current distribution.

governments.[27] However, this battle has been fought and won: in all Member States, and especially in the European monarchies, the governments require parliamentary confirmation. The governments of the Member States are democratic institutions, and so are the two councils.

The democratic transformation of the fox has succeeded. The understanding that the Member States' executive branches are undemocratic is misleading. The democratic constitutional development in the 20th century aims for governments that derive their legitimation from elections, but simultaneously form a centre of power able to realise democratic rule.[28] This latter aspect explains the European Council's crucial role in the European system of government.[29]

It has not always been like this. In the first decades of integration, the paradigm was the Community method, according to which it was first the duo of the Commission and the Council and then the trio of the Commission, the Council, and the Parliament that should dominate the European political process. To the chagrin of many a Euro-federalist, the increasing role of the European Council since the 1970s was superimposed on this method.[30] From the 1990s, the European Council has ever more assumed a role which the Member State constitutions ascribe to the office holders of which it is composed: political leadership. Many constitutions conceive – and many citizens understand – this office as a centre of power that shall determine the general direction in difficult policy fields and take critical decisions. Without political agency, there is no democracy.[31]

Today, the European Council, more than any other institution, ensures the Union's agency – as a provider of guidelines, as a shaper, mediator and crisis manager, as communicator with the public.[32] This reveals an irony of the European transformation: an institution that initially appeared to signal the EU's intergovernmental atrophy arguably became its most powerful engine.[33] Accordingly, much of the media presents the European Council as the quintessence of the European machine of compromise.

Compromises – that is one of the central arguments of this study – are in principle valuable, though by no means necessarily so. Indeed, compromises can also compromise

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[27] Christoph Schönberger, *Das Parlament im Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918)* (Klostermann 1997, Frankfurt am Main) 13 ff.

[28] Armin von Bogdandy, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik* (Mohr Siebeck 2000, Tübingen) 39 ff., 107 ff.

[29] Jan Werts, *The European Council* (2nd edn, John Harper 2008, London) 184 f.

[30] Pierre Pescatore, 'Some Critical Remarks on the Single European Act' (1987) 24 (1) Common Market Law Review 9–18, 11 ff, DOI: https://doi.org/10.2307/j.ctvnjbf19.

[31] Sabino Cassese, *Il buon governo. L'età dei doveri* (Mondadori 2020, Milano) 6–11.

[32] Luuk van Middelaar, *Alarums & Excursions: Improvising Politics on the European Stage* (Agenda 2019, Newcastle upon Tyne) 178 ff, DOI: https://doi.org/10.2307/j.ctvnjbf19.

[33] For a history written entirely from this perspective, see Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2014, London).

democracy. Compromises in the European institutions, to have constitutional value, must comply with the principles of art 2 TEU. In the case of the European Council, this is sometimes questionable, especially when we consider that the Treaty provides for the separation of powers as an expression of the principle of the rule of law. This can be exemplified by the discussion of the European Council's influence on Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, which is intended to also safeguard the democratic rule of law in the Member States.[34]

Now, it does not seem problematic that the European Council played a role in that legislative process, since preserving the Union's constitutional values is at stake. The issue concerns the Member States' essential interests and has encountered serious opposition from Poland and Hungary. Therefore, it corresponds to the logic of the European political system that the European Council renders a fundamental decision on this matter. Art 15 para 1 cl 1 TEU explicitly provides that the European Council establishes the 'general political directions and priorities' of the Union's development.[35]

But the role of the European Council does become problematic if it oversteps this remit and overrides the democratic process as established by the authors of the Treaties.[36] Art 15 para 1 cl 2 TEU prohibits the European Council from exercising legislative functions. That prohibition comes into question when European Council conclusions determine in detail what the European legislature, consisting of the Council and the Parliament, should enact, impinging on their function of democratic representation. In the case of Regulation 2020/2092, the European Council even imposed detailed requirements for its application.[37] It is important to protect the Union legislature from the European Council. Institutionally, this task falls to the duo of the European Parliament and the European Court of Justice.

The central role of the European Council in the Union's political process, as defined in art 15 para 1 TEU, is not unusual in comparative constitutional law. Rather, it expresses the presidentialisation of many political systems against the backdrop of increasing complexity, globalisation, and Europeanisation, structures of attention in the media, the dynamics of election campaigns, and the weakness of traditional party structures.[38] Notwithstanding the problems

[34] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[35] See for example the guidelines set by the European Council in the context of dealing with financial repercussions of the Covid 19 pandemic, European Council Conclusions, 17–21 July 2020, 15 f.

[36] See the contrasting views in Editorial Comments, 'Compromising (on) the General Conditionality Mechanism and the Rule of Law' (2021) 58 Common Market Law Review 267–284 (infringement) DOI: https://doi.org/10.54648/COLA2021020; Bruno de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 (3) Common Market Law Review 635–682, 667 ff., 681 (no infringement) DOI: https://doi.org/10.54648/COLA2021046.

[37] European Council Conclusions, 10–11 December 2020, 1–4.

[38] Thomas Poguntke, 'Die Präsidentialisierung des politische Prozesses: Welche Rolle bleibt den politischen Parteien?' in Julian Krüper, Heiker Mertens and Thomas Poguntke (eds), *Parteienwissenschaften* (Nomos 2015, Baden-Baden) 261–282, DOI: https://doi.org/10.5771/9783845257839-261.

that presidentialisation entails, it comes with good democratic reasons. They become clear when we consider the former socialist states of Central and Eastern Europe. It is a significant aspect of their transformations that government gained in stature over the ruling party, which previously had total power.[39] In Poland, the situation after 2015 was already deficient because the country's most powerful politician, Jarosław Kaczyński, was not part of the government (until the autumn of 2020), but determined the country's fate as a party leader from behind.

When old constitutional thinking – for instance about the *division* of powers between the legislative and the executive branch – persists, it hinders the understanding of the Councils' democratic role. Contrary to art 10 para 2 subpara 2 TEU, the German Basic Law fails to declare the *Bundesrat* to be a body of democratic representation and mainstream German constitutional theory denies such a role.[40] The prevalent idea holds that the German people, represented solely by the *Bundestag*, bear the entire burden of democratic legitimation. The Federal Republic is, after all, a *unitary* federal state.[41] That is not the case with the European Union.

3 Weiler's Doubts

The authors of the Treaties posit the Parliament and the Councils as democratic institutions. But their will alone cannot create a living democracy. Now, European politics are certainly lively: the Union institutions are buzzing with activity, the European political process has been undeniably politicised. However, it is disputed, famously by Joseph Weiler, that the institutions produce a democracy.[42] Confronting his doubts helps to clarify further structures of European democracy.

Weiler's argumentation emphasises the first-person plural. For him, democracy means that *we* decide by means of elections. This 'we' expresses a conception of democracy that requires a strong collective identity. In Weiler's view, the meaning of elections ultimately lies in *our* collective decision between different candidates for the office of head of government,

[39] Klaus H. Goetz and Hellmut Wollmann, 'Governmentalizing Central Executives in Post-Communist Europe: a Four-Country Comparison' (2001) 8 Journal of European Public Policy 864–887, DOI: https://doi.org/10.1080/13501760110098260.

[40] On the discussion, Alexander Hanebeck, *Der demokratische Bundesstaat des Grundgesetzes* (Duncker & Humblot 2004, Berlin) 199–205, 279–282, 312–313.

[41] Konrad Hesse, *Der unitarische Bundesstaat* (Müller 1962, Karlsruhe); Holger Hestermeyer, *Eigenständigkeit und Homogenität in föderalen Systemen. Eine vergleichende Studie der föderalen Ordnungen der Bundesrepublik Deutschland, der Vereinigten Staaten und der Europäischen Union* (Mohr Siebeck 2019, Tübingen) 115 ff.

[42] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403–2483, DOI: https://doi.org/10.2307/796898; Joseph H. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012, Oxford) 137–158, DOI: https://doi.org/10.1093/acprof:oso/9780199588770.003.0006; Joseph H. H. Weiler, 'The Crumbling of European Democracy' in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional democracy in crisis?* (Oxford University Press 2018, Oxford) 629–638.

candidates who represent contrasting programmes. Thus, elections determine *our* will and *our* destiny. Nota bene: Weiler does not advocate democratising the Union along those lines, which would imply advocating a European federal state and a European people. Weiler's understanding of democracy serves to criticise, but not to show a way for a more democratic Union. In contrast to Weiler, I am convinced that the authors of the Treaties' decision in favour of a European democracy without a collective identity and Westminster-like structures is theoretically plausible, conforms with the Member States' constitutional traditions and enjoys democratic legitimacy.

The authors of the Treaties decided against a competitive model and in favour of a democracy of many mediations and broad majorities. Democratic theories speak of a democracy of compromise, concordance, consensus, or negotiation.[43] Just consider the composition and voting modes in the two Councils, the composition and voting modes of the European Parliament, the composition of the Commission and the interdependence of these institutions. The logic of art 15 para 4 TEU, art 16 para 4 TEU, and art 17 para 7 TEU forces the European political process to consider the interests of many political camps. European democracy understands and uses the legitimising power of consensus.[44] The idea of leading candidates *(Spitzenkandidaten)*, whereby the candidate of the largest EP group should preside over the Commission, is fully compatible with a democracy of compromise, concordance, consensus, or negotiation.[45]

For Weiler, the decision by the authors of the Treaties in favour of a democracy of many mediations fails the idea of democracy. This position could be substantiated if the Member State elections determined the head of government and decided between right-wing and left-wing politics. But that is hardly the case. In most Member States, electoral law has come to reflect societal pluralism. Thus, the electoral decision is only one stage of an often long and unpredictable path to a government and a government programme.[46] Seeking compromise, consensus, concordance, and negotiation characterise many Member States' politics today. While nobody disputes the ensuing problems,[47] neither does anyone call into question the democratic nature of the Member States for that reason. If a government were

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[43] On the various approaches Manfred G. Schmidt, *Demokratietheorien. Eine Einführung* (Leske + Budrich 1995, Opladen) 319–328.

[44] Christine Reh, 'European Integration as Compromise: Recognition, Concession and the Limits of Cooperation' (2012) 47 Government and Opposition 414–440, DOI: https://doi.org/10.1111/j.1477-7053.2012.01369.x.

[45] For an assessment, see Nicola Lupo, 'La forma di governo dell'Unione, dopo le elezioni europee del maggio 2019' in Paolo Caretti and others (eds), *Liber Amicorum per Pasquale Costanzo Diritto costituzionale in tranformazione VI: Diritto costituzionale eurounitario e comparazione costituzionale* (2020, Genova) 25–36; 'Editorial. Spitzenkandidaten and the European Union's System of Government' (2019) 15 European Constitutional Law Review 609–618, DOI: 10.1017/S1574019619000427.

[46] Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (2nd edn, Yale University Press 2012, New Heaven – London) 130–157; but see also Alan Renwick and Volker Weichsel, 'Im Interesse der Macht: Ungarns neues Wahlsystem' (2012) 62 Osteuropa 3–17.

[47] On parallels between the democratic problems of the Federal Republic and the EU, see Florian Meinel, *Vertrauensfrage. Zur Krise des heutigen Parlamentarismus* (C.H. Beck 2019, Munich) 25.

only democratic if elections directly decided the head of government, proceedings under art 7 TEU would have to be initiated against many Member States.

Some critics claim, similar to Weiler, that the rules of decision-making in the EU are so complex that hardly anyone understands them and that this is a serious democratic problem.[48] I maintain that this view is inaccurate. The public perceives Brussels as the site of arduous struggles for compromise. Indeed, as a rule, the councils decide all important issues by consensus. Only rarely, and only as a last resort, do they decide by majority according to a complex formula that does not allow the majority to impose its will unilaterally. The Union is a consensus system in the shadow of qualified majority voting. This is well-known, sensible, and harnesses the intuitive legitimacy of consensus.

Weiler further calls the elections to the European Parliament into question by pointing out low voter turnout, which, he claims, confirms the meaninglessness of European elections.[49] It is true that voter turnout fell from 63 per cent in 1979 to 51 per cent in 2019, having reached its lowest point with 43 per cent in 2014. However, such turnout rates hardly support Weiler's argument. State elections in German states generally have similarly low turnout rates, yet no one doubts the democratic legitimacy of *Länder* parliaments and state governments. Even in the motherland of modern democracy, the United States of America, in the elections with most participation, the presidential elections, voter turnout totalled only 42 per cent in 2014, 53 per cent in 2018, and 66 per cent in 2020 – the latter being the best turnout in decades.

For Weiler, European elections are not sufficiently meaningful as they lack a specifically European meaning.[50] Indeed, many voters seem to be guided not so much by European election programmes as by the national party spectrum, making their decision based on the domestic political situation. To me, this does not seem meaningless at all, but rather sensible. For one, the European election enables voters to guide their government's policies in the two councils of the Union. For another, voters have reason to assume that the representatives of a party in the European Parliament pursue similar objectives as in the national context.

With their vote, citizens ensure that their preferences are represented in the many mediations of the European political process. Elections to the European Parliament are relevant to how Union citizens are governed. Of course, usually it is not a grand or sweeping right-left decision that is at stake. We may recall slogans such as 'freedom or socialism', 'Moscow is voting for Brandt ... and you?', 'Instead of Star Wars, peace on earth', or, to cite a catchy American example, 'coal, guns, freedom'. The elections to the European Parliament do not reflect such a grand collective choice of direction between left and right, but just one among many instances of mediation between many different preferences and world views.

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[48] Christoph Möllers, *Die Europäische Union als demokratische Föderation* (Fritz Thyssen Stiftung 2019, Cologne) 24.

[49] Weiler, 'The Crumbling of European Democracy' (n 42) 630.

[50] Joseph H. H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999, Cambridge) 350.

Finally, Weiler objects to what he perceives as a lack of political accountability in the Union, since no one can be voted out of office for bad policies.[51] But if we look at this issue more closely, this position is hardly tenable. Every Member of Parliament must stand for re-election. The Commission's term of office is limited. There is the motion of censure under art 234 TFEU, similar to the impeachment proceedings against the US President under art I s 3 of the US Constitution. The councils are also accountable, as they are tied to the national democratic systems in which the government's European policies often play a decisive role.[52]

The European system of government has many mechanisms of democratic accountability. But it is true that it is hard for a democracy of compromise, consensus, concordance, and negotiation to bring about political catharsis. The US elections of 3 November 2020 provide one example for the latter. A majority of Americans probably see them as a liberation and a choice of direction for the American people. But quite a few other Americans believe that there was election fraud, that the new government is illegitimate, and some are ready to resist by force.[53]

The true difference between American and European society does not lie in their respective heterogeneity but in the logic of how it is addressed. To bring matters to a head: the current political system in the US is defined by its *partisanship*, by the Schmittian scheme of friend and foe, while the European system is defined by its many mediations.[54] On the other side of the Atlantic, compromise seems to be a betrayal of the cause, whereas on this side, it seems to be a political virtue.

4 The Democratic Value of Trilogues

An important doctrine of European public law states that laws *(lois, Gesetze)* constitute the centre of the legal order because legislation fuses the many individual wills into the *volonté générale.*[55] It builds on art 6 of the French Declaration of the Rights of Man and of the

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[51] Joseph H. H. Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2012) Singapore Journal of Legal Studies 248–268, 252.

[52] On this nexus, Cesare Pinelli, 'Il doppio cappello dei governi fra Stati e Unione europea' (2016) Rivista trimestrale di diritto pubblico 639–649.

[53] Bright Line Watch, 'A Democratic Stress Test – The 2020 Election and Its Aftermath. Bright Line Watch November 2020 Surveys', <http://brightlinewatch.org/a-democratic-stress-test-the-2020-election-and-its-aftermathbright-line-watch-november-2020-survey/> accessed 22 December 2021.

[54] Justin Greenwood, Christilla Roederer-Rynning, 'Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective' in Olivier Costa (ed), *The European Parliament in Times of EU Crisis Dynamics and Transformations* (Palgrave Macmillan 2019, Cham) 121–141, DOI: https://doi.org/10.1007/978-3-319-97391-3_6; Cathie Jo Martin, 'Conditions for Successful Negotiation: Lessons from Europe' in Jane Mansbridge and Cathie Jo Martin (eds), *Political Negotiation: A Handbook* (Brookings Institution Press 2016, Washington D.C.) 199–230.

[55] Alf Ross, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmen-historischer Untersuchungen* (Deuticke 1929, Leipzig – Wien) 34 f.; Raymond Carré de Malberg, *La loi, expression de la volonté générale. Étude sur le concept de la loi dans la Constitution de 1875* (Recueil Sirey 1931, Paris); Michael Stolleis, *Im Namen des Gesetzes* (Duncker & Humblot 2004, Berlin) 14.

Citizen of 1789: 'law *(la loi)* is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its formation.'

Therefore, the laborious and still incomplete path towards European laws and legislation symbolises the path of European society towards its democracy.[56] Already the ECSC Treaty of 1951 and then the EEC Treaty of 1957 authorised the enactment of general and abstract, that is, statute-equivalent rules, albeit not in the form of statutes *(lois)* but only as regulations and directives. According to Member State constitutional traditions, regulations and directives are general and abstract norms of the executive branch that lack the dignity and legitimacy of a statute which only originates in parliament.

The authors of the Treaties introduced the concept of the legislature only in 1997, but in an entirely subordinate position and, ironically, in relation to the law-making role of the Council, but not the Parliament. In 2004, however, they attempted a great leap with the Constitutional Treaty. Under this Treaty, the Union legislature was supposed to enact Union statutes *(lois, Gesetze)* by means of a legislative procedure. As is well known, the Constitutional Treaty failed.

How the authors of the Lisbon Treaty reacted to this failure is characteristic of the tortuous emergence of the democratic European society. Today, the Union has a *legislature* (art 14 TEU), which adopts *legislative acts* (art 12 TEU) by means of *legislation* (art 16 TEU) in the ordinary *legislative procedure* (art 289 TFEU). However, making a small concession to the sceptics, the Lisbon Treaty does not refer to the legislative acts as statutes *(lois, Gesetze).* It still uses the terms *regulation* and *directive*. The incomplete state of terminological transformation is representative of the general incompleteness of the Union's democratic transformation.

The authors of the Treaties accorded legislation the same top position it occupies in the Member States' constitutional traditions: it is always the first-named, that is, the paramount public function (art 14 TEU, art 16 TEU). But many scholars, pointing to the trilogue, call into question whether the legislative procedure provides democratic legitimation. I shall argue, against such doubts, that the trilogical structures not only do not betray European democracy but should even be understood as a significant democratic innovation.

The Union's ordinary legislative procedure is complex, as is commensurate with the concept of dual legitimation. A legislative act requires 'joint adoption by the European Parliament and the Council […] on a proposal from the Commission' (art 289 para 1 TFEU). This accommodates a Hegelian approach, which relies on mediation and therefore not on the separation but on the cooperation of powers.[57]

The Treaty sets up the legislative procedure in a way that requires much mediating between the institutions. It creates the Conciliation Committee as a forum for consolidating

[56] Jürgen Bast, 'Europäische Gesetzgebung – Fünf Stationen in der Verfassungsentwicklung der EU' in Claudio Franzius, Franz C. Mayer and Jürgen Neyer (eds), *Strukturfragen der Europäischen Union* (Nomos 2010, Baden-Baden) 171–181, DOI: https://doi.org/10.5771/9783845228792-171.

[57] Hegel (n 22) §§ 272, 300.

the different interests, preferences, and positions into a general European will. That committee consists of

> the members of the Council [...] and an equal number of members representing the European Parliament' and has 'the task of reaching agreement [...] by a qualified majority of the members of the Council [...] and by a majority of the members representing the European Parliament within six weeks of its being convened' (art 294 para 10 TFEU).

Given, on average, 120 legislative acts per year, we might expect this forum, this agora, this marketplace of European democracy to be full, bustling, noisy. But in fact, it is quiet and empty.

In 2019 and 2020 the Conciliation Committee did not meet once. Matters are similar in Germany. The Mediation Committee under art 77 para 2 of the German Basic Law, which is supposed to mediate between the ideas of the Bundestag and those of the Bundesrat, has successfully concluded only six mediation procedures in the last legislative period. From here, we can begin tracing the path towards a significant innovation of European democracy.

The declining importance of the German mediation committee is a sign of its increasingly fragmented party-political landscape.[58] Today many politically decisive mediations take place directly between the parties.[59] With 190 parties in the European Parliament and no European parties to guide the process of political positioning across institutions, the European democracy of negotiation cannot pursue such a path. It has developed another and, indeed, more democratic way: the trilogue.[60]

Trilogues are committees that bring together representatives of the Council, the Parliament, and the Commission. They are much smaller than the Conciliation Committee. The Presidency of the Council participates, assisted by the General Secretariat. The European Parliament sends the concerned rapporteur, accompanied by the shadow rapporteurs of the other political groups. The Commission is present with its top administrative staff. As a rule, the meetings involve fewer than thirty people. This is essential: thanks to the manageable number of participants, a trilogue enables dialogic encounter and substantive negotiation. In this way, it differs from the much larger Conciliation Committee, which brings together more than twice the number of people. The fact that the meetings are not open to the public and that there are no minutes also promotes dialogue and substantive negotiations. However, the meetings are by no means secret: the public is informed of a trilogue, and the

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[58] Meinel (n 47) 35 f.

[59] Schmidt (n 43) 319. For criticism of all-party governments, Ernst-Wolfgang Böckenförde, 'Sozialer Bundesstaat und parlamentarische Demokratie' in Jürgen Jekewitz, Michael Melzer and Wolfgang Zeh (eds), *Politik als gelebte Verfassung: Aktuelle Probleme des modernen Verfassungsstaates* (VS Verlag für Sozialwissenschaften 1980, Wiesbaden) 182–199, 191 f, DOI: https://doi.org/10.1007/978-3-322-87747-5_15.

[60] The following remarks are based on the dissertation of Giacomo Rugge, *Trilogues: The Democratic Secret of European Legislation* (Dissertation, Goethe University Frankfurt 2021).

shadow rapporteurs, who are often critical of the proposals under debate, can report on the proceedings in the committees and to the public.[61]

A trilogue is not an institution; it cannot decide anything. But the participants can establish a consensus. Such a consensus exerts great influence because all subsequent steps are usually a mere formality. The legislative project in its agreed form is transmitted to the Council and the Parliament, which almost always establish it as the European general will, usually without further debate.

The high success rate shows that there is enormous pressure on all participants to succeed. It also shows that they have strong mandates. All participants can assume that the institutions involved will support any outcome within the given mandates. Such a mandate requires, in turn, a great deal of internal negotiation beforehand. Without a strong mandate, there will be no trilogue. Thus, for example, the Council, which has had the Commission's proposal for a reform of European refugee law since 2016, has not yet been able to formulate a viable negotiating mandate because the positions within the Council are too heterogeneous. In such cases, no trilogue is initiated.

The European Parliament develops its negotiating mandate in a double filtering system: both the majority of the negotiator's political group and the majority of the committee responsible must support it.[62] This system of will-formation, similar to the procedure in the Council, aims for broad majorities. Importantly, the political groups and the committee not only serve to formalise agreements reached elsewhere but are often the actual place of mediation. In this context, the members of the European Parliament are often better able to provide democratic representation than their national counterparts, who frequently have to support a government line.[63] I see it as a strength and not a weakness of European democracy that it allows for such pluralism and does not subordinate the various conflicts to one overarching line of conflict.[64]

There is even more: institutional logic urges the parliamentary delegation to propose a strong political alternative to the Commission and the Council, since this serves to increase public awareness of the parliamentarians' political profile. This is a starting point for dealing with an important deficiency of the European political process: the technocratic argument that there is no alternative.[65] The logic of European parliamentarism is to bring forth alternatives, which, however, need to be better communicated to the public.

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[61] On the problems with the representatives of Eurosceptic parties, see Ariadna Ripoll Servant and Lara Panning, 'Eurosceptics in Trilogue Settings: Interest Formation and Contestation in the European Parliament' (2019) 42 West European Politics 755–775, DOI: https://doi.org/10.1080/01402382.2019.1575639.

[62] Rugge (n 60) 50.

[63] Peter Mair and Jacques Thomassen, 'Political representation and government in the European Union' (2010) 17 Journal of European Public Policy 20–35, 23 ff, DOI: https://doi.org/10.1080/13501760903465132.

[64] But this is the argument in Möllers, *Die Europäische Union als demokratische Föderation* (n 48) 18.

[65] Renaud Dehousse, 'Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?' (1995) 18 West European Politics 118–136, 122, 124 f, DOI: https://doi.org/10.1080/01402389508425094; van Middelaar, Alarums and Excursions (n 32) 240.

Trilogues meet with a great deal of criticism:[66] parliamentarians, who are unknown to most citizens and appointed as rapporteurs in obscure procedures, develop a text with the Council Presidency in a non-transparent process of wheeling and dealing that takes place far from the public eye. Moreover, this text then almost automatically comes to become the European *volonté générale*. Opposing this phalanx, Giacomo Rugge shows that trilogue procedures are the functional equivalent of strong parties and even have several democratic advantages.[67]

According to the traditional model of parliamentarism, parliament is supposed to determine the general will after a struggle in public session and based on the best argument. The practice of 20th-century parliamentary democracies falls short of this model – a fact which Carl Schmitt, who personifies the Weimar critique of parties and representation, used to delegitimise liberal parliamentarism.[68] Gerhard Leibholz turns this critique into something constructive: he recodes the haggling of party politics into the central achievement of democratic mediation.[69] This successful recoding contributes to the understanding of the Federal Republic as a democratic polity; similar recodings were also undertaken in other European states.[70]

However, this means that the place of mediation lies outside the public institutions and is hardly framed by procedural law. Political parties are private associations. The provisions of the German Political Parties Act do not concern their decision-making process on legislative proposals. There is no duty to inform the public about a negotiation. Access to the place of mediation is not regulated. The opposition is mostly excluded unless its participation is required. This makes parties' democratic monitoring function more difficult. The intra-party logic of power can break through largely unchecked.

Trilogues are more democratic. Both the access to them and their procedures are regulated, including in the Joint Declaration on Practical Arrangements for the Codecision Procedure, the Rules of Procedure of the European Parliament, and the Parliament's Code of Conduct for Negotiating in the Context of the Ordinary Legislative Procedure. The public does not have access to a trilogue, and the lead negotiators need not publicly justify

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[66] Deirdre Curtin and Päivi Leino, 'In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn' (2017) 54 (6) Common Market Law Review 1673–1712, DOI: https://doi.org/10.54648/COLA2017146; Jelena von Achenbach, 'Verfassungswandel durch Selbstorganisation: Triloge im europäischen Gesetzgebungsverfahren' (2016) 55 Der Staat 1–39, DOI: 10.3790/staa.55.1.1.

[67] Rugge (n 60) ch V and VI.

[68] Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (2nd edn, Duncker & Humblot 1926, München). On this conception, Armin von Bogdandy, 'Parlamentarismus in Europa. Eine Verfalls- oder Erfolgsgeschichte?' (2005) 130 Archiv des öffentlichen Rechts 445–464, DOI: https://doi.org/10.1628/000389105780275681.

[69] Gerhard Leibholz, *Der Strukturwandel der modernen Demokratie. Vortrag, gehalten in der Juristischen Studiengesellschaft in Karlsruhe am 30. April 1952* (C.F. Müller 1952, Karlsruhe). On Leibholz' role Anna-Bettina Kaiser (ed), *Der Parteienstaat. Zum Staatsverständnis von Gerhard Leibholz* (Nomos 2013, Baden-Baden).

[70] E.g. Pietro Scoppola, *La repubblica dei partiti. Evoluzione e crisi di un sistema politico (1945–1996)* (Il Mulino 1997, Bologna).

how they conduct the negotiations. However, they do have to inform the parliament[71] and are subject to monitoring by the shadow rapporteurs of the competing parties. Thereby, the opposition is involved. It strikes me as difficult to dispute the democratic nature of this process.

This is especially true when we consider trilogues in their constitutional context. A trilogue is only the final component in a long series of democratic mediations. The first component are the competences and Treaty objectives, legitimised by the Member States' ratifications. The second component consists of the European Council's mediations in the shape of its 'impulses', 'objectives' and 'priorities' for European legislation. A third component is the annual roadmap of European legislation negotiated by the Parliament, the Council, and the Commission.[72] On the basis of the Commission's proposal, each institution then internally mediates the different interests, preferences, and positions into a mandate that makes a trilogue possible. Only then can a trilogue consolidate the various interests, preferences, and positions into the general will of European society.

These many complex mediations may seem to be an errant democratic path if we interpret the general will as the expression of a compact majority will that is realised in a statute's enactment. But in a plural, differentiated, diverse society, such a compact will of the majority is usually fictitious. Today, the majority will mostly aggregates overlapping particularities.[73] To put it in Hegelian terms: the European legislative act is the result of a multitude of complex mediations that correspond to the fundamental principles of art 2 TEU. We should not disqualify a compromise that arises from such mediations as the lowest common denominator but understand its democratic value.[74]

To conclude with a Hegelian figure, European society will only be fully at ease with itself once many citizens understand the trilogues of the EU as an integral aspect of their democracy, which both demands and consists of compromises. Until this insight is achieved, the problem of alienation will plague European society.

III A More Democratic Union

To avoid the impression of an apology, let me emphasise that I have focused on the classificatory dimension of the concept of democracy, whether the Union is a democratic or rather an undemocratic system of government. But the concept of democracy has not

[71] Gijs Jan Brandsma, 'Transparency of EU Informal Trilogues Through Public Feedback in the European Parliament: Promise Unfulfilled' (2019) 26 Journal of European Public Policy 1464–1483, DOI: https://doi.org/10.1080/13501763.2018.1528295.

[72] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L123/1.

[73] Pierre Rosanvallon, *La légitimité démocratique. Impartialité, réflexivité, proximité* (Seuil 2008, Paris) 10–12.

[74] This is the fundamental thesis of Rugge (n 60).

only a classificatory, but also a comparative dimension. Democracies can be more or less democratic.[75] Indeed, democracies can and should become more democratic. This applies to the European Union as well.[76]

According to Eurobarometer 2019, 55 percent of respondents are satisfied with the EU's democracy.[77] On the one hand, this is remarkable, considering the categorical denial of the Union's democratic nature by some. On the other hand, the result is not satisfactory. The 55 per cent for the institutions of the EU are only in the lower midfield in European comparison: frontrunners like Denmark's democracy have a satisfaction rate of 95 per cent, Ireland's democracy achieves 80 per cent and Germany's 74 per cent. At the same time, satisfaction with French democracy, at 53 per cent, with Greek democracy, at 35 per cent, and with Croatian democracy, at only 33 per cent, is worse than with the EU. The components of European democracy are not only diverse but also of very different quality.[78]

The Union should become more democratic. In many respects, this aim seems open, but in others it does not. For example, hardly anyone is advocating that the Union be modelled on the American, British, Chinese, Russian, or Swiss type of government. European society is forging its own path of democratic mediations, and indeed the authors of the Treaties mandate the Union's institutions to bring about more democracy.

The institutions must 'aim to promote its values' (art 13 para 1 TEU). Art 2 TEU, read together with the provisions in the EU Treaty's three introductory titles that contour it, suggests that the basic idea of a representative and just democracy that protects human rights and is based on the rule of law and on solidarity should guide the interpretation of all further provisions of the EU Treaty and the TFEU.

Against this backdrop, various issues come to the fore. To me, the most important by far is improving democracy in national societies that show systemic deficiencies, some of which are even considered as not fully democratic, but rather hybrid regimes. Today, the true European democratic deficit is not at the European, but at the national level. That is the flip side of the importance of national democracy to European democracy. After the Europeanisation of democratic thought, the further democratisation of Europe requires above all the democratisation of some national systems of government.

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[75] Hans-Joachim Lauth, *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich* (Springer 2004, Wiesbaden). See, concretely, the democracy index Freedom House, <https://freedomhouse.org/report/freedom-world> accessed 22 December 2021; Varieties of Democracy (V-Dem), <https://www.v-dem.net/> accessed 22 December 2021; Bertelsmann Transformation Index, <https://bti-project.org/en/home.html?&cb=00000> accessed 22 December 2021.

[76] Sylvie Goulard and Mario Monti, *La democrazia in Europa. Guardare lontano* (Rizzoli 2012, Milano); Antoine Vauchez, *Démocratiser l'Europe* (Seuil 2014, Paris); Möllers, *Die Europäische Union als demokratische Föderation* (n 48).

[77] European Union, Standard Eurobarometer 91, Spring 2019, 144, <https://europa.eu/eurobarometer/surveys/detail/2253> accessed 22 December 2021.

[78] Ibid 141.

Cristian Gallorini*

The Termination of Intra-EU Investor-state Arbitration and the Enforceability of Intra-EU Awards in the United States District Courts

Abstract

Over the past 20 years, the gradual termination of ISDS mechanisms in intra-EU BITs and the ECT have received considerable attention within the EU. The CJEU judgments in *Achmea*, *Komstroy* and *PL Holdings* accelerated this termination process. This article aims to contribute to the debate.

After providing an assessment of how the EU anti-investment arbitration policy started and is gradually leading to a complete termination of intra-EU investment arbitration, the article analyses arbitral tribunals' possible reaction to *Komstroy*. The article proposes that nothing suppresses tribunals of the jurisdiction to hear intra-EU disputes under Article 26 ECT and *Kompetenz-Kompetenz*. At the same time, the possibility for tribunals to render awards that are enforceable within the EU is seriously at stake. Aware of that, European investors are seeking enforcement of favourable intra-EU awards outside the EU. One of the preferred venues is the US District court for the District of Columbia which, however, has not yet taken a firm position on the matter. The article concludes that while arbitration under the intra-EU BITs is barely breathing, under the ECT investors should prefer the recourse to ICSID. In the final section, it discusses whether the enhanced protection of international investment law is still offered to European investors while investing in the EU.

Keywords: Energy Charter Treaty, Komstroy, PL Holdings, intra-Eu BITs, intra-EU investor-state arbitration, EU law, United States District Courts

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I Introduction

The gradual termination of intra-EU investor-state arbitration has received considerable attention within the European Union (EU) over the past 20 years. It is a debate mostly encouraged by the EU institutions and EU legal order for establishing the priority and autonomy of EU law over international investment law.

In 2018, the Court of Justice of the European Union (CJEU) accelerated the termination process by rendering the judgment in the *Slowakische Republik v Achmea BV (Achmea)* case.[1] In *Achmea*, the CJEU held that Investor State Dispute Settlement (ISDS) provisions in the fashion of Article 8 of the Netherlands-Slovakia Bilateral Investment Treaty (BIT)[2] were incompatible with EU law. The Member States and the European Commission (Commission) interpreted the judgment as extending to all intra-EU BITs, without a BIT-by-BIT analysis, as well as to the Energy Charter Treaty (ECT).[3] However, this approach missed the point that *Achmea* is one of the rare investment arbitration cases which involved EU law, and specifically the freedom of establishment and free movement of capital.[4] In this sense, *Achmea* should have been construed quite narrowly

[1] Case C-284/16 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158, para 31. The case in front of the CJEU originated from the interpretation of an intra-EU BIT concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and inherited by the Slovak Republic after the dissolution of Czechoslovakia. The offer to arbitrate in the BIT gave rise to arbitration proceedings over Slovakia's breach of the BIT's expropriation standard carried out by implementing various legislative measures. Those measures allegedly constituted a systematic reversal of the previous liberalisation of the Slovak health insurance market that had pushed Achmea (formerly Eureko B.V.) to invest in the Slovak Republic's health insurance sector. The question referred by the German *Bundesgerichtshof* was whether EU law would prevent the application of an arbitration clause (Art. 8 Netherlands-Slovakia BIT), which allowed an investor from one of those Member States to bring proceedings against a Member State before an arbitral tribunal, and the jurisdiction of which the Member States have undertaken to accept. The CJEU, giving a concise reasoning, held that articles 267 and 344 TFEU should be interpreted as precluding the application of an arbitration clause, such as Art. 8 of the Netherlands-Slovakia BIT, so far as it allowed for the resolution of investment disputes by way of arbitration. The CJEU, within its reasoning, also strengthened its opinion that arbitral tribunals within the scope of intra-EU BITs, 'cannot be regarded as a "court or tribunal of a Member State" within the meaning of Art. 267 TFEU.'

[2] In its relevant parts, Article 8 Netherlands-Slovakia BIT reads that '[e]ach Contracting Party hereby consents to submit a dispute referred to in paragraph 1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement.'

[3] The *Energy Charter Treaty* [1994] 2080 UNTS 100. The ECT is a mixed agreement that was signed on 17 December 1994 and entered into force on 16 April 1998. At present 54 members are part of the ECT, including the EU, the Euratom, 26 EU Member States and 26 non-EU members. The ECT is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. Originally, the ECT was intended to foster energy exchanges in the Eurasian context, particularly between the developed economies of Western Europe, Japan, and the emerging economies of the former CIS. See, Graham Coop, 'Energy Charter Treaty and the European Union: Is Conflict Inevitable?' (2009) 27 (3) Journal of Energy & Natural Resources Law 404–419, 405 DOI: https://doi.org/10.1080/02646811.2009.11435222.

[4] Freedoms that are codified in the Treaty on the Functioning of the European Union (TFEU) respectively in Article 49 (right of establishment) and Article 63 (free movement of capital).

instead. Nonetheless, in an escalation of a little more than 2 years after *Achmea*, the Commission and the Member States adopted a series of political acts[5] that culminated in the signature by almost all the Member States of the Agreement for the Termination of Bilateral Investment Treaties (Termination Agreement).[6]

The most recent acts on the termination of intra-EU investor-state arbitration process are represented by the CJEU judgments in *Republic of Moldova v Komstroy LLC* (*Komstroy*)[7] and *Republiken Polen v PL Holdings Sàrl* (*PL Holdings*).[8] While in *Komstroy* the CJEU

[5] *Declarations of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union* (2019 Declarations) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 31 March 2022. The 2019 Declarations were extremely dangerous (because they may have undermined the interpretation of the BITs in the application of *The Vienna Convention on the Law of the Treaties* (VCLT) and eventually impacted on legal certainty) and potentially tremendously influential (because they may have constituted the object of an authentic interpretation with the aim of amending a treaty).

[6] *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union* [2020] OJ L169 (Termination Agreement or TA). 23 of the 27 Member States signed the Termination Agreement. Beside the UK (which at the time of the signature had withdrawn from the EU), Austria, Finland, Ireland, and Sweden are the EU Member States that did not sign the Termination Agreement. The Contracting Member States have instead made some strong decisions within the Termination Agreement. They terminated sunset clauses included in intra-EU BITs (Art. 3 TA). They generally provided for retroactivity of the Termination Agreement and thus for retrospective extinguishment of arbitral jurisdiction in pending proceedings (Art. 4 TA). Overall, they firmly exercised their sovereign power in a manner which may seem to be oriented to thwart investor-state arbitration in the state's favour. Similarly, they seem to be asking investors to renounce the rights acquired by starting an investor-state dispute or the pecuniary right acquired by an award issued in their favour. In the best scenario, investors would still have transitional remedies to have their case reconsidered, either by an amicable settlement mechanism or by national courts, the results of which may differ from the protection received under the intra-EU BITs regime and the compatibility of which with EU law (especially for the structured dialogue) is debatable (Artt. 8 to 10 TA).

[7] Case C-741/19 *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655. This article would only focus on the *dictum* in *Komstroy* where the CJEU held the incompatibility of the ISDS provision in the ECT with EU law. The jurisdictional arguments and the case between Moldova and the Ukrainian company Komstroy (formerly Energolians) will not be addressed in this analysis. For the sake of completeness, it suffices to note briefly that the disputes between Komstroy and Moldova arose out of Komstroy's action to recover outstanding payments related to a series of contracts for the supply of electricity to Moldova, by Energolians. After the Paris-seated arbitration tribunal awarded Komstroy $ 46.5 million in damages, Moldova proceeded to annul the award before the *Cour d'appel de Paris*. The court of appeal annulled the award on the ground that the contract for the sale of electricity did not constitute investment for the purposes of the ECT, and Komstroy appealed to the *Cour de cassation*. The French Supreme Court quashed the judgment on the ground that the court of appeal misinterpreted the definition of investment. Hence, on remand, the Court of Appeal started a preliminary ruling procedure and submitted four questions before the CJEU to clarify the definition of investment under the ECT. The CJEU concluded that the ECT 'must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an "investment" within the meaning of those provisions.'

[8] Case C-109/20 *Republiken Polen v PL Holdings Sàrl* [2021] ECLI:EU:C:2021:875 (provisional text). For what is relevant for the present article, the judgment is briefly analysed in this article in Ch. V Conclusions, below.

extended *Achmea* to the ECT and concluded for the incompatibility with EU law of the ISDS provision included in Article 26 ECT,[9] in *PL Holding* the CJEU extended the incompatibility beyond the ISDS provisions included in an investment treaty, and held *ad hoc* arbitration agreements entered between an investor and a Member State (the content of which is identical to the ISDS provisions in that treaty) to be invalid. However, in the aftermath of *Komstroy* and *PL Holdings,* nothing suggests that an arbitral tribunal, in deciding on their own jurisdiction, will act any differently to that in the aftermath of *Achmea*. Arbitral Tribunals seized with a jurisdictional objection on the ground of the mentioned CJEU case law would still be able to assume jurisdiction on the matters under the principle of *Kompetenz-Kompetenz*. What seems to be at stake is nevertheless the possibility for those arbitral tribunals to render awards that will be final and enforceable, especially within the borders of the EU. Investors may in fact eventually be expropriated of their final awards and see their economic rights frustrated by the impossibility to enforce the awards, neither under the ICSID Convention nor the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention).

In the delineated environment, this article aims to contribute to the debate on the relationship between EU law and international investment law by providing a critical analysis of intra-EU investment arbitration. A commentary will first be provided on how (Ch. II) the EU anti-investment arbitration policy started, and how (Ch. III) it is gradually leading to a complete termination of intra-EU investor-state arbitration. It will then address (Ch. IV) the enforcement of intra-EU awards outside the EU and more specifically within the United States District Court of the District of Columbia (D.D.C.). The conclusion (Ch. V) will summarise the new challenges that European investors will incur by investing in the EU and whether a possibility still exists for investors to receive the enhanced protection of investment law treaties while investing in the EU.

II The EU Anti-investment Arbitration Attitude. How It Started…

The accession of the twelve Central and Eastern European Countries to the European Union[10] turned the BITs concluded between the then Member States and those countries into intra-EU BITs. These intra-EU BITs, which remained intact in their substance and

[9] For present purposes here, the primarily relevant ones are paragraphs (3)(a) and (6) of Article 26, which respectively state '(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration… in accordance with the provisions of this Article' and '(6) [a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'

[10] Malta, Cyprus, Slovenia, Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, and Hungary acceded to the EU in 2004; Bulgaria and Romania acceded in 2007. See generally, Carrie E. Anderer, 'Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty' (2010) 35 (3) Brooklyn Journal of International Law 851–882.

effect,[11] soon became the main legal source of protection for West European investors.[12] At the same time, Member States called to respond to investment arbitration claims started to assert the incompatibility of intra-EU BITs with EU law.[13]

Meanwhile, the Commission promoted an anti-investment law arbitration approach through the exercise of its Treaty obligations stemming from Article 17 TEU.[14] First, the Commission expressed its view by using political acts.[15] Second, it participated in investment arbitration as *amicus curiae,* where its role of a non-disputing party in support of Respondent Member States turned into 'a second respondent more hostile to [the investors] than [the host state] itself'.[16] In these proceedings, the Commission used recurrent legal arguments regarding both substance and procedure.[17] It used to argue that the investment standards included in intra-EU BITs were incompatible with the EU Treaties because (i) their application may have affected the already complete set of rules on investment protection provided for by EU law;[18] and (ii) the intra-EU BITs' investment standard could constitute a violation of the requirement of equal treatment of nationals and non-nationals under the EU fundamental freedoms.[19] Last, under a public international law perspective,[20] the Commission used to infer that intra-EU BITs and the EU Treaties share the same 'subject

[11] Csongor I. Nagy, 'Extra-Eu BITs and Eu Law: Immunity, "Defense of Superior Orders", Treaty Shopping and Unilateralism' in Csongor I. Nagy (ed), *Investment Arbitration and National Interest* (Council on International Law and Policy 2018, Indianapolis, 137–148) 138.

[12] Csongor I. Nagy, 'Intra-EU BITs after Achmea: a Cross-Cutting Issue' in Csongor I. Nagy (ed), *Investment Arbitration in Central and Eastern Europe: Law and Practice* (Edward Elgar 2019, 1–13) 2.

[13] Juliane Kokott, Christoph Sobotta, 'Investment Arbitration and EU Law' 2016/18 Cambridge Yearbook of European Legal Studies 3–19, 9 DOI: https://doi.org/10.1017/cel.2016.5. As discussed by Lavranos, the first case in which the Commission has participated in the debate was *Eastern Sugar v Czech Republic*, started in 2004 (award issued in 2007). See generally, Loukas A Mistelis, Nikolaos Lavranos, 'The World after the termination of intra-EU BITS' (2020) 5 European Investment Law and Arbitration Review 196–214, 197, DOI: https://doi.org/10.1163/24689017_008.

[14] Art. 17(1) of the *Treaty on European Union* (TEU), according to which the Commission has an obligation to ensure the Treaties' application and oversee the application of EU law.

[15] European Commission, 'Spain Support for electricity generation from renewable energy sources, cogeneration and waste' 10.11.2017 C(2017) 7384 final (letter).

[16] ICSID Case No ARB/07/19 *Electrabel S.A. v Republic of Hungary* Award (25 November 2015), para 234.

[17] Ibid. For an analysis of the Perspective of the Commission on intra-EU BITS, Ursula Kriebaum 'The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective' (2015) (1) ELTE Law Journal 27–35.

[18] European Commission (n 15) paras 160–162.

[19] As well as the general principle of non-discrimination on the ground of nationality pursuant to Article 19 TFEU. In this sense, intra-EU BITs were said to provide preferential treatment to investors from certain Member States and not to others, even though both nationals may be in comparable situations.

[20] At the time, the idea was reinforced by the fact that the intra-EU BITs have 'some commonality' with the EU freedom of establishment and the free movement of capital. George A. Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 (3) Arbitration International 398–446, 432ff, DOI: https://doi.org/10.1093/arbitration/28.3.397.

matter' for the purposes of Articles 30(3)[21] or 59(1)[22] VCLT. In this sense, the accession of both the BIT's parties to the EU would have had the effect of automatically terminating the BIT as an earlier agreement, incompatible with the EU Treaties,[23] or at least disapply those provisions of the BIT that were incompatible with the subsequent EU Treaties.[24]

A different set of Commission's arguments used to be strictly related to the ISDS mechanism included in intra-EU BITs. In general terms, the Commission stated that the very idea of investor-state arbitration is incompatible with EU law. The offer to arbitration included in intra-EU BITs would in fact provide for a parallel jurisdiction for intra-EU investor-state disputes and would remove those disputes from the basic system of judicial remedies provided by the EU Treaties. Moreover, due to the lack of competence of an arbitral tribunal to start a preliminary ruling procedure in the sense of Art. 267 TFUE,[25] intra-EU investor-state arbitration may improperly apply EU law. This may also prevent the full effectiveness and autonomy of EU law and thus violate the overarching principles of mutual trust between Member States.[26] Last, the Commission has used what was identified by an author as the 'circularity argument'.[27] According to this argument, a foreign final award which orders the Member State to pay damages or compensation, but which *de facto* has the effect of reinstating forms of state aid, would constitute state aid itself and it would not be enforceable within the Member States because of being in breach of EU law.

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[21] Article 30(3) VCLT reads that 'when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.

[22] Article 59(1) VCLT reads that 'a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:/(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or/(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.'

[23] Art. 59 VCLT.

[24] Art. 30 VCLT; Kriebaum (n 17) 29, 31.

[25] Art. 267 TFEU reads in relevant parts that 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;/Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.' As generally explained in one of the EU institutional websites, the preliminary reference procedure is a mechanism provided by the Treaties that creates a 'dialogue between the CJEU and national courts.' The preliminary ruling proceeding aims to (1) 'provide national courts with assistance on questions regarding the interpretation of EU law.' (2) 'to contribute to a uniform application of EU law' across the Member States; and (3) 'to create an additional mechanism – on top of the action for annulment of an EU act (set out in Article 263 TFEU) – for an ex-post verification of the conformity of acts of the EU institutions with primary EU law (the Treaties and general principles of EU law).' Rafał Mańko, 'Preliminary reference procedure' [2017] European Parliamentary Research Service (EPRS) 1–12, 1, accessible at <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2017)608628> accessed 31 March 2022.

[26] Kokott, Sobotta (n 13) 10ff; *Achmea* (n 1) para 56.

[27] Tamás Kende, 'Arbitral Awards Classified as State Aid under European Union Law' (2015) (1) ELTE Law Journal 37–56, 50 ff.

Although some of these arguments may be perceived far back in the history of European investment law and some of them have been largely superseded by arbitral tribunals (i.e., the 'public international law' argument),[28] they are nevertheless important because they shaped the Commission and Member States' anti-investment arbitration policy. They also summarise well-reasoned defences against investors' claims in intra-EU investor-state disputes and show the directions in which the dismantling of intra-EU investor-state arbitration took place over time. The process has been occurring one piece at a time and started exactly with the attempt to eliminate intra-EU BITs.

III …And How It Is Leading to the Termination of Intra-EU Investor-state Arbitration

It is no surprise that the dismantling of investor-state arbitration started tackling investment arbitration. ISDS provisions are 'the most essential provisions' in the BITs,[29] which cannot find any corresponding rule in the EU Treaties. More importantly, investment arbitration, revolving around the 'arbitration without privity doctrine',[30] is something 'dramatically different from anything previously known in the international sphere'.[31] In practice, by creating an effective and compulsory (at least for the state party to the dispute) mechanism for the resolution of investment disputes, ISDS provisions generally empower the aggrieved investors to invoke 'compulsory arbitration to secure a binding award'[32] against the host state; 'whether or not any specific agreement has been concluded with the particular complainant',[33] and without any home states' (diplomatic) intervention or consent.

In addition to that, arbitral tribunals are creatures of international law, and they have the power to decide their own jurisdiction under the principle of *Kompetenz-Kompetenz*. From an EU law point of view, *Kompetenz-Kompetenz* produces the feared effect of removing investor-state disputes from the jurisdiction of national courts, and thus from a commonly agreed system of judicial remedies enshrined in the EU Treaties,[34] which primarily

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[28] Csongor I. Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back"' (2018) 19 (04) German Law Journal 982–1116, 1002; ICSID, Case No. ARB/07/22 *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary* Award (23 September 2010); SCC, Case No. 088/2004 *Eastern Sugar B.V. (Netherlands) v The Czech Republic* Partial Award (27 March 2007); SCC, Case No. V 2014/168) *GPF GP S.à.r.l. v Republic of Poland* Award (29 April 2020).

[29] *Eastern Sugar B.V.* (n 28) para 165. See also *GPF GP S.à.r.l.* (n 28) para 366.

[30] Paulsson Jan, 'Arbitration without Privity' (1995) 10 (2) Foreign Investment Law Journal 232–257, 256, DOI: https://doi.org/10.1093/icsidreview/10.2.232.

[31] Ibid.

[32] Jeswald W. Salacuse, 'The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 (3) The International Lawyer 655–675, 672.

[33] Paulsson (n 30) 233.

[34] *Achmea* (n 1) para 55.

includes the possibility to start a preliminary ruling before the CJEU for the request of an interpretation on the correct application of EU law.[35]

These considerations were at the very heart of the CJEU rulings in the cases *Slowakische Republik v Achmea BV* and *Komstroy v Moldova*, which respectively denote the CJEU's invalidation of the ISDS mechanism included in intra-EU BITs and the attempt to invalidate Art. 26 ECT.

1 The CJEU Strikes ISDS Mechanism in Intra-EU BIT: *Slowakische Republik v Achmea BV*

In *Achmea*, the CJEU affirmed the principle that Articles 344[36] and 267 TFEU preclude ISDS provisions in intra-EU BITs, in the fashion of Article 8 of the Netherlands-Slovakia BIT, for their incompatibility with the EU overarching principles of mutual trust among Member States and the autonomy of EU law. The EU Commission,[37] and most of the Member States[38] have attempted to interpret *Achmea* extensively. They stated that all investment agreements (either based on intra-EU BITs or the ECT) which could give rise to an intra-EU arbitration proceeding (notwithstanding its type, whether *ad hoc* or institutional) are incompatible with the basic principles of EU law. The expansive effects attributed to *Achmea,* and its impact were overrated, nonetheless. Many factual and legislative elements in the case showed that *Achmea* should not have been interpreted extensively under the perspective of either EU law or investment law.

From an EU law perspective, the factual and legal background to Achmea's award fell within the scope of the freedom of establishment and free movement of capital. The case concerned a request for damages brought by Achmea, a subsidiary of a larger Dutch insurance group, on the ground of the limitation of the company's freedom of establishment. In fact, Achmea was prohibited from distributing profits generated by private sickness insurance activities due to a legislative ban imposed by the Slovak Republic and obtained by reversing the liberalisation of the private sickness insurance market.[39] Moreover, the Slovak measure infringed the freedom of payments and repatriation of profits, which, in line with the *Gebhard* jurisprudence, are considered corollaries of the overarching freedom of establishment.[40] On these grounds, investors would have had a different cause of action

[35] *Achmea* (n 1) paras 49, 56.

[36] Article 344 TFEU limits the Member States' power to 'submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. In this sense, Article 344 creates a monopoly over the interpretation and application of EU law that excludes any other courts or tribunal from that exercise.

[37] European Commission, 'Protection of intra-EU investment' (Communication) COM(2018)547/2.

[38] 2019 Declarations (n 5) para III.

[39] *Achmea* (n 1) para 8.

[40] Nagy (n 28) 994; Case 55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1994] ECLI:EU:C:1995:411, para 25.

based on national law rather than investment law.[41] As such, solely on these grounds, the CJEU was able to conclude that the arbitral tribunal in *Achmea* could be 'called on to interpret or indeed to apply EU law'.[42]

From an investment law perspective, despite the existence of a commonality of ISDS provisions in different intra-EU BITS, ISDS provisions are often worded differently, and it is preferable to avoid generalising a sole idea of an ISDS provision with the aim of providing an extensive application of *Achmea*. Major differences also exist in the law applicable to the disputes. Some ISDS provisions explicitly provide for the application of the rules of the relevant BIT and the general principles of international law,[43] while others do not include any rule on the applicable law at all, which will be determined under the applicable arbitration rules. In this way, certain intra-EU investment arbitration may never deal with the application or interpretation of EU law.[44] On the contrary, ISDS provisions in the fashion of Article 8(6) of the Netherlands-Slovakia BIT included as law applicable to the dispute the law 'in force of the Contracting Party concerned' and the provision of 'other relevant Agreements between the Contracting Parties'.[45] EU law could therefore find application or interpretation in assessing the breach of investors' rights by an arbitral tribunal, either as part of national law or a 'subsequent Agreement between the States Parties' to the Netherlands-Slovakia BIT.[46]

Application of EU law could also have derived from the parties' specific choice of arbitral seat. Article 8 of the Netherlands-Slovakia BIT provided solely for *ad-hoc* arbitration according to the United Nations Commission of International Trade Law rules (UNCITRAL),[47] which allowed the parties to choose the seat of the arbitration and thus 'the law applicable to the procedure governing judicial review of the validity of the award'.[48] By choosing Germany as the *lex loci arbitri*, the parties provided the possibility for EU law

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[41] *Achmea* (n 1) paras 35–36.

[42] And thus, eventually undermining the full effectiveness and autonomy of EU law. However, the scope of application of the investment standards stemming from the Netherlands-Slovakia BIT could safely be deemed broader than EU law itself. *See* in this sense *Achmea* (n 1) paras 40–42; Nagy (n 28), 988 ff.

[43] See for example Article 8 of the 1998 Italy-Slovakia BIT (terminated); or Article 9 of the 2000 Slovenia-Italy BIT (terminated).

[44] N. Lavranos, T. Singla, 'Achmea: Groundbreaking or Overrated?' (2018) 16 (6) German Arbitration Journal 348–357, 350.

[45] Article 8(6) of the Netherlands-Slovakia BIT.

[46] Johann R. Basedow, 'The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration' (2020) 23 (1) Journal of International Economic Law 271–292, 274, DOI: https://doi.org/10.1093/jiel/jgz025.

[47] Art. 8(2) Netherlands-Slovakia BIT, in the part that reads, '(2) Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement' and Art. 8.(5) Netherlands-Slovakia BIT which reads, '(5) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law" (UNCITRAL)'.

[48] *Achmea* (n 1) para 51.

to apply, and for Germany to revise the award (with the consequence that a preliminary ruling procedure could be started).[49]

To conclude, if a ground-breaking aspect were to be found in *Achmea*, it was the reinforcement of the idea that no substitute for a case-by-case analysis should exist on investor-State disputes based on BITs. The assimilability of other investor-state disputes with *Achmea* should have depended on the wording of the BIT at issue, the choice of arbitral rules and the seat of arbitration within or outside the EU. In this sense, no *a priori* incompatibility between intra-EU BITs and EU Law could have been inferred, neither from the CJEU case law nor by application of any of the general rules of interpretation under Article 31 VCLT. Nonetheless, neither the Member States nor the CJEU has implemented a *narrow* interpretation of *Achmea*. The Member States signed the Termination Agreement or took the obligation to get rid of all their intra-EU BITs in the foreseeable future in a different manner; the latter has recently extended the arguments used in *Achmea* to the ISDS mechanism contained in the ECT when it rendered its judgement in *Komstroy*.

2 The CJEU (Attempt to) Strike the ISDS Mechanism in the ECT: *Komstroy, LLC v Moldova*

The relevance of the choice of the seat of arbitration within the Member States for determining the invalidity of intra-EU ISDS provisions has recently been confirmed in *Komstroy*. There the CJEU took the controversial decision to affirm in an *obiter dictum* the invalidity of the ISDS clause included in the ECT. The position taken by the CJEU in *Komstroy* is problematic, primarily because the case did not involve any intra-EU disputes, nor had at issue any jurisdictional question on the compatibility of Article 26 ECT with EU law. In *Komstroy*, the CJEU was nevertheless able to assume jurisdiction over the dispute because the sole choice of France as arbitral seat 'entail[ed]' for the purposes of the procedure to set aside the award, the application of EU law,[50] and therefore the possibility for the CJEU to be 'in principle required to give a ruling' under Article 267 TFEU.[51]

On these grounds, the CJEU nonchalantly moved from discussing the four questions referred by the *Cour d'appel de Paris* about the existence of an investment for the purposes of the ECT, to analysing why Articles 344 and 267 TFEU invalidate the ISDS provision

[49] Nagy (n 28) 994. The author here favours 'a pretty narrow' interpretation of the judgment in *Achmea*. He suggested that *Achmea* should only refer to 'dispute settlement clauses providing for ad hoc arbitration' and thus clauses contained in intra-EU BITs referring to institutional (either ICSID or investment) arbitration under the ECT should not be automatically or analogically interpreted as inconsistent with EU law. In addition, he argued that the (in)compatibility of Article 8 of the Netherlands-Slovakia BIT with EU law is highly dependent on the wide freedom of choice of the *lex loci arbitri* provided to the parties: the parties may have equally chosen a place of arbitration outside the EU and thus have circumvented the possibility for one of the Member States to start a preliminary ruling and consequently carry out an annulment proceeding.

[50] *Komstroy* (n 7) para 34.

[51] *Komstroy* (n 7) para 35.

included in Article 26 ECT in a dispute between a Member State and an investor of another Member State concerning an investment made by the latter in the first. On this last matter, the CJEU undoubtedly reaffirmed with enhanced clarity those principles put forward in *Achmea*.[52] These includes the arguments on (1) the autonomy of EU law with respect to Member States and international law;[53] (2) the 'objective of securing the uniform [and consistent] interpretation of EU law' and the full effect of the law established by the EU Treaties;[54] and (3) the facts that the arbitral tribunal do not constitute tribunal for the purposes of referral under Article 267 TFEU.[55] The CJEU therefore concluded that 'Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State'.[56]

By reproducing the same arguments used in *Achmea*, *Komstroy* is nevertheless a decision entirely formulated from the perspective of EU law. The CJEU, in *Komstroy,* completely disregarded any international law analysis. More importantly, *Komstroy* analogises arguments used to declare the invalidity of intra-EU BITs that are different in nature from the ECT. The ECT is technically what it is known as a mixed agreement.[57] It is true that a few similarities exist between the ECT and the Netherlands-Slovakia BIT. Professor Basedow, analysing the applicability of the ECT in intra-EU investment arbitration, has recalled some of them.[58] First, he noted that the ECT and Netherlands-Slovakia BIT are both international treaties among EU Member States. Second, they both provide for the establishment of a conventional investment tribunal of a comparable nature. Third, both arbitral tribunals fall outside Art. 19 TEU, and thus they cannot request a preliminary ruling from the CJEU.[59] Nevertheless, a significant element differentiates the two treaties. The Dutch–Slovak BIT forms part of the national law of the contracting Member States, whereas the ECT, due to the EU presence as a contracting party to the ECT, is an international agreement which forms part of EU law.[60] In the first scenario, if a conflict between EU law and the intra-EU BIT arises, EU law, having primacy over national law, will prevail. In the latter scenario, the EU 'is bound by the ECT in the light of its obligation of "strict observance and development of international law" under Art. 3(5) TEU'[61] and thus the 'ECT should, at least in principle, prevail over European law'.[62]

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[52] *Komstroy* (n 7) paras 42–59.
[53] *Komstroy* (n 7) paras 42–44.
[54] *Komstroy* (n 7) para 46.
[55] *Komstroy* (n 7) para 51.
[56] *Komstroy* (n 7) para 66.
[57] Basedow (n 46) 272.
[58] Basedow (n 46) 275.
[59] Ibid. Those similarities, according to the author, also individuate the reasons at the basis of many scholars' and policymakers' belief that the ECT is ultimately contrary to EU law.
[60] Ibid.
[61] Ibid.
[62] Ibid.

This 'significant difference'[63] is one of the main arguments against the impracticability of mirroring the arguments used in *Achmea* in cases involving the ECT. This significant difference also suggests that, when interpreting the ECT,[64] importance should be given to the common intention of all the contracting parties of the ECT (intra and extra-EU) and not only to the EU Member States parties in 'an analogous way to the provision of [intra-EU BITs]', as the CJEU seems to suggest.[65] The suggested BIT-by-BIT analysis in the case of the ECT should thus be carried out considering the ECT as a multilateral treaty as a whole and not as a cluster of many BITs.

An additional problem that the case in *Komstroy* raises is that the entire opinion on the incompatibility of the ECT with intra-EU disputes is not part of the dispositive portion of the judgment. It is instead a *dictum* (in the sense of EU law) that is not binding on any Member State courts. Moreover, the entire judgment does not constitute a precedent within the EU.[66] In sum, as some authors have advanced, the opinion in *Komstroy* 'provides scant and inconsistent reasoning' and it 'may… be considered to be based on political considerations rather than a sound and reasoned interpretation of the law'.[67] In this last sense, *Komstroy* is no different to the other political acts put in place by the Institutions of EU Law and the Member States.[68]

3 Arbitral Tribunals Strike Back: The Arbitral Tribunal Response to 'Achmea Objections'

The recent judgment in *Komstroy* raises the question of how arbitral tribunals will react to the CJEU's *dictum*. At present, nothing suggests that the arbitral tribunal reaction to *Komstroy* will be any different to that of arbitral tribunals in the aftermath of *Achmea* when asked to resolve the so-called Achmea objections.[69]

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[63] Ibid.

[64] In accordance with Article 31 VCLT.

[65] *Komstroy* (n 7) para 64.

[66] The CJEU judgments do not form a precedent in the common sense of the term, since the CJEU is based on a system that is for the most part of a civil law tradition. Tamás Szabados, 'Precedents' in EU Law – The Problem of Overruling (2015) (1) ELTE Law Journal 125–146, 125 ff.

[67] Gibson Dunn & Crutcher LLP, 'Intra-EU Arbitration Under the ECT is Incompatible with EU Law According to the CJEU in Republic of Moldova v Komstroy' [2021] Lexology <https://www.lexology.com/library/detail.aspx?g=2bef6789-1ad1-4944-968e-5ce57e67b2a7> accessed 31 March 2022.

[68] Declarations (n 5).

[69] The term *Achmea objection* generally indicates a jurisdictional objection brought by the Member State in arbitration proceedings on the grounds of the principle in *Achmea*. All arbitral tribunals seized with the question to 'independently assess whether the parties consented to arbitrate' in intra-EU arbitration proceedings rejected Achmea objections and confirmed their jurisdiction under the principles of Kompetenz-Kompetenz and international law. *GPF GP S.à.r.l.* (n 28) para 345.

A few jurisdictional decisions are summarised here to exemplify this trend.[70] For instance, in *Marfin Investment Group v The Republic of Cyprus,*[71] the Achmea objection was dismissed on the grounds that the Cyprus-Greece BIT and its arbitration clause was valid because EU law was not the law applicable to the case. In *UP and C.D. Holding Internationale Hungary,*[72] the arbitral tribunal instead used the argument that the CJEU never intended to extend *Achmea*'s principle to institutional arbitrations, included ICSID arbitration, because it did not mention them anywhere in the judgment.[73] In *GPF GP Sàrl v The Republic of Poland*, a case which arose out of Poland's alleged breach of the Belgium-Luxembourg Economic Union (BLEU)-Poland BIT, the Achmea objection was also dismissed.[74] Here, the arbitral tribunal first analysed the compatibility between Article 9 BLEU-Poland BIT (an offer to arbitrate clause almost identical to Article 8 of the Netherlands-Slovakia BIT) and Articles 267, 344 TFEU, and Article 19 TEU. Although the arbitral tribunal started from the statement that interpretation of successive treaties, without termination or amendment of the precedent one, should be carried out in such a manner 'that avoids or at least minimizes conflicts of norms'[75], it concluded in favour of a case-by-case analysis. Moreover, the arbitral tribunal stated that Articles 344 and 267 TFEU, play 'at most […] as a carve out […] as opposed to a complete preclusion' in respect of the sole dispute involving the interpretation or application of EU law.[76]

A similar approach was taken by ICSID tribunals in a dispute involving the ECT before *Achmea*.[77] This is the case of *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*.[78]

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[70] Additional examples of intra-EU BITs cases are analysed in Sophie Lemaire, Malik Laazouzi, 'Chronique de jurisprudence arbitrale en droit des investissements' (2019) 2 Revue de l'Arbitrage 552–617.

[71] ICSID Case No. ARB/13/27 *Marfin Investment Group v Cyprus* award (26 July 2018). This is probably the first case where an arbitral tribunal has decided on the Achmea objection.

[72] ICSID Case No. ARB/13/35 *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v Hungary* Decision on jurisdiction (3 March 2016).

[73] Ibid, paras 252 ff.

[74] The dispute arose out of some of Poland obligations in relation to an investment made by private equity investor with the aim of developing a real estate project in Warsaw. The arbitral proceeding was conducted under the SCC Arbitration rules. *GPF GP S.à.r.l.* (n 28) para 8.

[75] Ibid, paras 371–375.

[76] Ibid, para 381.

[77] Most of them involved Spain and its special legislation that, starting from the '90s, has established a special regime for renewable energy production which sought to encourage and promote foreign investment in the renewable energy sector. More recently, Spain changed course and revoked such incentives and issued a series of decrees that reformed the energy sectors in ways that run directly counter to foreign companies' interest. Spain's behaviour led foreign companies to start a few arbitral proceedings in front of various ICSID tribunals.

[78] ICSID Case No. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* Award (16 May 2018). The case was about a limited corporation based in the Netherlands whose business focuses in developing renewable energy sources. *Masdar* invested € 79.37 million in three solar panels projects in Spain which had started offering financial inducements and regulatory incentives to companies such as *Masdar* to encourage investment in its territory. In 2012, after Spain changed course and revoked such incentives, *Masdar* started an arbitration proceeding in front of ICSID, claiming that Spain's actions had violated its obligation under the ECT to accord investors from signatories States fair and equitable treatment.

In *Masdar Solar,* the tribunal rejected Spain's jurisdictional argument based on *Achmea* and concluded that Spain was liable for €64.5 million in damages plus interest to *Masdar*. More importantly, the ICSID tribunal rejected Spain's jurisdictional objection by fully adopting the argument used in AG Wathelet's Opinion in *Achmea*.[79] The tribunal stated that *Achmea*'s application is limited to Article 8 Netherlands-Slovakia BIT and any other intra-EU ISDS provision in the fashion of Article 8 Netherlands-Slovakia BIT.[80] The Tribunal then concluded that *Achmea* 'does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party'.[81]

After the judgement in *Achmea,* the first ECT case where the Achmea Objection was raised (and denied) is *Vattenfall AB and others v Federal Republic of Germany.*[82] At the time the case was ready to be decided on the merit, the CJEU issued the judgement in *Achmea*, and the Tribunal was obliged to decide first on the jurisdictional objection. The Tribunal dismissed Germany's jurisdictional objection on the grounds of different subsequent logical arguments.[83] For present purposes, it suffices to report the following ground. After having determined its own competence to decide the jurisdictional matter, the Tribunal affirmed that EU law constitutes international law because it is 'rooted in International Treaties'.[84] Nonetheless, the Tribunal did not find its application to the case because (1) EU law does not constitute general law applicable to the interpretation and application of clauses included in a mixed agreement;[85] (2) EU law could not find application under Article 31(3)(c) VCLT as 'relevant rules of international law applicable in the relations between the parties', because 'it is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules, […] external to [that] treaty […], which would contradict the ordinary meaning of its terms.'[86] And (3) even *'arguendo'* that EU law would be applicable to the dispute at hand, the

[79] *Masdar Solar* (n 78) para 680.

[80] *Masdar Solar* (n 78) para 679.

[81] Ibid.

[82] ICSID Case No. ARB/12/12 *Vattenfall AB and others v Federal Republic of Germany* Decision on the Achmea Issue (31 August 2018). The Decision was taken in the context of an intra-EU investment dispute between Vattenfall AB and other investors and the Federal Republic of Germany which was commenced by the Request for Arbitration dated 14 May 2012 under the ICSID Convention. The dispute arose out of Germany's decision to phase out the use of nuclear energy which, according to Vattenfall, resulted in the breach of several obligations under the ECT.

[83] Konstantina Georgaki, 'The Decision on the Achmea Issue in Vattenfall v Germany or: How to Escape the Application of the CJEU's Decision in Achmea in Three Steps' [2018] OXFORD Business Law Blog <https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/decision-achmea-issue-vattenfall-v-germany-or-how-escape-application> accessed 31 March 2022.

[84] *Vattenfall AB* (n 82) para 146. In this sense the Tribunal agreed with the arbitral tribunal in *Electrabel* (n 16).

[85] *Vattenfall AB* (n 82) paras 158,167. Considering otherwise would create a set of rules applicable to intra-EU dispute and a different set of rules applicable to ECT disputes involving extra-EU countries, hence contravening to the systemic coherence of the ECT and the principles of *pacta sunt servanda* and good faith.

[86] *Vattenfall AB* (n 82) para 154.

CJEU in *Achmea* did not stretch the CJEU's rationale to encompass also intra-EU disputes under the ECT.[87]

The *Vattenfall*'s tribunal, being the first to deal with the *Achmea* objection, certainly started a trend that was confirmed in later ICSID decisions.[88] In *Landesbank Baden-Württemberg and others v Kingdom of Spain,*[89] the Tribunal rejected the argument sustained by Spain[90] and stated that there is nothing in the text of the ECT that exclude the application of the ECT in intra-EU situations.[91] Thereby, it affirmed that the differences between the ICSID Tribunal, as a tribunal established according to Art. 25 ICSID Convention and 26 ECT, and the *ad hoc* tribunal in *Achmea* are more significant than their similarities.[92] It thus concluded in favour of the priority of the ECT over EU law.[93] More importantly, the tribunal in *Landesbank* correctly noted that, differently from the tribunal in *Achmea,* which had its seat in Germany, ICSID tribunals derive their 'authority from Article 25 of the ICSID Convention', have 'no national "seat"' and they are not 'subject to the jurisdiction of [any] national court'.[94]

Overall, the approach maintained by arbitral tribunals in their decisions before and after *Achmea* has been of the kind that excludes a broad extension of the principle in *Achmea* to the applicability of ECT in intra-EU investment arbitration. The line of case law, examples of which are analysed above, shows that the various ICSID tribunals' awards have been consistent in considering that the ECT does not operate under EU law but under international law on the grounds of (1) the need for a harmonious application of the ECT rules to all Contracting Parties (intra e extra EU); and (2) with respect to the principle of non-discrimination.[95] In the aftermath of *Komstroy,* nothing suggests that arbitral tribunal would act differently. Nothing in *Komstroy* will prevent an arbitral tribunal from acquiring jurisdiction in intra-EU disputes brought to them under Article 26 ECT. Arbitral tribunals are not bound by the CJEU's judgments, and they will still be able to affirm their jurisdiction

[87] *Vattenfall AB* (n 82) para 167.

[88] Lavranos, Singla (n 44) 354.

[89] ICSID Case No. ARB/15/45 *Landesbank Baden-Württemberg and others v Kingdom of Spain* Decision on the Intra-EU Jurisdictional Objection (25 February 2019).

[90] Among others Spain, brought the arguments that (i) 'EU law establishes its own system of investor protection within the context of the internal market, which is superior to the protection offered by the ECT or any bilateral investment treaty.' (ii) the EU law protection system 'prevails over that of any other international treaty' including the ECT. It (iii) went on to argue that Art. 26 ECT does not provide an offer to arbitrate from the side of Spain and that 'when the ECT was signed, the Member States were unable to enter into obligations between themselves as regards the internal market because they had transferred their sovereignty in that area to the EU'. *Landesbank* (n 89) para 43.

[91] Ibid, para 113.

[92] Ibid, para 146.

[93] Ibid, para 148.

[94] Ibid, para 150.

[95] Ibid, 156 ff.

over intra-EU ECT disputes.[96] What seems to be ultimately at stake is nevertheless the possibility for arbitral tribunals to render awards that will be final and enforceable, especially within the borders of the EU.

IV Enforceability of Intra-EU Awards in the United States District Courts

The enforcement of international arbitration awards is regulated by international conventions and national arbitration laws. Two main conventions regulate the enforcement of investor-state awards.[97] (i) The ICSID Convention, according to which ICSID awards are treated 'as if they were a final judgment of a court' in the ICSID Contracting state where enforcement is sought.[98] (ii) The New York Convention which applies to awards issued in *ad hoc* investor-state arbitration proceedings; it facilitates the enforcement of awards within the NY Convention's contracting states; and limits domestic courts' refusal to enforce to the grounds enlisted in Article V NY Convention.[99]

1 Enforceability of Intra-EU Awards against a Member State's Assets within and outside the EU

Within this framework, the CJEU case law on the invalidity of ISDS mechanism in intra-EU disputes suggests that domestic courts within the EU will likely proceed by not enforcing awards rendered in intra-EU investor-state arbitration under the ICSID Convention, nor the NY Convention. Although the ICSID Convention does not permit 'any other remedy

[96] While the present article was under review, a first ICSID tribunal decided on Spain's request to reconsider a decision on jurisdiction, liability, and directions on quantum on the ground of the CJEU judgment in *Komstroy*. ICSID Case No. ARB/16/18 *Infracapital F1 S.À R.L. and Infracapital Solar B.V. v Kingdom of Spain* Decision on Respondent's Request for Reconsideration Regarding the Intra-Eu Objection and the Merits (1 February 2022). In line with the position proposed in this article, the ICSID tribunal in *Infracapital F1* found 'the judgment [in *Komstroy*] entirely irrelevant to the Tribunal's rulings on jurisdiction and on liability.' *Infracapital F1* para 116.

[97] For a detailed analysis of the enforcement of intra-EU awards before the judgement in *Komstroy* and the Termination Agreement, see generally Julian Scheu and Petyo Nikolov, 'The setting aside and enforcement of intra-EU investment arbitration awards after Achmea' (2020) 36 (2) Arbitration International 253–274 DOI: https://doi.org/10.1093/arbint/aiaa016.

[98] Per Article 54 ICSID Convention, ICSID awards are not subject to judicial review by the Contracting State where enforcement is sought, and the awards are enforceable 'as if they were a final judgement of a court in that State'.

[99] For present purposes, Article V allows domestic courts to refuse enforcement of a foreign award where the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made' [Art. V(1)(a) NY Convention]; and in the case in which the award is contrary to the public policy of the state where enforcement is sought [Art. V(2)(b) NY Convention].

except those provided in [Article 53] Convention',[100] a Member State's court requested to enforce an intra-Eu BIT investment award may in fact be bound to disapply Article 54 ICSID Convention under the principle of supremacy of EU law over domestic and international treaty.[101] On a different level, Article V(1)(a) NY Convention would similarly allow the Member State's court to refuse enforcement of an award that was rendered under an arbitration agreement that 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.[102] In addition to that, enforcement may also be refused on the ground that the decision in *Achmea* and the *dictum* in *Komstroy* constitute public policy of the state (as EU public policy) where enforcement is sought, pursuant to Article V(2)(b) NY Convention.[103]

For these reasons, European investors, constrained from seeking enforcement of favourable intra-EU awards within the EU, started filing for enforcement in extra-EU countries' courts where Member State's attachable assets are located and, in principle, not protected by any state immunity doctrine.[104] Enforcement of many intra-EU awards has been sought before the U.S. State District Court for the District of Columbia.[105] The D.D.C.

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[100] Article 53 ICSID Convention.

[101] Scheu, Nikolov (n 97) 267 ff. However, this would most likely not be the case in the ECT scenario, where the ECT would probably prevail for the obligations arising out of the EU being a party of the ECT.

[102] Article V(1)(a) NY Convention.

[103] With regard to *Achmea*, the conclusion is reached by Scheu, Nikolov (n 97) 270. However, what constitutes EU public policy is debated in the doctrine. Although it is now settled case law that many competition law and consumer law provisions are part of EU public policy, the CJEU has not decisively defined the width of EU public policy. In sum, the CJEU Cases C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECLI:EU:C:1999:269, C-168-05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] ECLI:EU:C:2006:675 and C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [209] ECLI:EU:C:2009:615 show that the CJEU, by holding when a EU law provision is 'mandatory', also decides the degree of EU law intrusion on Member States' freedom to determine their own public policy concept. In practice, Article V(2)(b) NY Convention is applied narrowly, 'sparingly' and with 'extreme caution.' See on the point, Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 3647–3652.

[104] Scheu, Nikolov (n 97) 270.

[105] As of January 2022, seven intra-EU awards enforcement proceedings can be found in Westlaw that are pending in front of the D.D.C. and in six of them enforcement of the awards is sought against Spain. *Infrastructure Servs. Luxembourg S.A.R.L. v Kingdom of Spain*, No. CV 18-1753 (EGS) 2019 WL 11320368 at *1 (D.D.C. Aug. 28, 2019); *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, 397 F. Supp. 3d 34 (D.D.C. 2019); *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); *CEF Energia, B.V. v Italian Republic* No. 19-CV-3443 (KBJ) 2020 WL 4219786 at *1 (D.D.C. July 23, 2020); *NextEra Energy Global Holdings B.V. v Kingdom of Spain*, No. 19-cv-01618 (TSC), 2020 WL 5816238 at *1 (D.D.C. Sept. 30, 2020); *9REN Holding S.A.R.L. v Kingdom of Spain* No. 19-CV-01871 (TSC) 2020 WL 5816012 at *1 (D.D.C. Sept. 30, 2020); *InfraRed Env't Infrastructure GP Ltd. v Kingdom of Spain* No. CV 20-817 (JDB) 2021 WL 2665406 at *1 (D.D.C. June 29, 2021). In all the proceedings mentioned, the D.D.C. granted the Respondent Member State's motion to stay, given the ongoing annulment proceedings either at ICSID or at the seat of arbitration; and considered the interest of judicial economy and international comity. In addition to that, other European investors have petitioned the D.D.C. to enforce arbitration award against the Kingdom of Spain. These includes *RWE Renewables GMBH et al v. Kingdom of Spain*, 1:21-CV-03232 and *Aes Solar Energy Cooperatief U.A. et al v. Kingdom of Spain*, 1:21-CV-03249.

has nevertheless avoided taking a position on the faith of intra-EU awards and their enforceability, as the next subchapter explains.

2 Enforcement of Intra-EU Awards at the United State District Court, District of Columbia

Most intra-EU awards where enforcement is sought at the D.D.C. arose out ECT cases and involved ICSID awards.[106] In the U.S., enforcement of ICSID awards is regulated by Federal Statute. Title 22 of the U.S. Code 'implements the treaty obligations of the United States, as contracting party of the ICSID'[107] and applies in place of Rules 9 and 10 of the Federal Arbitration Act (FAA).[108] Pursuant to 22 USC § 1650a, Federal Courts must accord ICSID awards 'full faith and credit as if the award were a final judgment of […] one of the several States'.[109] 22 USC § 1650a also determines the exclusive jurisdiction of Federal Courts on the enforcement of ICSID awards.[110] However, 'Section 1650a cannot fairly be read as serving as an independent source of subject matter jurisdiction over a foreign sovereign'.[111] Additional requirements for jurisdiction, service of process and venue, are instead assumed from the relevant provisions of the Foreign Sovereign Immunity Act of 1976 (FSIA).[112] 'The FSIA provides that "[s]ubject to existing international agreements to which the United State is a party", foreign sovereigns 'shall be immune from the jurisdiction of the courts of the [US]' and subject to the enumerated exceptions to this grant of immunity.[113] Two of those exceptions are relevant here, the so-called (i) 'waiver exception' and (ii) 'arbitration exception'. Under the waiver exception, the immunity does not apply when the sovereign state has 'waived its immunity either explicitly or by implication'.[114] Some courts have interpreted foreign sovereigns to have impliedly waived their immunity when they entered the ICSID Convention and accepted the enforcement mechanism provided by ICSID.[115] On a different level, the arbitration exception deprives the foreign sovereign of immunity when an action is brought either 'to enforce an agreement made by the foreign state with

[106] All the listed proceedings in note 105, except for *CEF Energia, B.V.* (n 105) involve ICSID intra-EU awards.

[107] Title 22 of the United States Code outlines the role of foreign relations and intercourse in the United States Code.

[108] The FAA is instead applicable to the enforcement of awards under the NY Convention. *Infrastructure Servs. Luxembourg S.A.R.L.* (n 105) at *2.

[109] 22 USC § 1650a(a).

[110] 22 USC § 1650a(b).

[111] *Mobil Cerro Negro, Ltd. v Bolivarian Republic of Venezuela*, 863 F. 3d 96, 113 (2d Cir. 2017)

[112] The FSIA is codified at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602–1611.

[113] 28 USC 1604, 1605. *Masdar Solar* (n 105) 38.

[114] 28 USC 1605(a)(1)

[115] *Blue Ridge Invs., L.L.C. v Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) citing *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993), as amended (May 25, 1993) according to which the foreign sovereign '"must have contemplated enforcement actions in other [Contracting] states," including the United States'.

or for the benefit of a private party to submit to arbitration' or 'to confirm an award made pursuant to such an agreement to arbitrate' if the agreement or award is subject to a treaty. As per the rule on venue, it suffices to note here that, under the FSIA, any civil action against a foreign state can always be brought in front of the D.D.C., notwithstanding the defendant's contact, presence of its assets, or residency of the parties within the district.[116] In sum, two conditions must be met to establish jurisdiction over a foreign sovereign under the FSIA: (1) The applicability of an exception from jurisdictional immunity established by the FSIA and (2) proper service on the foreign sovereign 'in accordance with the FSIA's provisions'.[117]

Within the delineated framework, it is easy to understand how the lack of a valid agreement to arbitrate an intra EU-investor state dispute may result in the district court's lack of subject matter jurisdiction over the dispute: by losing the possibility to apply one of the exceptions to sovereign immunity under the FSIA, the general immunity rule will protect the foreign sovereign from the investors' action to enforce the award. Aware of this possibility and with no intention to provide a premature holding on the merit of enforceability of intra-EU awards within the US borders, the D.D.C. has so far avoided acquiring jurisdiction on the disputes brought in front of it by European investors. The D.D.C. has instead preferred to order the *stay* of all the proceedings started in front of it. In order to do so without acquiring jurisdiction beforehand over the dispute, the D.D.C. considered the motions to stay as a threshold, non-jurisdictional ground, which allows the district court to '[bypass] questions of subject matter and personal jurisdiction, when considerations of convenience, fairness and judicial economy so warrant'.[118] Then, with similar reasoning and holding, the D.D.C. has decided to wait for the ICSID Committees to determine the EU law matter on the pending annulment proceedings and not 'delve prematurely into EU case law, international treaties and sovereign constitutions'[119] and 'cross-border piecemeal litigation'[120]. The D.D.C. reached analogous conclusions also with regard to enforcement of intra-EU awards that fall within the scope of the NY Convention,[121] and even though the basis for the enforcement of the awards is found in the different set of

[116] 28 USC 1391(f)(4) that reads: '(4) the United States District Court for the District of Columbia'. This is likely to be one of the main factors that encouraged investors to seek enforcement of ICSID awards at the D.D.C., to avoid the cost and delay of a removal.

[117] Exceptions that are enumerated in 28 U.S.C. § 1608. Moreover, the district court in *Mobil Cerro* held that the relationship between 22 USC § 1605a and the FSIA, in the case of enforceability of ICSID awards, does not give rise to any problem of compatibility. *Mobil Cerro Negro, Ltd.* (n 111) 115.

[118] *Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007).

[119] *Masdar Solar* (n 105) 38; *NextEra Energy* (n 105) 3; *9Ren* (n 105) 2. The D.D.C. also generally noted that a stay of proceedings before the ICSID Committee decided on the annulment of the awards would delay the district court proceedings. However, the delay would still be shorter than if the D.D.C. were to confirm the award and afterwards the ICSID set it aside.

[120] *Masdar Solar* (n 105) 40.

[121] *CEF Energia* (n 105).

rule codified in Rule 9 FAA.[122] Also, in these cases where intra-EU awards are rendered by *ad hoc* tribunal, the D.D.C. preferred to order the stay of the proceedings.

To conclude, the D.D.C. may have become one of the favourite extra-EU courts for the enforcement of intra-EU awards for European investors. It is also, with high probability, the default venue for seeking intra-EU awards enforcement within the United States. However, the D.D.C. did not take any position on whether the intra-EU agreements contained in the intra-EU BITs and Art. 26 ECT are valid for the purposes of enforcement of the intra-EU awards. It does not seem that any decision on this topic will be ripe until one of the appointed ICSID Committees will render a ruling on the annulment of the awards on the grounds of *Achmea* or *Komstroy*'s objection. It can however be expected that any ICSID ruling against the Member States may have major effects on the principles of enforceability and finality of the intra-EU awards in the US District Courts, and it will eventually encourage the D.D.C. to take a position on the merit of the matter.

V Conclusions

The process of terminating Intra-EU investor-state arbitration is far from being over. The shifts that *Achmea, Komstroy* and *PL Holdings* created in intra-EU investment arbitration have certainly contributed to accelerating this process. All the EU institutions and Member States' actions seem ultimately to be oriented to protecting the Member States rather than investors.

On the intra-EU BITs' front, with the progressive entry into force of the Termination Agreement in most Member States, intra-EU BITs are barely breathing. Investment law substantive standards and the ISDS mechanism will soon be replaced by the EU Treaties' substantive principles and Member States' national courts' remedies. This change would leave no arbitration choice to European investors. After *Republiken Polen v PL Holding S.à.r.l.,*[123] European investors seem to have lost even the last possibility to resort to investment arbitration through the signature of an *ad hoc* arbitration agreement included in a contract between the investor and the Member State with the same content as the ISDS provision in the treaties. This was a possibility that, right after *Achmea*, still seemed to be viable for European investors. The award rendered in the SCC case *PL Holding*

[122] 9 USC 201-208. Rule 9 FAA transpose and ratify the NY Convention in the U.S. Consistent with the pro-arbitration FAA policy and USC 9 207, the FAA limit the refusal of enforcement and recognition of the awards on the ground limited in the NY Convention, including the mentioned cases of an invalid agreement to arbitrate pursuant to Article V(1)(a) NY Convention. A third relevant ground to refuse enforcement under the NY Convention may also be the cases in which the award has not yet become binding on the parties or has been set aside or suspended under Article V(1)(e).

[123] *PL Holdings* (n 8).

S.à.r.l. v Poland endorsed the position,[124] which was also confirmed by Sweden's national court when it rejected Poland's action for setting aside the *PL Holding* award on the ground of the incompatibility of Article 9 of the BLEU-Poland BIT with EU law.[125] At first, the *Svea Court of Appeal* (Svea) in fact reasoned that the judgement in *Achmea* only precluded Member States from entering an arbitration agreement in the form of a ISDS provision stemming from a Treaty. According to the Svea, however, nothing in the TFEU precluded a Member State from entering into an arbitration agreement based on the private law principle of party autonomy.[126] The decision was welcomed as revolutionary because the Svea, with its argument, limited the effect of *Achmea* over an agreement to arbitrate that was equal to Art. 8 Netherlands-Slovakia BIT. The Svea also superseded the argument used in *Achmea,* according to which Member States' consent to arbitration could derive solely from a treaty.

However, the Svea reasoning was problematic *ab initio* from a theoretical point of view. Although a parallel may be found between investment arbitration and commercial arbitration,[127] the two law fields do not actually correspond. Even justifying the presence of a valid arbitration agreement based on parties' autonomy, in the case of investment arbitration, awards would still express rules and principles of public international law,[128] which may

[124] SCC Case No. 163/2014 *PL Holdings v Republic of Poland* Partial Award (28 June 2017). The Tribunal rejected the jurisdictional objection based on the invalidity of a treaty under Articles 30 and 59 VCLT, by considering that (i) the objection was untimely (para 306); and, more importantly, that (ii) the '"intra-EU BIT" defence' was without merit (paras 309–317). The Tribunal eventually decided in favour of the investors and awarded damages to *PL Holding* for the forced sale of the investor's shareholding in the Polish FM Bank PBP (for PLN 653,639,384).

[125] Case No. T 8538-17 and No. T 12033-17 *Republic of Poland v PL Holdings S.á.r.l.* Svea Court of Appeal (22 Feb. 2019). The judgement in favour of the investors was subsequently appealed in front of the Swedish Supreme Court (Högsta Domstolen), which started the preliminary ruling procedure in front of the CJEU.

[126] Case No. T 8538-17 and No. T 12033-17 p. 43. The SVEA interpreted *Achmea* and the TFEU as not precluding 'as such… Poland and PL Holdings from entering into an arbitration agreement and participating in arbitral proceedings regarding an investment-related dispute'. In other words, they '[do] not preclude arbitration agreements between a Member State and an investor in a particular case: a Member State is, based on party autonomy, free – even though the Member State is not bound by a standing offer as such as that in [the relevant intra-EU BITs] – to enter into an arbitration agreement with an investor regarding the same dispute at a later stage, e.g. when the investor has initiated arbitral proceedings. An arbitration agreement and arbitral proceedings between, on the one hand, an investor from a Member State and, on the other hand, a Member State, is therefore as such not in violation of the TFEU.' What they preclude is instead 'that Member States conclude agreements with each other, meaning that one Member State is obligated to accept subsequent arbitral proceeding with an investor and that the Member States thereby establish a system where they have excluded disputes from the possibility of requesting a preliminary ruling, even though the disputes may involve interpretation and application of EU law'.

[127] Giuditta Cordero Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009, Oxford) part VIII Ch 39, DOI: https://doi.org/10.1093/acprof:oso/9780199571345.003.0039.

[128] Moss (n 127) 784.

widely limit the sovereign power of the host state and have a large political significance in Member States' international relations.[129] For these reasons, Member States' consent to arbitrate based on party autonomy may still have the effect of removing investment disputes concerning the application and interpretation of EU law from the EU 'system of judicial remedies'[130]. Such arbitration proceedings would still contravene the EU overarching principles used in *Achmea*.

As it could be expected, the decision was later appealed in front of the Högsta Domstolen (Swedish Supreme Court), which sent a request for a preliminary ruling to the CJEU, to resolve the question of compatibility of *ad hoc* arbitration agreements with the autonomy of EU law.[131] On October 2021, the CJEU eventually held in *PL Holding S.à.r.l.* that Articles 267 and 344 TFEU preclude Member States from concluding an *ad hoc* arbitration agreement with an intra-EU investor, the content of which is identical to the invalid ISDS provision included in an intra-EU BITs, and which allows the investor to continue the arbitration proceeding.[132] Lastly, the CJEU stressed that deciding otherwise would 'in fact entail a circumvention of the obligations arising for [the Member States] … under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in … *Achmea*'.[133] In this sense, it seems that European investors have the sole recourse to national courts as a viable remedy to their intra-EU investment disputes.

On the different front of the ECT, this analysis seems also to suggest that, at least where still possible under the ECT, European investors are recommended to have recourse to the ICSID self-contained arbitration system. In principle, although the Member States have an obligation to request the annulment of intra-EU awards in any court where enforcement is sought, choosing a place of arbitration with no seat may increase the opportunity of having a final and enforceable intra-EU award, at least outside the EU. In any event, the termination of the protection afforded by the ECT is not a question of if but how it will be carried out in the foreseeable future. A revision and modernisation of the ECT has been discussed

[129] On the contrary, commercial arbitration, even when one of the parties is a State, regulates private and commercial law matters which are less invasive of the state's public international law power.

[130] *Achmea* (n 1) para 55

[131] *PL Holdings* (n 8) para 37. In details, the Högsta Domstolen asked the CJEU whether 'Articles 267 and 344 TFEU, as interpreted in *Achmea*, mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor – where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States – by virtue of the fact that the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?'. The full request for preliminary ruling can be read at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=225602&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=300488> accessed 31 March 2022.

[132] *PL Holdings* (n 8) para 70.

[133] *PL Holdings* (n 8) para 47.

for some time now.[134] Any proposed amendment or termination for the EU or its Member States may thereby create barriers for EU investors to invest directly in renewable energy[135] while still relying on arbitration. Those European investors that still want to pursue a pro-investment policy within the EU may ultimately consider structuring their investments into Member States EU countries through vehicles incorporated outside the European Union and, where possible, use the protection afforded by extra-EU BITs.

[134] A proposal for the modernisation of the energy charter treaty by the EU Commission has been in place at least since 2019 <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2049> accessed 31 March 2022. In 2020, the Commission even presented its EU proposal for the ECT modernisation <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148> accessed 31 March 2022. On the topic of withdrawal from the ECT, see Nathalie Bernasconi-Osterwalder, 'Energy Charter Treaty Reform: Why withdrawal is an option' [2021] Investment Treaty News in IISD which can be accessed at <https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/#_ftn6> accessed 31 March 2022. On December 14, 2021, The Energy Charter Conference at its 32nd Statutory Meeting took note of the Progress Report of the Modernisation Group 2021 in the 'Decision of The Energy Charter Conference' CCDEC 2021 21 NOT. The CCDEC 2021 Decision also set out a schedule for the negotiation on the modernisation of the ECT for 2022.

[135] Investments that are much needed within the European Union to meet the Paris Agreement goals. See Loukas A. Mistelis, Nikolaos Lavranos, 'The World after the Termination of Intra-EU BITS' (2020) 5 European Investment Law and Arbitration Review 196–214, 208–209 DOI: https://doi.org/10.1163/24689017_008.

Rafael Quintero Godínez*

A Habermasian Response to the Legitimacy Crisis of Investment Arbitration

Abstract

This article presents the Habermasian theory of adjudication's role in and legitimacy to achieve three major objectives, first, to develop a diagnosis of the legitimacy crisis of investment arbitration; second, to understand why dominant positivistic approaches cannot solve it; and third, to propose argumentative strategies so that investment arbitrators can address this crisis.

Keywords: investment arbitration, Habermas' theory of constitutional adjudication, legitimacy crisis, international human rights

I Introduction

This article advances the argument that the legitimacy crisis of investment arbitration rests upon three factors drawn from the Habermasian theory of the role and legitimacy of constitutional adjudication. These are, first, that investment arbitration tribunals have not safeguarded the normative content enshrined in international human rights that shapes the architecture of international law. Second, investment arbitral tribunals have not fully opened the *channels* for inclusive opinion- and will-formation processes, ensuring that the interests of all those affected by their decisions are taken into account. Third, investment tribunals have not yet fulfilled the role of custodians of the deliberative democracy of international law.

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The central argument of this article is based on three major premises. First, the debate surrounding the legitimacy crisis of investment arbitration is, for the most part, undertheorised and lacks a conceptual framework to develop a crisis diagnosis. Second, the legitimacy crisis of investment arbitration is a symptom of the democratic deficit in global governance caused by the partial collapse of the Westphalian political order. Third, to address this issue, I evaluate the possibility of applying the idea of Habermas's model of deliberative democracy concerning the adjudicatory process of constitutional courts. Ultimately, this model – at least at the theoretical level – would help investment arbitration address some of its legitimation problems.

To develop these arguments, this paper proceeds as follows. Section 2 introduces the Habermasian theory of the role and legitimation of constitutional adjudication in a democratic system. Section 3 presents the academic debate concerning the legitimacy crisis of international investment arbitration and explains why it remains undertheorised, as well as the problems that it brings about. Section 4 links Habermasian theory to the diagnosis of the legitimacy crisis of investment arbitration in light of the notion of international law as a constitutional democratic system and explains why it helps to solve some of the investment arbitration legitimacy concerns. Finally, Section 5 delivers the final remarks for this piece.

II The Habermasian Theory of the Role and Legitimacy of Constitutional Adjudication

This section introduces the Habermasian notion of the role and legitimacy of constitutional courts. Habermas analyses the role and legitimacy of constitutional courts from the vantage point of the separation of powers between the democratic legislature and the judiciary.[1] He offers three ways in which this debate can be framed. These are, first, the dissolution of the liberal paradigm of law;[2] second, the methodological errors in the self-understanding of constitutional courts;[3] and, third, the role of constitutional courts as guardians of democratic legislative procedures.[4] In the following sections, I present the details of this threefold scheme.

[1] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, The MIT Press 1996) 239, DOI: https://doi.org/10.7551/mitpress/1564.001.0001.

[2] Ibid, 239–241.

[3] Ibid, 264.

[4] Ibid, 240.

1 The Expansion of Judicial Functions as a Dissolution of the Liberal Paradigm of Law

Constitutional courts perform functions that overlap with democratic legislatures, particularly concerning judicial review, which breaks the liberal paradigm of law in terms of separation of powers.[5] In concrete terms, this is seen when constitutional courts analyse whether certain legislative statutes are constitutional, or whether they contradict a consistent system of rights.[6] Habermas argues that, in principle, this task belongs to parliament, but it is transferred to constitutional courts.[7] This raises the question of why the legislative branch delegates this function to the judicial review of constitutional courts, if nothing restricts the legislature from reserving it to a parliamentary committee of self-review?[8] Moreover, if the legislature were to engage in a process of self-reflection on its decisions, this would prompt legislators to endorse the normative content of constitutional principles throughout their deliberations.[9] So, the question remains: what justifies the legislature's decision not to examine the constitutionality of its own decisions?

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[5] I argue that investment arbitration tribunals closely resemble, at the functional level, constitutional courts, due to three aspects of their arbitration practice. First, they have to decide every investment dispute presented to them, even when the law does not offer a solution [see: Article 42(1) of the ICSID Convention]. Second, arbitral tribunals have developed their own principles to assess their own jurisdiction and to determine the applicable law via the self-reference of their decisions, based on the principle of Kompetenz-Kompetenz [see: William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' (Boston University School of Law Public Law & Legal Theory 2007) 4]. Finally, investment tribunals have developed their own understanding and practices in the zone of structural coupling between the legal and political systems, by influencing who gets to decide, when, how, and what collective goals are being pursued by investment arbitration [see: Cédric Dupont and Thomas Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System' (2016) 7 Journal of International Dispute Settlement 3, 6]. Following a functionalist analysis of the role of constitutional courts, Habermas reaches a different, although it may also be seen as complementary, approach towards the functions of constitutional courts. He argues that the three tasks that these courts perform are settling intragovernmental disputes; reviewing the constitutionality of norms; and constitutional complaints *per se* (Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 240. The reason why the functions of the courts discussed previously differ from the ones presented by Habermas are that this article draws its understanding of the functioning of constitutional courts from the autopoietic theory of law, in the tradition of Niklas Luhmann [*Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004)] and Gunther Teubner [*Law as an Autopoietic System* (Zenon Bankowski ed, Anne Bankowska and Ruth Adler trs, Blackwell 1993], as interpreted by Ralf Rogowski in 'Constitutional Courts as Autopoietic Organisations' in Christian Boulanger and Michael Wrase (eds), *Die Politik des Verfassungsrechts – Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Nomos 2013), while Habermas develops his understanding based on his own vision of the functioning of constitutional courts. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 240.

[6] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 241.

[7] Ibid, 240–242.

[8] Ibid, 240.

[9] Ibid, 241.

Habermas argues that the legislature does not engage in a 'quasi-judicial review of its own'[10] is because of the risk of losing the normative content of constitutional principles; that is, even if a parliamentary committee is staffed by legal experts, moral and ethical considerations in parliamentary deliberations could be deemed as negotiable commodities subject to political compromises.[11] Considering that moral and ethical principles penetrate almost all areas of the legal order, there is a demand that cases with constitutional implications be interpreted constructively – in other words, 'sensitive to context and referring to the legal system as a whole'.[12]

When facing normative issues to decide a case, constitutional courts engage in 'constructive' interpretation. This becomes more evident when considering that constitutional courts almost exclusively decide cases in which several basic rights collide[13] – namely, hard cases dealing with implicit limitations on basic rights, the principle of proportionality, the limitation of immediately valid fundamental rights by a third party's fundamental rights, and the protection of basic rights through organisational and procedural provisions.[14] When adjudicating cases of collision, constitutional courts develop normative arguments and key constitutional principles based on moral and ethical considerations, as well as on public policy factors, to safeguard the unity and consistency of the legal order.[15] Why? This is because the normative content of rights can no longer be solely considered as negative rights that grant liberties vis-à-vis an interfering administration. Instead, they have become the architectonic principles of the legal order,[16] which constitutional courts develop and then replicate in further decisions. As Habermas explains:

> In cases of collision, these concepts serve to interrelate various norms with a view to the unity and consistency of the Constitution: With the development of key relational concepts in the light of cases and problems, the Federal Constitutional Court has acknowledged and underlined the

[10] Ibid.

[11] Ibid.

[12] Ibid, 246.

[13] There are other interpretations of 'hard cases'. For instance, Bengoetxea defines 'hard cases' as those in which the solution to the legal controversy depends upon finding the rational interpretation of a norm, the meaning of which may not be clear due to the polysemy, vagueness, generality and ambiguity of its terms. Instead of the Dworkinian notion of constructive interpretation, Bengoetxea argues that to decide hard cases, judges are required to elaborate on arguments beyond purely analytic and deductive reasoning in the form of syllogism. This is, in Bengoetxea's terms, a justification of the second-order with pre-established law that involves elements of foreseeability and rationality, namely consistency of the decision with pre-established law; coherence with established law; and consequentialist reasoning See: *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford University Press 1993) 168–171.

[14] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 248.

[15] That is, the orientation to fundamental norms and principles means the judiciary must turn its attention from its former focus on the institutional history of the legal order and attend primarily to problems of the present and future. Ibid, 246.

[16] Ibid, 247.

> 'open' structure of the Basic Law, within limits that must be specified. To some extent, one can understand these key concepts, which have grown out of the practice of decision making itself, as procedural principles that mirror the operations of constructive interpretation as required by Dworkin, that is, the interpretation of the individual case in terms of the entirety of a rationally reconstructed legal order.[17]

In this way, the legitimacy of transferring the task of judicial review concerning the constitutionality of legislative acts lies in seeking to safeguard the normative content that shapes the architecture of the legal order while maintaining its unity and consistency.[18]

2 The Self-understanding and Practical Effects of Constitutional Adjudication

Not only does constitutional adjudication raise legitimacy concerns about overlapping functions between the judiciary and the legislature, but also about the impossibility of deciding constitutional questions rationally.[19] These worries come up because constitutional courts interpret norms in a way that looks a lot like implicit lawmaking.[20] However, Habermas argues that these concerns rest upon a false methodological consideration of the self-understanding and practical effects of constitutional adjudication. In principle, the constructive interpretation of constitutional courts – where rights are seen as principles of moral and ethical considerations that permeate throughout the legal order – does not differ from the interpretation of basic norms and principles. If anything, a constructive interpretation does not produce any more rationality gaps than the straightforward application of norms.[21]

An adjudication guided by principles implies a redefinition of the liberal paradigm of the system of rights. Rather than interpreting rights as negative liberties between the administration and citizens, constitutional adjudication should interpret rights as systemic norms, constitutive of a democratic legal order.[22] Ultimately, this is what Habermas implies as a rethink of self-understanding and the practical effects of constitutional adjudication. Even if judicial review enshrines elements of judicial lawmaking, which draws critics of judicial activism,[23] constitutional courts must examine the contents of disputed norms in connection with a theory of constitutional democracy, 'according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative project of establishing just (i.e., relatively more just) conditions of life'.[24]

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[17] Ibid, 248.
[18] Ibid, 247–248.
[19] Ibid, 261.
[20] Ibid, 258.
[21] Ibid, 261.
[22] Ibid, 263.
[23] Ibid, 264.
[24] Ibid, 263.

Therefore, constitutional adjudication has to ensure that the legal order protects the effective exercise of communicative and participatory rights of citizens as a part of a democratic constitutional order.[25] To do so, constitutional courts must guarantee that the *channels* for the inclusive opinion- and will-formation processes (through which a democratic legal community self-organises) remain intact.[26] As Habermas states:

> [U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about […]. More specifically, it must start by examining the communication structures of a public sphere subverted by the power of the mass media; go on to consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised; and conclude with the equal parliamentary representation of all the currently relevant groups, interest positions, and value orientations.[27]

3 Constitutional Courts as Custodians of Deliberative Democracy

As previously stated, the legitimacy conditions of a democratic constitutional order require that constitutional courts guarantee that the *channels* for inclusive opinion- and will-formation remain open to political participation for as many interested citizens as possible.[28] However, the multiplication and clash of competing interest groups make impartial will-formation difficult to develop.[29] Therefore, the influence of interest groups that further their ambitions through the state apparatus at the cost of the general interest is deemed a real problem, and one that threatens the legitimacy of the democratic constitutional order.

In light of the above, constitutional courts should assume the role of custodians of deliberative democracy.[30] They should develop interpretation schemes to ensure that the legislative has used some form of rational judgment rather than reacting mechanically to the pressures of interest

[25] Ibid, 264.

[26] Previously, Habermas had introduced the notion that rational political opinion- and will-formation is possible only as an institutionalised ideal. This is 'through a system of rights that secures for each person an equal participation in a process of legislation whose communicative presuppositions are guaranteed to begin with'. This is precisely what constitutional adjudication should deal with when courts examine the content of disputed norms in connection with a theory of constitutional democracy. See: Ibid, 110.

[27] Ibid, 264–265.

[28] In a subsequent chapter in *Between Facts and Norms*, Habermas lays down, following Norberto Bobbio's theory of democracy, the 'procedural minimum' criteria necessary so that democracy can be implemented. These are: (a) the political participation of as many interested citizens as possible, (b) majority rule for political decisions, (c) the usual communication rights and therewith the selection from among different programs and political elites, and (d) the protection of the private sphere, Ibid, 303.

[29] Ibid, 275.

[30] Ibid.

groups.[31] The justification is that the legislature should deliberate for the benefit of the public good rather than mechanically respond to private interests. In this way, constitutional courts should not so much examine the outcome of the legislative process, but rather 'whether it is deliberation – undistorted by private power – that gave rise to that outcome'.[32]

What should emerge is a (reasonable) standard of judgement that focuses not so much on examining or justifying the reasonability of political reasons, but a jurisprudence that analyses whether legitimate policies and goals are a by-product of private concerns unfit for public justification.[33] If that is the case, the courts should invalidate the statute or act. This would make it more likely for better arguments to be used in different types of deliberation while still obtaining fair bargaining terms.[34]

III The Debate Concerning the Legitimacy Crisis of International Investment Arbitration

1 Mapping the Legitimacy Crisis of Investment Arbitration

After three decades of the proliferation of investor-friendly bilateral investment treaties (BITs) that have empowered investors to bring international claims against host states, public opinion is changing towards scepticism regarding and strong opposition to the investment arbitration regime.[35] As a result, it faces a backlash that has challenged its legitimacy.[36] The legitimacy crisis debate has been building for some time, and critical voices are accumulating because the regime has not yet undergone structural transformations.[37]

In charting the legitimacy crisis of investment arbitration, Langford and Behn identify three broad periods.[38] The first period is the pre-crisis (1990–2001) and the build-up to it (2002–2004). Only a handful of cases were filed in this period, and the regime was generally eclipsed by contract-based investment and commercial arbitrations.[39] On the other hand,

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[31] Cass Sunstein, 'Interest Groups in American Public Law' (1985) 38 Stanford Law Review 69, DOI: https://doi.org/10.2307/1228602; and Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 276.

[32] Sunstein (n 31) 58; Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 276.

[33] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 276.

[34] Ibid, 279.

[35] Andreas Kulick, 'Narrating Narratives of International Investment Law: History and Epistemic Forces' in Stephan Schill, Christian Tams and Rainer Hofmann (eds), *International Investment Law and History* (Elgar 2018) 65.

[36] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 The European Journal of International Law 551, 552, DOI: https://doi.org/10.1093/ejil/chy030.

[37] David Schneiderman, 'International Investment Law's Unending Legitimation Project' (2017) 49 Loyola University Chicago Law Journal 229, 229–230.

[38] Langford and Behn (n 36).

[39] Ibid, 554.

the building-crisis era began with the first high-profile cases that triggered controversy. These included the *Loewen* case, in which the investor suffered arbitrary court procedures that constituted a denial of justice and a breach of the obligation to provide investors with fair and equitable treatment (FET).[40] Nonetheless, the tribunal rejected the investors' claim on two contentious grounds: first, the investor had failed to pursue its domestic remedies;[41] and second, the reorganisation of the investor following its bankruptcy as a US corporation withdrew the tribunal's jurisdiction.[42] Because the claim was against the US, some considered that this case 'was a lost opportunity to show that the rule of law applies equally to the world's most powerful country'.[43] Also, this period saw the *Aguas del Tunari* case against Bolivia,[44] which arose out of the *Guerra del Agua*; i.e., 'the ill-fated effort to privatise the water system in Bolivia'.[45] The sheer amount of criticism coming from outside the sphere of investment arbitration[46] resulted in the investor reaching an agreement with the Bolivian government on a no-pay basis.[47]

The second period is the legitimacy crisis *per se* (2005–2010). What characterises this era is the rising number of contradictory rulings on basically the same subject matter, as well as an increase in the number of controversial cases, in which states' regulatory powers were called into question.[48] Concerning the first issue, Susan Frank[49] identified three sets of inconsistent arbitral decisions that caused uncertainty about the meaning of rights in BITs.[50] First, there were cases dealing with the same facts, related (yet not identical) parties,

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[40] Noah Rubins, 'Loewen v United States: The Burial of an Investor-State Arbitration Claim' (2005) 21 Arbitration International 1, 6, DOI: https://doi.org/10.1093/arbitration/21.1.1.

[41] *Loewen Group, Inc and Raymond L Loewen v United States of America* [2003] ICSID ARB(AF)/98/3, Award [162, 215]. In concrete terms, the arbitration tribunal stated that the investor could have pursued the filling a petition of certiorari coupled with the application for a stay to the US Supreme Court. Ibid, 210.

[42] *Loewen Group, Inc and Raymond L. Loewen v United States of America* (n 41) paras 223–224.

[43] These are words expressed by Jacques Werner, cited in an interview in Michael Glodhaber, 'NAFTA Suit Is Alive and Kicking' (2004) 1 National Law Journal.

[44] *Aguas del Tunari, SA v Republic of Bolivia* ICSID ARB/02/3.

[45] Alexandre de Gramont, 'After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, SA v Republic of Bolivia' (2006) 3 Transnational Dispute Management 1.

[46] The *New Yorker* magazine, for example, featured an article on the *Guerra del Agua* in Cochabamba entitled William Finnegan, 'Leasing the Rain' [2002] The New Yorker <https://www.newyorker.com/magazine/2002/04/08/leasing-the-rain> accessed 31 March 2022. Taken from: de Gramont (n 45).

[47] Kyla Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16 Review of European Community & International Environmental Law 230, 234, DOI: https://doi.org/10.1111/j.1467-9388.2007.00557.x.

[48] Langford and Behn (n 36) 556.

[49] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1582. Franck explains that there are three categories of inconsistent cases; namely (1) cases involving the same facts, related parties, and similar investment rights, (2) cases involving similar commercial situations and similar investment rights, and (3) cases involving different parties, different commercial situations, and the same investment rights. Ibid, 1558.

[50] Franck (n 49) 1558 et seq.

and similar investment rights: the *Lauder*[51] and *CME* cases[52] exemplified this issue.[53] In these cases, actions and omissions by the Czech media regulatory body were subject to two separate arbitral proceedings conducted at different fora (London and Stockholm), which, moreover, resulted in contradictory rulings.[54] Second, there were cases involving similar commercial situations and similar investment rights, such as in the *SGS* cases. Here, two ICSID tribunals came to opposite conclusions regarding the extent to which an umbrella clause may elevate a breach of a contractual claim into a breach of a relevant BIT.[55] Third, there were cases involving different parties and different commercial situations, but the same investment rights. Frank points out that at least three different NAFTA cases came to different interpretations on whether *fair and equitable* was a guarantee of minimum treatment under customary international law, or whether it was an independent standard of protection.[56]

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[51] *Ronald S Lauder v The Czech Republic* UNCITRAL 2001, Final Award.

[52] *CME Czech Republic BV v The Czech Republic* UNCITRAL 2003, Final Award.

[53] Kevin Williams and Sergey Ripinsky, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008) 145–148; and Giorgio Sacerdoti, 'The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards' (Bocconi Legal Studies Research Paper No 07-02 2007) 2, DOI: https://doi.org/10.2139/ssrn.981020.

[54] While in the *Lauder* case the London *ad hoc* tribunal found that although the Czech government took arbitrary and discriminatory measures, '[t]he Claimant has indeed not brought sufficient evidence that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his rights to use his property or even of interfering with his property rights'. Hence, it concluded that 'there was no direct or indirect interference by the Czech Republic in the use of Mr Lauder's property or with the enjoyment of its benefits'. [*Ronald S Lauder v The Czech Republic* (n 51) paras 201–202]. On the other hand, in the *CME* case, the Stockholm arbitration tribunal considered 'immaterial whether the State itself (rather than local investors or other third parties) economically benefits from its actions' when analysing whether an expropriation happened. Therefore 'The Czech Republic's actions in this case – threatening destruction of CME's investment through regulatory proceedings once the foreign investor's profits appeared too large' amounted to 'expropriation by consent'. *CME Czech Republic BV v The Czech Republic* UNCITRAL 2001, Partial Award [150–151, 153].

[55] In *SGS v Pakistan*, the tribunal stated that there is no basis on which contractual claims could be elevated to investment treaty claims, when there is no intent by the contracting states that the umbrella should have such a far-reaching scope (*SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* [2003] ICSID ARB/01/13, Decis Trib Object Jurisd [167].) However, in *SGS v Philippines*, the tribunal accepted that the umbrella clause was clear and unambiguous, so that the State's failure to comply with its contractual obligations amounted to a breach of the provisions of the investment treaty (*SGS Société Générale de Surveillance SA v Republic of the Philippines* [2004] ICSID ARB/02/6, Decis Trib Object Jurisd [109]). That said, as Sanderson notes: '[w]hile commentators have been keen to see the two SGS cases as extreme poles, the differences in outcome in these cases is more nuanced and, in fact, the polarisation between the broad and the more restrictive approaches may have only truly been established in subsequent cases' 'Umbrella Clauses in Investment Treaty Arbitration' *(LexisNexis)* <https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/59XM-CHD1-DXSN-60B9-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=umbrella-clauses-in-investment-treaty-arbitration> accessed 31 March 2022.

[56] Franck (n 49) 1576–1582. In concrete terms, Franck refers to the following three cases: first, to *SD Myers v Canada*, in which the tribunal concluded that international law must ultimately determine whether the regulation is sufficiently egregious to amount to an instance in which 'a foreign investor has been denied 'fair and equitable treatment' (*SD Myers, Inc v Government of Canada* [2000] Partial Award (UNCITRAL) [264–269].

Concerning the issue of controversial cases, Burke-White[57] analyses four cases decided by early 2008 against Argentina, in the aftermath of its worst economic crisis.[58] Although Argentina invoked the treaty-based defence of non-precluded measures provisions in its BITs,[59] as well as the customary defence of necessity, in three of the four cases, ICSID tribunals held Argentina liable for adopting several measures to stabilise its economy, such as the conversion of all its financial obligations into the Argentinian peso. This triggered the legitimacy concern on the diminishment of the States' ability to develop policy responses to overcome critical situations.[60] Moreover, the crisis narrative was exacerbated, due to a large number of cases that deteriorated the protection of basic human rights, environmental standards and sustainable development goals,[61] as well as cases against Bolivia, Venezuela and Ecuador, due to the enactment of expropriation laws.[62] Consequently, several States

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Second, to *Metalclad v Mexico*, in which the tribunal considered that 'fair and equitable' is a positive right independent of customary international law (*Metalclad Corporation v The United Mexican States* [2000] ICSID ARB(AF)/97/1, Award [99–101]. And third, to *Pope & Talbot v Canada*, in which the tribunal concluded that the 'fair and equitable treatment' standard in article 1105 did not mean that NAFTA States should provide minimum standards of treatment under international law; but rather, it was an standard in addition to minimum guarantees under international law (*Pope & Talbot Inc v The Government of Canada* [2001] Award (UNCITRAL) [105–118]). As a result of these discrepancies, the NAFTA Free Trade Commission enacted a binding interpretation which clarified NAFTA's FET clause meaning, under Article 1105. It asserted that this provision does not require that host States give treatment in addition to or beyond that which is required by the minimum standard of treatment under customary international law (NAFTA Free Trade Commission, 'NAFTA's Notes of Interpretation of Certain Chapter 11 Provisions' (2001).

57 William W Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System' (2008) 3 Journal of WTO & International Health Law and Policy 199, 221.

58 *CMS Gas Transmission Company v The Republic of Argentina* [2005] ICSID ARB/01/8, Award.); *CMS Gas Transmission Company v The Republic of Argentina* [2007] ICSID ARB/01/8, Annulment.; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* [2007] ICSID ARB/01/03, Award.); and *Sempra Energy International v The Argentine Republic* [2007] ICSID ARB/02/16, Award.

59 These provisions exempt certain actions taken by states in response to extraordinary circumstances. William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307, 321.

60 Burke-White, von Staden (n 59) 222. Burke also acknowledges two other causes of legitimacy concerns: first '[t]he tribunals reached opposite conclusions, based on different interpretations of the treaty's NPM terms and different understandings of the necessity defense in customary international law', Ibid, 221. Secondly, the composition of the tribunals and the precedential value of ICSID awards, ibid, 222.

61 For instance, when the tribunal in *Suez v Argentina* needed to address the role of human rights on investment disputes; it concluded that human rights operate independent from investment protections, so that they are of no relevance to investment treaty obligations (*Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* [2010] ICSID ARB/03/19, Decis Liabil [257–265]).

62 Langford and Behn (n 36) 556; Michael Waibel and others, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010) xlix.; Cf with Detlev Vagts, who argues that the backlash against investment arbitration resembles the awakening of the 'spirit of Carlos Calvo' in 'Foreword to the Backlash against Investment Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010) xxiv.

denounced the ICSID Convention. While states such as Argentina adopted a neither-in-nor-out approach by maintaining its BITs and ICSID membership,[63] Bolivia, Venezuela and Ecuador denounced the ICSID Convention.[64]

The last period is the late crisis and its counter-crisis (2011–present). This era includes major controversial cases, in which the powers of sovereign States to regulate public affairs were called into question, which, in turn, spurred a debate on the chilling effect of international investment disputes.[65] Examples of such cases are the *Phillip Morris* regulation cases,[66] the *Vattenfall* cases against Germany,[67] and *Chevron's* US $18 billion denial of justice case against Ecuador.[68] On top of this, developed countries such as Australia[69] and Czechia initiated an internal policy review of terminating and renegotiating some of their BITs.[70] Also, as of 2015 a second wave of high-profile cases were decided against, *inter alia*, Venezuela,[71] Zimbabwe,[72] Canada,[73] and Russia.[74] Additionally, during that period,

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[63] Yoram Z Haftel and Hila Levi, 'Argentina's Curious Response to the Global Investment Regime: External Constraints, Identity, or Both?' (2020) 23 Journal of International Relations and Development 755, 755–758, DOI: https://doi.org/10.1057/s41268-019-00174-8.

[64] Waibel and others (n 62) xlix.; and Langford and Behn (n 36) 556. Cf Devashish Krishan, Todd Weiler and Freya Baetens, 'Thinking About BITs And BIT Arbitration: The Legitimacy Crisis That Never Was' in *New Directions in International Economic Law* (Brill/Nijhoff 2011) 130.

[65] Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos/Hart 2014); for an opposing view on this subject see: Martins Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 European Journal of International Law 663, DOI: https://doi.org/10.1093/ejil/chv041; See also, Leif Johan Eliasson and Patricia Garcia-Duran Huet, *Civil Society, Rhetoric of Resistance, and Transatlantic Trade.* (Springer 2019) 63, who quote the Corporate Europe Observatory, which mentions that '[s]ometimes the mere threat of an investor-state dispute can be enough to kill legislation because the policy-maker is afraid of being sued, and that shows that investor-state disputes are also an enormous threat to our democracy'.

[66] *Philip Morris Asia Limited v The Commonwealth of Australia* [2017] UNCITRAL PCA Case No. 2012-12, Award; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* [2016] ICSID ARB/10/7, Award.

[67] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany* [2011] ICSID ARB/09/6, Award [12].; *Vattenfall AB and others v Federal Republic of Germany* [2018] ICSID ARB/12/12, Decis Achmea Issue [232].

[68] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)* [2009] UNCITRAL PCA Case No. 2009-23, Pending.

[69] Later on, Australia reversed its anti-ISDS policy and signed the TPP in February 2016.

[70] Langford and Behn (n 36) 557.

[71] *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela* [2019] ICSID ARB/07/30, Award; *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2014] ICSID ARB(AF)/09/1, Award.; *Venezuela Holdings, BV, et al (case formerly known as Mobil Corporation, Venezuela Holdings, BV, et al) v Bolivarian Republic of Venezuela* [2014] ICSID ARB/07/27, Award.

[72] *Bernhard von Pezold and Others v Republic of Zimbabwe* [2015] ICSID ARB/10/15, Award.; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe* [2015] ICSID ARB/10/25, Award.

[73] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* [2015] UNCITRAL PCA Case No. 2009-04, Award Jurisd Liabil.

[74] *Yukos Universal Limited (Isle of Man) v The Russian Federation* [2014] UNCITRAL PCA Case No. 2005-04/AA227, Final Award PCA Case No 2005-04/AA227; *Hulley Enterprises Limited (Cyprus) v The Russian*

67 intra-EU ISDS cases have been initiated related to activities in the supply of energy and financial services,[75] most of which were brought against three EU member states: Spain (28 cases), Italy (10 cases), and Croatia (7 cases).[76] This period is also marked by an increase in the number of publications regarding additional aspects that have triggered the legitimacy crisis of investment arbitration, along with suggestions of reforms to tackle them.[77] Examples of legitimacy concerns identified in the academic literature are the bias of arbitrators,[78] lack of transparency during the proceedings,[79] and the need to expand the participation of third parties.[80]

On the other hand, the counter-crisis period has produced a countervailing trend, characterised by negotiations and the conclusion of new regional mega-agreements which aim to safeguard the regulatory powers of states. One example is the recently concluded United States-Mexico-Canada Agreement, which includes a caveat to investment protection when governments adopt or maintain measures to protect legitimate public welfare objectives.[81] In the same vein, a new era of modern investment agreements, such as the

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Federation [2014] UNCITRAL PCA Case No 2005-03/AA226, Final Award; and *Veteran Petroleum Limited v The Russian Federation* [2014] UNCITRAL PCA Case No 2005-05/AA228, Final Award.

[75] About 83 per cent of the intra-EU cases related to activities in the services sector. Half of the services cases related to the supply of electricity, gas, steam and air (77 cases) and 15 per cent to financial and insurance services (24 cases). UNCTAD, 'Investment Policy Hub' <https://investmentpolicy.unctad.org/publications/1193/fact-sheet-on-intra-european-union-investor-state-arbitration-cases> accessed 31 March 2022.

[76] This is about 40 per cent of the total of 174 known intra-EU investor-State disputes that have been registered from 1987 until July 2018. Ibid.

[77] Although Langford and Behn do not give any information on this point, a search at the 'Most-Cited Law Journals' in HeinOnline reveals that from 2010 to date (June 20, 2021) there are 96 publications containing the words 'Legitimacy Crisis Investment Treaty Arbitration', while only 74 from 2000 to 2009. See: <https://heinonline.org/HOL/LuceneSearch?terms=Legitimacy+Crisis+Investment+Treaty+Arbitration&face_quers=partof%3Atop30&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&sendit=&all=true&yearlo=2000&yearhi=2010> accessed 31 March 2022.

[78] Gus Van Harten, 'Perceived Bias in Investment Treaty Arbitration?' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010); Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211; Cf Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28 The European Journal of International Law 731, who, unlike Van Harten, assert that 'the results of the experiment suggest that, because of a cognitive predisposition to help the party with fewer resources, or because of the contemporary contested standing of ISDS, or to ensure buy-in on the part of litigants (and secure 'customers' for this arbitration system), arbitrators tend to 'compensate' perceived economically weaker parties who are successful in a proceeding when exercising discretion'.

[79] Schneiderman (n 37) 259. He argues that pre-award transparency, for instance, is hardly available in ICSID and UNCITRAL tribunal practice.

[80] Avidan Kent, 'The Principle of Public Participation in ICSID Arbitrations' in Marie-Claire Cordonier Segger and CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992–2012* (Routledge 2017) 554, DOI: https://doi.org/10.4324/9781315769639-24.

[81] Additionally, UNCTAD has outlined various reform packages that advocate, *inter alia*, (i) Safeguarding the right to regulate: Clarifying or circumscribing provisions such as most-favoured-nation (MFN) treatment,

Indian[82] and the Southern African Development Community Model Bilateral Investment Treaty[83] templates, contain provisions on compliance with domestic laws and corporate social responsibility. Moreover, at the level of arbitral proceedings themselves, there have been attempts to respond to the backlash. For example, recent arbitral awards have underscored the fact that regulatory changes to the legal framework of host states cannot be deemed unfair *per se* when States implement actions to protect basic human rights.[84] Other awards have also set forth that when analysing governmental regulations that may be detrimental to investors' rights, the arbitral tribunal must take into account the forceful defence of environmental regulations and protection provided in the BIT.[85]

Despite these responses, there remains discontent over the lack of a systemic reform of the investment arbitration regime.[86] For instance, Langford et. al. find that the lack of consistency and coherence in the interpretation of legal issues remains largely unsolved.[87]

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fair and equitable treatment (FET) and indirect expropriation, as well as including exceptions, e.g. for public policies or national security; (ii) Reforming investment dispute settlement: Improving the arbitral process, e.g. by making it more transparent and streamlined; limiting investors' access, e.g. by reducing the subject matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by 'mailbox' companies; introducing an appeals facility (whether bilateral, regional or multilateral); and creating a standing international investment court; (iii) Promoting and facilitating investment: granting outward incentives or investment insurance can be conditioned on the sustainable development impact or good governance record of the benefitting investment; (iv) Ensuring responsible investment: options include not lowering standards clauses and provisions on investor responsibilities, such as clauses on compliance with domestic laws and on corporate social responsibility; (v) Enhancing systemic consistency: owing to the fragmentation of international law into different 'systems' that pursue their own objectives, past investment cases have revealed tensions between investment and these other parts of international law. Addressing this relationship in investment treaties can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction; (vi) An investment court system composed of a first instance Tribunal and an Appeal Tribunal operating on similar principles to the WTO Appellate Body UNCTAD, 'World Investment Report 2015. Reforming International Investment Governance' (2015) xi–xii. Additionally, a special issue of The Journal of World Investment & Trade 'Comparative and International Investment Law: Prospects for Reform' gathers a series of articles that take the domestic level of investment governance to set forth suggestions for reform to the investment law regime. See: Georgios Dimitropoulos, 'Comparative and International Investment Law: Prospects for Reform – An Introduction' (2020) 21 The Journal of World Investment & Trade 1.

[82] In particular, see the following articles of this treaty: Article 1(4) and 1(5) Definition of investment and of investor; Article 12 Corporate Social Responsibility; Article 32.1(IV) General Exceptions to protect the environment.

[83] In concrete terms, see the following articles of this treaty: Article 2 Definition of Investment; Article 13: Environmental and Social Impact Assessment; Article 15 Minimum Standards for Human Rights, Environment and Labour; and Article 16: Corporate Governance Standards.

[84] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* [2016] ICSID ARB/07/26, Award [623–624].

[85] *Adel A Hamadi Al Tamimi v Sultanate of Oman* [2015] ICSID ARB/11/33, Award [389–390].

[86] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361, 361, DOI: https://doi.org/10.1017/ajil.2018.70.

[87] Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2020) 21 The Journal of World Investment & Trade 188, 250, DOI: https://doi.org/10.1163/22119000-12340172.

Furthermore, Steininger has identified a serious lack of uniform methodology in the judicial interpretation and application of human rights law by arbitrators.[88] Another issue that lingers unresolved is that the current arbitration rules provide for limited transparency. For example, Regulation 22 of the ICSID Administrative and Financial Regulations states that the ICSID Secretary-General may only publish arbitral awards or minutes and other records of proceedings if both parties agree. In addition, Rule 32 of the Rules of Procedure for Arbitration Proceedings of the ICSID states that, unless either party objects, the tribunal may allow other persons to participate in the oral procedure.[89]

2 A Response to Mapping the Legitimacy Crisis of Investment Arbitration

The chronological framework of Langford and Behn offers the advantage of tracking the progress of the legitimacy crisis in an orderly way. However, it lacks a theoretical framework with which to deploy a crisis analysis. Although this may be due to the fact that the debate surrounding the legitimacy crisis of investment arbitration has developed chaotically and randomly, it does not render the theorisation of the debate less problematic. For example, the first period of the legitimacy crisis – i.e., the building crisis – is said to be challenging given the rising number of high-profile cases that triggered controversy. Indeed, both the *Loewen* and the *Aguas del Tunari* cases sparked a fair amount of criticism. However, the underlying reasons for their being symptomatic of a legitimacy crisis are not given. Granted, the tribunal in the *Loewen* case may have missed the opportunity to prove to the world that the rule of law applies to the world's most powerful country as equally as to others; likewise, the privatisation of the water supply in Bolivia undermined indigenous populations' human right to access water. Both have merit as real concerns.

The same can be said about the second and final periods of the crisis. Contradictory rulings and controversial cases are unavoidable in any adjudicatory system; however, they do not *per se* trigger legitimacy concerns. In the Netherlands, for example, there are contradictory rulings on the status of food-delivery riders as employees.[90] The US Supreme Court has dealt with several controversial cases, in issues including racial segregation in education,[91] abortion,[92] police procedures to ensure the protection of a criminal suspect,[93] the individual's right to possess

[88] Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 Leiden Journal of International Law 33, 55, DOI: https://doi.org/10.1017/S0922156517000528.

[89] In this sense, see: *Bernhard von Pezold and Others v Republic of Zimbabwe* [2012] ICSID ARB/10/15, Proced Order No 2 [63]). There, the tribunal stated that '[t]he Petitioners' request to attend the hearings in these proceedings must be denied in any event because the Claimants' objection constitutes an absolute bar to granting the request'.

[90] Nuna Zekic, 'Contradictory Court Rulings on the Status of Deliveroo Workers in the Netherlands' (2019) 17 Comparative Labor Law & Policy Journal.

[91] *Brown v Board of Education of Topeka* [1964] SCOTUS 347 U.S. 483.

[92] *Roe v Wade* [1973] SCOTUS 410 U.S. 113.

[93] *Miranda v Arizona* [1966] SCOTUS 384 U.S. 436.

a firearm unconnected with service in a militia,[94] and so on. However, in neither country did contradictory rulings or controversial cases spur a legitimacy crisis debate.

This is why it becomes apparent that debating the legitimacy of any adjudicatory system demands a conceptual framework from which to develop a crisis diagnosis. So far, the discussion on the legitimacy crisis of investment arbitration has served to point out perceived problems and chart the trajectory of the crisis, but what is necessary is a thorough examination of why controversial, contradictory rulings and the increase in the number of publications develop a crisis of legitimacy based on a theoretical framework from which one can develop a crisis diagnosis.

IV The Diagnosis of the Legitimacy Crisis of Investment Arbitration

In light of this, the following section applies the Habermasian theory of the role and legitimacy of constitutional adjudication to diagnose legitimacy concerns in international investment arbitration. Three aspects are examined in particular. The first is whether investment tribunals have developed normative arguments and key principles based on moral and ethical considerations, as well as public policy, to safeguard the unity and consistency of the international legal order. The second is whether investment tribunals have guaranteed that the *channels* for the inclusive opinion- and will-formation processes are open to the democratic legal community of international law. The last question is whether investment arbitration tribunals have done their job as guardians of international law's democracy.

1 Human Rights as Normative Principles of the International Legal Order

As previously mentioned, the Habermasian paradigm no longer considers rights to be exclusively negative liberties in a constitutional order. Instead, they are deemed as architectonic principles that permeate throughout the legal order, which constitutional courts integrate into the legal system by means of constructive interpretation. To analyse the legitimacy crisis of investment arbitration, it is argued that investment tribunals may uphold the legitimacy of this public adjudicatory system[95] through integrating a constructive

[94] *District of Columbia v Heller* [2008] SCOTUS 554 U.S. 570.

[95] Venzke and Von Bogdandy argue that while ICSID tribunals are judicial bodies that engage in public adjudication, given the inherent law-making in their adjudicatory practice, they cannot be considered constitutional courts in the same way as the Court of Justice of the European Union, the European Court of Human Rights and the and the Inter-American Court of Human Rights. This is for two reasons. First, because it would be possible for investment tribunals to justify their de-coupling from an effective legislature. Second, if they engage in creative and expansive interpretation of their legal foundations, say the ICSID Convention, that would be considered illegitimate. See: *In Whose Name?: A Public Law Theory of International Adjudication*

interpretation (one that incorporates international human rights norms) in their deliberations. To further this argument, I discuss two issues; first, whether international law embeds a system of rights similar to constitutional rights that investment tribunals can integrate into their judicial review. Second, even if such a system or rights exist, are investment tribunals in a position to engage in a constructive interpretation, similarly to constitutional courts?

a) Whether international law embeds a system of constitutional rights

The constructive interpretation that Habermas suggests for courts to integrate the normative architectonic principles into the legal system resembles Gardbaum's three-fold model to analyse the constitutionalisation of international human rights.[96] This model describes three general characteristics of constitutional law, which, for the most part, are met by international human rights law. These are the *architectonic principles that permeate throughout the international legal order*.[97] According to Gardbaum, the main features of constitutional rights are the following. First, it is law made by a special, episodic, and self-consciously constituent power.[98] Second, it is law that occupies the highest hierarchical position in the legal system.[99] Third, it is law *entrenched* against ordinary methods of reform through additional procedural requirements.[100]

How does the three-fold model apply to international human rights law? Concerning the first criterion, Gardbaum argues that the birth of the Universal Declaration of Human Rights (UDHR), the International Covenant of Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) – together known as the International Bill of Rights[101] – were the product of a constitutional moment.[102] The International Bill of Rights was an appropriate and effective response to the threats and challenges of a rising political movement that created a new paradigm.[103] Indeed, the framers

(Oxford Scholarship Online 2014) 128–130. Although this paper acknowledges, just as Venzke and von Bogdandy do, that ICSID tribunals are not ontological constitutional tribunals, what we consider is their functional nature. Hence, their factual nature is inconsequential.

[96] Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 European Journal of International Law 749, 753 et seq., DOI: https://doi.org/10.1093/ejil/chn042.

[97] Gardbaum includes two. These are '(i) there is no single international human rights system but regional and global ones which overlap and interact in complex ways; and (ii) there is no single international legal source of human rights law and many of the sources also overlap'. Ibid, 754.

[98] Ibid, 753.

[99] Ibid, 754.

[100] Ibid.

[101] Surya Prakash Sinha, 'The Axiology of the International Bill of Human Rights' (1989) 21 Pace Yearbook of International Law 21, 22; and Gardbaum (n 96) 749.

[102] Gardbaum (n 96) 756.

[103] Anne Marie Slaughter and William W Burke-White, 'An International Constitutional Moment' (2002) 43 Harvard International Law Journal 1, 2; and Bruce Ackerman, 'A Generation of Betrayal?' (1997) 65 Fordham Law Review 1519, 1519.

of the UDHR, ICCPR, and ICESCR were responding to the barbarous acts that outraged the conscience of mankind resulting from the Second World War. This is why these laws were seen as a way to protect the ideal of free human beings.

With respect to the hierarchical status of international human rights, Gardham acknowledges that, aside from the most important human rights that have achieved *jus cogens* pedigree,[104] there is no consensus on the hierarchical status of human rights norms.[105] That said, at the regional level, the supremacy of human rights over other international treaty obligations has been acknowledged.[106] For example, in the *Mangold* case, the European Court of Justice (ECJ) elevated the prohibition of discrimination on grounds of age to a general, unwritten, principle of EU law which triumphs over secondary laws.[107] Similarly, in the case *Test-Achats*, the ECJ found Article 5(2) of the Directive 2004/113/EC to be against the Charter of Fundamental Rights of the European Union. The ECJ considered that permitting proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor is against Articles 21 and 23 of the Charter. This is because any discrimination based on sex is prohibited and equality between men and women must be ensured in all areas.[108]

Lastly, most human rights norms contain a more onerous process of amendment than the general or treaty amendments contained in article 40 of the Vienna Convention on the Law of Treaties.[109] For instance, Article 51 of the ICCPR sets forth a four-stage process for

[104] Gardbaum (n 96) 756. Asif Hameed considers that *jus cogens* norms are those identified in the commentaries of the International Law Commission of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, including the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, and torture. In particular, Commentary 5 of Article 26 (Compliance with peremptory norms), 'Unravelling the Mystery of Jus Cogens in International Law' (2014) 84 British Yearbook of International Law 52, 83. Moreover, these principles of *jus cogens* coincide with those set out in international jurisprudence, such as in *Prosecutor v Furundžija*, in which the tribunal stated that 'this revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination'. *Lašva Valley, Prosecutor v Furundžija (Anto)* [1998] Judgement (ICTY) [147].

[105] Whether Article 103, the supremacy clause of the UN Charter, incorporates mandated or authorised human rights measures remains uncertain. Gardbaum (n 96) 756.

[106] Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361, DOI: https://doi.org/10.1017/S1528887000002676.

[107] *Werner Mangold v Rüdiger Helm* [2005] ECJ (Grand Chamber) C-144/04, Judgment [75–78].

[108] *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECJ (Grand Chamber) C-236/09, Judgment [17]. Similarly, in *Atala Riffo v Chile*, the Inter-American Court of Human Rights deemed that the sentence of the Chilean Supreme Court (whereby it reverted the custody of the children the former male partner of Ms Atala on the basis that the mother's sexuality (after her divorce, Ms Atala began to live with her female partner) would cause irreversible damage to the children's development) amounted to discrimination on the grounds of sexual orientation, which is impermissible under Inter-American Convention of Human Rights *Atala Riffo and Daughters v Chile* [2012] Inter-American Court of Human Rigths 12.502, Judgm Merits Repar Costs [90].

[109] Gardbaum (n 96) 758.

its amendment. Moreover, the ICCPR contains no provision on termination or withdrawal, because, as stated by the UN Human Rights Committee, the parties to the Covenant deliberately intended to exclude the possibility of denunciation, since the rights enshrined in the Covenant belong to the people living in the territory of the State party.[110]

This shows that there is at least a reasonable argument to be made that the International Bill of Rights can be thought of as enshrining a form of quasi-constitutional law at the international level, particularly that of constituent power and entrenchment.[111]

b) How can investment tribunals engage in an international constructive interpretation?

Coming to the second question, namely whether investment tribunals are able to integrate international human rights norms as constitutional rights in their deliberations, the answer is also in the affirmative, based on Santacroce's analysis. He argues that the application of human rights law to international investment disputes rests on four grounds (which may operate separately or cumulatively). These are: (i) that international human rights law is part of international law, which governs the merits of investment disputes; (ii) the presence of express references to human rights in relevant international investment treaties; (iii) the presence of implied references to human rights in relevant investment treaties; and (iv) the principle of systemic integration.[112]

Considering the first point, Santacroce argues that not only can investment tribunals interpret human rights norms, but they also have jurisdiction over host states' counterclaims for breaches of human rights by the investors.[113] Recent investment decisions confirm this point. For instance, the tribunal in the case of *UP and CD Holding* stated that human rights and *jus cogens* are part of the corpus of general norms of international law that cannot be derogated in the application of international investment norms.[114] Also in *Urbaser*, the tribunal established jurisdiction over Argentina's counterclaim for the investor's breach of the human right to access to water.[115]

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[110] UN Human Rights Committee, 'CCPR General Comment No 26: Continuity of Obligations' (1997) CCPR/C/21/Rev.1/Add.8/Rev.1 <https://www.refworld.org/docid/453883fde.html> accessed 20 June 2021.

[111] Gardbaum (n 96) 753–754.

[112] Fabio Giuseppe Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes' (2019) 34 ICSID Review – Foreign Investment Law Journal 136, 136, DOI: https://doi.org/10.1093/icsidreview/siz005.

[113] Ibid, 139.

[114] *UP (formerly Le Chèque Déjeuner) and CD Holding Internationale v Hungary* [2018] ICSID ARB/13/35, Award [217]. The tribunal based this determination on the International Law Commission, Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification And Expansion of International Law' (2006) UN Doc. A/CN.4/L.682 108.

[115] *Urbaser SA. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (n 84) para 1154.

Regarding the applicability of human rights norms because of their express reference in BITs, one must look at the specific BITs governing the relevant investment dispute. Although most BITs do not contain specific human rights provisions, there are some shining exceptions worth mentioning. For instance, the preambles of the EU–Singapore and the UK-Japan free trade agreements state that the parties have 'regard to the principles articulated in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948'. The latter goes so far as to include a denial of benefits clause in the event that a host State adopts or maintains measures that are related to the protection of human rights.[116] Moreover, BITs may even impose express obligations on investors to comply with relevant human rights norms, as established in Article 14(b) of the 2017 Intra-MERCOSUR Investment Facilitation Protocol. As Santacroce notes, the importance of these types of references is that they mainly provide a basis for the direct application of such a body of law to the substance of the investment treaty dispute.[117]

The implied reference to human rights in BITs refers to instances where there is not a direct reference to human rights norms, but rather refer to values that fall within the scope of the protection by international human rights principles, such as human life, human health, due process of law, the protection of the environment and public welfare.[118] Examples are the preamble of the Model Text for the Indian Bilateral Investment Treaty, which seeks to align the objectives of foreign direct investment (FDI) with sustainable development and inclusive growth; or the Southern African Development Community Model Bilateral Investment Treaty, which recognises that FDI should aim to reduce poverty, increase productive capacity, economic growth, transfer technology and further human rights and human development.[119] According to Santacroce, the implied reference to those values in BITs suggests that human rights principles and instruments can be employed as interpretative tools that may help to determine the rights and obligations of both States and investors.[120]

This last point refers to the application of human rights norms in light of the principle of systemic integration, enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Two cases are emblematic in showing that human rights norms should be employed as interpretative tools in investment arbitration disputes.[121] The first is the decision ICSID *ad hoc* Committee in *Tulip v Turkey*. The importance rests in the Committee's reckoning:

[116] Article 8.13 a.

[117] Santacroce (n 112) 146.

[118] Ibid, 146–147.

[119] Santacroce also mentions the US Model BIT, which states that, under US Model BIT (2012), the parties would enter into the agreement 'Desiring to achieve [its] objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.' Ibid, 147.

[120] Ibid, 148.

[121] Ibid, 149.

(i) of human rights as an influence on international investment arbitration;[122] (ii) the systemic nature of international law;[123] (iii) that investment tribunals should not restrict themselves to apply only the norms to the treaty upon which their jurisdiction is based;[124] (iv) that international human rights norms and jurisprudence has been employed in investment cases as interpretative devices on several points concerning individual rights;[125] and (v) in particular, that provisions in human rights instruments dealing with the right to a fair trial and any judicial practice are relevant to the interpretation of the concept of a fundamental rule of procedure of the ICSID Convention.[126] The second is the award in the case *Urbaser v Argentina*. There, the tribunal stated that, based on the principle of systemic integration, the relevant BIT of the dispute has to be interpreted in harmony with other rules of international law of which it forms part, including those relating to human rights.[127]

International law is a legal system, the rules and principles of which interact with each other.[128] Systemic integration is at the heart of this idea, which says that international norms should be interpreted in light of their normative surroundings.[129] 'The rationale for such principle is that all treaty provisions receive their force and validity from general law'.[130] For this reason, tribunals should not restrict themselves to the treaty upon which their jurisdiction is based and which constitutes the treaty under dispute.[131] This is particularly important in *ad hoc* tribunals, such as investment tribunals, because 'a case-specific mandate is not a license to ignore systemic implications'.[132] Moreover, as several ICSID tribunals have stated, a BIT is not:

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[122] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* [2015] ICSID ARB/11/28, Decis Annu [86]. It is worth mentioning that the Committee draws much of its understanding of the nature of the principle of systemic integration from the Fragmentation Report of the International Law Commission, which expresses that international law is a legal system the rules and principles of which interact between each other and that its norms are to be interpreted by reference to their normative environment. See: Study Group of the International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/CN4/L682 177–178.

[123] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (n 122) paras 87–88.

[124] Ibid, 89.

[125] Ibid, 91.

[126] Ibid, 92.

[127] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (n 84) 1200.

[128] Study Group of the International Law Commission (n 122) 177–178. In the same vein, McLachlan expresses: '[o]ne of the characteristics which distinguishes international law from other legal systems is its horizontality. Lacking a single legislature or court of plenary competence, and depending in all aspects fundamentally on state consent, international law lacks developed rules for a hierarchy of norms. It draws its normative content from a wide range of sources operating at different levels of generality' 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 The International and Comparative Law Quarterly 279, 282.

[129] McLachlan (n 128) 282, DOI: https://doi.org/10.1093/iclq/lei001.

[130] Study Group of the International Law Commission (n 114) 208.

[131] Ibid, 212.

[132] *Glamis Gold, Ltd v The United States of America* [2009] UNCITRAL ICSID, Award [6].

> [a] self-contained closed legal system limited to provide for substantial material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or domestic law nature.[133]

In this sense, it is certainly the case that the days when investment tribunals could reject human rights arguments[134] and matters pertaining to international human rights law are over.[135]

In the last two points, I have argued that international human rights function as constitutional rights, as well as that investment tribunals are in a position to integrate them as interpretative tools in solving investment disputes. At this stage, the parallel with constructive interpretation becomes clearer. In the Habermasian theory of the role of constitutional adjudication, constitutional courts enhance the legitimacy of the legal system by integrating constitutional rights, because they secure the unity of the legal order. The idea here is that rights are architectonic principles of the legal order that permeate the legal system. Integrating rights as interpretative devices guarantees that the legal order is embedded with the normative legitimacy enshrined in constitutional rights. Just as in other constitutional tribunals, such as the ECJ,[136] investment tribunals should integrate human rights norms as interpretative tools to decide investment disputes. In this way, their judicial review makes sure that the democratic legitimacy rules have been met.[137]

2 Investment Tribunals Must Ensure that the *Channels* for Inclusive Opinion- and Will-formation Remain Open

As discussed earlier, the Habermasian paradigm suggests that, to guarantee a democratic constitutional order, courts must safeguard the effective exercise of communicative and participatory citizens' rights. To accomplish that goal, courts should ensure that *channels* for inclusive opinion- and will formation remain open. When this idea is transposed into the crisis diagnosis of the legitimacy of investment arbitration, one has to analyse whether

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[133] *Asian Agricultural Products Ltd v Republic of Sri Lanka* [1990] ICSID ARB/87/3, Award [21]; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* [2015] ICSID ARB/08/11, Award [113].

[134] For instance, when the tribunal in *Suez v Argentina* needed to address the role of human rights on investment disputes; it concluded that human rights operate independently from investment protections, so that they are of no relevance to investment treaty obligations [*Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (n 61) 257–265].

[135] Santacroce (n 112) 155.

[136] Bo Vesterdorf, 'A Constitutional Court for the EU?' (2006) 4 International Journal of Constitutional Law 607, 617, DOI: https://doi.org/10.1093/icon/mol026.

[137] Ernst-Ulrich Petersmann, 'Human Rights, Constitutionalism, and 'Public Reason' In Investor-State Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 893, DOI: https://doi.org/10.1093/acprof:oso/9780199571345.003.0045.

there are blocking stoppages that prevent arbitration tribunals from considering divergent and marginal voices to be heard during the proceedings they conduct. My theoretical argument is that the more inclusive arbitration proceedings become, the more investment arbitration would reduce its democratic deficit.[138] In this sense, this argument argues against the formalistic view of Born and Forrest, who endorse the position that investment tribunals have to ensure that *amicus curiae* participation does not disrupt the arbitral proceedings or impose undue cost or prejudice.[139]

To further my theoretical argument, two issues are examined; first, whether there are procedural norms functioning as obstacles that prevent the *channels* for the inclusive opinion- and will formation further the democratisation of international law. Given that the ICSID Convention has set forth the main investment arbitration forum,[140] I confine the analysis to the Rules of Procedure for Arbitration Proceedings of ICSID. Second, why is it that Born's and Forrest's positions render the legitimacy crisis of investment arbitration unsolved? This last point is the entry gate to the following section, in which I discuss how investment tribunals could ensure inclusive *channels* for opinion- and will-formation to guarantee democratic-generating procedures.[141]

a) Do procedural norms of the ICSID Rules of Procedure block democratic channels for inclusive opinion- and will formation?

The democratic *channels* for inclusive opinion- and will formation refer to the deliberative and representative procedures that secure incumbent parties' equal access and inclusion in binding decision-making processes through democratic forms of participation.[142] When these *channels* are blocked, there is a real danger that the asymmetries of power lurking behind dominating acts would promote the juridification of a hegemonic legal façade.[143] In this sense, the importance of dislodging barriers from democratic *channels* lies in impeding dominant interests from imposing their agenda on decision-making processes, under the guise of impartiality.[144] When we transpose this idea into the diagnosis of the legitimacy of

[138] Jürgen Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' in *The Divided West* (Polity Press 2006) 122; Hans-Jörg Trenz and Klaus Eder, 'The Democratizing Dynamics of a European Public Sphere: Towards a Theory of Democratic Functionalism' (2004) 7 European Journal of Social Theory 5, 13, DOI: https://doi.org/10.1177/1368431004040016.

[139] Gary Born and Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration' (2019) 34 ICSID Review – Foreign Investment Law Journal 626, DOI: https://doi.org/10.1093/icsidreview/siz020.

[140] Until 9 June 2021, ICSID has served 685 times as the administering institution of ISDS disputes, encompassing more than 60% of the total case load of 1104 known treaty-based ISDS cases. See: UNCTAD, 'Investment Policy Hub' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 31 March 2022.

[141] Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 138) 131.

[142] Ibid, 141.

[143] Ibid, 182.

[144] Ibid, 142.

investment arbitration, it has to be analysed whether the decision-making processes inside the proceedings take *equal* account of the interests of all incumbents – regardless of their political and economic power.[145]

Only conflicts of legal nature arising directly out of an investment (jurisdiction *ratione materiae*) are within the jurisdiction of ICSID.[146] In other words, international investment disputes concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for a breach of a legal obligation.[147] On top of that, one of the parties must be a contracting state and the other party must be a national of another contracting state (jurisdiction *ratione personae*).[148] Indeed, the role of the parties is the 'foundation stone of arbitration generally, and of international arbitration in particular'.[149] Hence, arbitrators' deference to the parties have led them to identify with the parties' interests, instead of with public interests.[150] As Karton expresses: 'arbitrators also defer to party interests by preserving near-total confidentiality in the face of increasing criticism'.[151]

Scholars, such as Trakman, consider that confidentiality is key to the successful practice of international commercial arbitration because that is the very reason parties resort to arbitration rather than to litigation.[152] Given that commercial arbitration is a private forum to settle legal disputes between private parties, it makes sense that confidentiality is one of

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[145] Ibid, 122.

[146] *El Paso Energy International Company v The Argentine Republic* [2006] ICSID ARB/03/15, Decis Jurisd [97–100].

[147] Board of Governors of the International Bank for Reconstruction and Development, 'Report of the Executive Directors on the ICSID Convention' (1964) Resolution No. 214 para 26. See: Article 25(1) of the ICSID Convention.

[148] Executive Directors, 'Report of the Executive Directors on the ICSID Convention' (1965) para 28. While a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings, a juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings if that State had agreed to treat it as a national of another Contracting State because of foreign control. See: Article 25(2) of the ICSID Convention. As Michael Waibel explains: 'The scope of jurisdiction of investment tribunals can conceptually be split into four dimensions: subjects *(ratione personae)*; geography *(ratione loci)*; time *(ratione temporis)*; and subjects-matter *(ratione materiae).* Since international jurisdiction depends on consent as to all its elements, and failure to meet any of these four is fatal to jurisdiction of a given tribunal, the division into these four elements of jurisdiction is descriptive'. 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (C.H. Beck, Hart, Nomos, Baden-Baden, 2015) 1212, DOI: https://doi.org/10.5771/9783845258997-1261.

[149] Martin Hunter and others, *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th edn, Oxford University Press 2015) 135; *M&C Corporation v Erwin Behr BmbH & Company KG and Dr Heinz Etzel* [1994] ICC 7453/FMS, Award [53].

[150] Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013) 90.

[151] Ibid, 96.

[152] Leon E Trakman, 'Confidentiality in International Commercial Arbitration' (2002) 18 Arbitration International 1, 17–18; Karton (n 150) 80, DOI: https://doi.org/10.1023/A:1014277907158.

its main and fundamental principles.[153] However, arbitral investment tribunals are judicial bodies that engage in public adjudication given their lawmaking practices;[154] dealing with matters of public interest, such as the subject of the human right to water;[155] or assessing the relationship between the rights of indigenous peoples to use, manage, and conserve their lands vis-à-vis foreign investors' rights to extract minerals therefrom.[156]

This is why investment decisions may potentially affect parties beyond those immediately involved in the dispute.[157] Indeed, given the public interest in the subject-matter of this case (water distribution and provision of sewage services), the *Suez/Vivendi* tribunal opened the door to accept and consider *amicus curiae* from five NGOs.[158] However, the tribunal acted *ex officio*, because investment rules were completely silent concerning submissions of *amicus curiae* briefs.[159] Moreover, in proceedings conducted under the ICSID Arbitration Rules, Rule 32(2) stated that the consent of both the investor and the host state was *sine qua non* for non-disputing parties (NDPs) to attend the hearings.[160]

Given that the procedural rules did not have adequate means for the wider public to participate or to be engaged in investment disputes, an amounting pressure for greater public participation came about.[161] As a result, ICSID amended its Arbitration Rules in 2006.[162] One the one hand, a new provision, Arbitration Rule 37, codified discretionary

[153] Alvaro Galindo and Ahmed Elsisi, 'Non-Disputing Parties' Rights in Investor-State Dispute Settlement: The Application of the Monetary Gold Principle' in Katia Fach Gómez (ed), *European Yearbook of International Economic Law* (Springer 2021) 175, DOI: https://doi.org/10.1007/978-3-030-48393-7_11.

[154] Ingo Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication' (2016) 17 The Journal of World Investment & Trade 374, 399, DOI: https://doi.org/10.1163/22119000-01703002; Eloïse Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration' (2007) 22 ICSID Review – Foreign Investment Law Journal 349, 364–365, DOI: https://doi.org/10.1093/icsidreview/22.2.349.

[155] *Aguas del Tunari, S.A. v. Republic of Bolivia* (n 44); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (n 61); *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (n 84); Tamar Meshel, 'Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond' (2015) 6 Journal of international dispute settlement 277.

[156] *Bear Creek Mining Corporation v Republic of Peru* [2017] ICSID ARB/14/2, Award.

[157] Obadia (n 154) 365.

[158] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* [2005] ICSID ARB/03/19, Order Response Petition Transpar Particip Amic Curiae [19–21].

[159] Fernando Dias Simoes, 'Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration' (2017) 42 North Carolina Journal of International Law and Commercial Regulation 791, 800; Antonio R Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes' (2007) 22 ICSID Review – Foreign Investment Law Journal 55, 66, DOI: https://doi.org/10.1093/icsidreview/22.1.55.

[160] Simoes (n 159) 800.

[161] Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15 ILSA Journal of International & Comparative Law 337, 340–341.

[162] Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 ICSID Review – Foreign Investment Law Journal 427, 433, DOI: https://doi.org/10.1093/icsidreview/21.2.427.

powers to arbitral tribunals to allow *amicus curiae* submissions, and provides only for consultation with the parties.[163] On the other hand, the new Rule 32(2) now states that unless either disputing party objects, the tribunal may permit NDPs to attend or observe all or part of the hearings.[164]

While some argue that these changes have made investment arbitration more accessible to the public,[165] the new ICSID rules do not completely ensure that the channels for inclusive opinion- and will-formation processes take into account all of those who are affected by investment tribunal awards.[166] First, the modified Rule 32(2) essentially changes the language from 'the tribunal shall decide with the consent of the parties' to 'the tribunal shall decide unless either party objects'.[167] Second, while, as Antonietti suggests, a party's refusal to make itself available for such consultations may result in the tribunal upholding its decision,[168] we have learned that when tribunals believe that an amicus brief may unfairly prejudice the claimant, its application for submission is denied.[169]

b) A critique of the formalistic view of Born and Forrest

In light of the foregoing, it is worthwhile to consider Born and Forrest's position, according to which amicus participation in arbitration should be limited to the consensual nature of party autonomy.[170] In concrete terms, they make two main points. First, they contend:

> [A]llowing amicus participation in the absence of the parties' consent therefore gives rise to many of the same issues that would arise from requiring a party to arbitrate against a non-signatory [… which] would be contrary to the parties' arbitration agreement and the consensual nature of the arbitration.[171]

I argue against this premise because, as previously stated, investment tribunals conduct public adjudication, the outcomes of which affect parties other than those involved in the dispute.[172] To reduce the democratic deficit of investment arbitration, arbitrators

[163] Born and Forrest (n 139) 643.
[164] Obadia (n 154) 375.
[165] Ibid, 350.
[166] Simoes (n 159) 802–803.
[167] Ibid, 800.
[168] Antonietti (n 162) 435.
[169] *Bernhard von Pezold and Others v Republic of Zimbabwe* (n 89) para 62.
[170] Born and Forrest (n 139) 639 et. seq.
[171] Ibid, 640.
[172] See, for example, the recognition of the *Methanex* tribunal, which acknowledged that investment disputes are of public interest, wherein 'substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties' (*Methanex Corporation v United States of America* [2001] Decis Trib Petitions Third Pers Interv Amici Curiae (UNCITRAL) [49]).

must ensure the effective exercise of divergent and marginal voices' communicative and participatory rights during arbitral proceedings.

Their second argument is that, to secure the requirements of ICSID Arbitration Rule 37, arbitrators 'should ensure that *[amicus curiae]* participation does not disrupt the arbitral proceedings or impose unfair cost or prejudice on the parties to the arbitration the requirements'.[173] However, the closed character of this positivistic approach makes arbitration proceedings impermeable to extra-legal principles of democracy, reason or justice.[174] As Habermas puts it '[t]he legitimation of the legal [positivistic] order as a whole shifts to its origin, that is, to a basic norm or rule of recognition that legitimates everything without itself being capable of rational justification'.[175] However, this raises a problem: why should the voices of marginalised communities be silenced, even when the determinations of arbitral tribunals have an impact on their interests?[176] For positivists, the solution rests on the idealistic notion that cases have to be decided based on established law – nothing more and nothing less.[177] From that angle, it makes sense that Born and Forrest reject the view whereby investment tribunals would allow amicus participation without citing any apparent legal basis.[178] Otherwise, they argue, Arbitration Rule 37 would be rendered ineffective.[179]

However, this positivist approach suffers from the same flaw as 'legitimacy through legality'.[180] That is, it considers any decision reached without recourse to non-legal normative considerations of morality or political philosophy to be appropriate.[181] Positivists argue that a legal decision is *prima facie* valid because it has been impartially justified; namely, its impartial application precedes a valid decision.[182] Even so, because legal decisions are not neutral in their application – but rather a Pandora's box of pluralistic interpretations [183] – their legal validity does not guarantee their justice.[184] In their attempt to achieving their own goals, positivistic decisions become solipsistic and imperialistic.[185] Solipsistic, because they seeing nothing other than their own interests; and imperialistic, because everything taking place

[173] Born and Forrest (n 139) 652.
[174] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 202.
[175] Ibid.
[176] Cf. *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 89) para 62.
[177] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 201.
[178] Born and Forrest (n 139) 636.
[179] Ibid, 652.
[180] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 202.
[181] Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16 Legal Theory 111, 111, DOI: https://doi.org/10.1017/S1352325210000121.
[182] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 202.
[183] Susan S Silbey, 'After Legal Consciousness' (2005) 1 Annual Review of Law and Social Science 323, 352, DOI: https://doi.org/10.1146/annurev.lawsocsci.1.041604.115938.
[184] Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 1) 202.
[185] Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 European Journal of Legal Studies 8, 9.

in the world is judged from their own perspective.[186] When facing dogmatic interpretations, Koskenniemi reminds us that 'every conceptual move is a move in a game of power, where the one who has mastery over the concept will also have the power to decide'.[187]

Positivist positions reveal a lack of awareness of their own structural bias under the guise of impartiality.[188] Only themselves and their own preferences are valid, which, mechanically, they translate into the preferences of everyone else.[189] That is why they endorse the motto of Rule 37(2), *NDPs should not disrupt the proceedings*![190] Or, in Mexican diplomatic terms, *NDPs, eat and leave*![191] The need to legitimise investment arbitration can be found here, and it is through democratic means, such as allowing amicus participation, transparency and dissemination of information in investment disputes that channels for democratic opinion and will-formation will be opened to all those affected by arbitration investment decisions.[192]

3 How Can Investment Arbitration Tribunals Become Custodians of the Legitimacy of the International Legal Order?

Aside from the arguments advanced in section 4.1,[193] two additional avenues for investment tribunals to serve as custodians of the democratic international legal order can be advanced. First, Rule 37 should be interpreted as if the consent of the parties was not a precondition for allowing *amicus* participation. The incorporation of *amicus curiae* briefs puts arbitration tribunals in a better position to determine whether public policies were the result of legitimate concerns for public justification[194] or whether they were a by-product of arbitrary

[186] Ibid.

[187] Ibid, 13.

[188] Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 318, DOI: https://doi.org/10.1017/CBO9780511862403.014.

[189] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2009). In particular, part 8.2 Nihilism, Critical Theory and International Law, in which Koskenniemi asks: 'Why is it that concepts and structures that are themselves indeterminate nonetheless still end up always on the side of the status quo?' Ibid, 605–606.

[190] Cf. *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe* [2012] ICSID ARB/10/25, Proced Order No 2 [49–50].

[191] It refers to the famous incident in which then Mexican President, Vicente Fox, in the occasion of the International Conference on Financing for Development of March 2002, expressed to former Cuban President Fidel Castro: 'comes y te vas' ("eat and leave"), as a way of suggesting 'arrive at the meeting and leave immediately'. [Rafael Velázquez Flores, 'Política Exterior y Derechos Humanos En México: Tendencias a Finales Del Siglo XX y Prioridades a Inicios Del XXI.' (2017) 11 IUS 137, 150.] DOI: https://doi.org/10.35487/rius.v11i40.2017.340.

[192] Magraw and Amerasinghe (n 161) 340–341.

[193] In which I argue that investment tribunals are in a position to integrate international human right norms as interpretative tools in solving investment disputes.

[194] Examples are to address 'water management and the consideration of biodiversity; social issues concerning the indigenous communities; and the problem of small-scale illegal miners'. See: *Crystallex International Corporation v Bolivarian Republic of Venezuela* [2016] ICSID ARB(AF)/11/2, Award [379]. Similarly, the

and discriminatory measures, which could imply an international law delinquency and/or a BIT violation.[195] Second, allowing *amicus* participation should be interpreted as a response to a call for more transparency; specifically, as a moral argumentation principle that would remove communicative stumbling blocks that obstruct the participatory rights of all those who investment awards affect.[196] Ultimately, these would develop schemes of interpretation to ensure that the legislature has exercised some form of rational judgment rather than reacting mechanically to the pressures of the formal parties in the dispute.

The interpretation of Rule 37(2) in the *Biwater* case shades light on the first issue. When the tribunal analysed whether it had jurisdiction to accept *amicus curiae* submissions, it expressed that:

> Rule 37(2) requires a tribunal to consult with the parties, but does not ascribe to either or both parties together a veto over a decision by a tribunal to exercise its discretion as it sees fit for the best result in the matter before it.[197]

Moreover, when assessing the meaning of the FET standard[198] under Article 2 of the BIT,[199] the tribunal took into account the *amicus curiae* briefs of the petitioners.[200] In particular, the tribunal employed those *amici* briefs as countervailing factors to frame the scope of the FET standard, such as limiting expectations to only those that are reasonable and legitimate.[201] For example, tribunal determined that *Biwater Gauff* could not have had legitimately expected any special arrangement with respect to the timing of payment by Government institutions of their water and sewerage bills.[202]

Concerning the second issue, investment tribunals in the cases of *Methanex*[203] and *Glamis*[204] have emphasised that accepting *amicus* submissions would make arbitral

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fulfilment of tax obligations is considered a legitimate policy concern. See: *Spyridon Roussalis v Romania* [2011] ICSID ARB/06/1, Award [503].

[195] *Joseph Charles Lemire v Ukraine* [2010] ICSID ARB/06/18, Decis Jurisd Liabil [489].

[196] Jürgen Habermas, *Moral Consciousness and Communicative Action* (Polity Press 1990) 67.

[197] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2006] ICSID ARB/05/22, Petition Amic Curiae Status [10].

[198] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2008] ICSID ARB/05/22, Award [586].

[199] *The Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of 7 January 1994.*

[200] The petitioners for *amicus curiae* status, namely: The Lawyers' Environmental Action Team, The Legal and Human Rights Centre, The Tanzania Gender Networking Programme, The Center for International Environmental Law, and The International Institute for Sustainable Development: see *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (n 197).

[201] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (n 198) paras 601–602.

[202] Ibid, 630–635.

[203] *Methanex Corporation v. United States of America* (n 172).

[204] Howard Mann, 'Glamis Gold Ltd. v. United States of America' in Nathalie Bernasconi-Osterwalder and Lise Johnson (eds), *International Investment Law and Sustainable Development. Key cases from 2000–2010* (IISD 2011) 62.

proceedings more open and transparent, whereas blanket refusals to do so would harm them.[205] The decision of the tribunal to deny the application to make *amicus* submission in *Bernhard von Pezold* illustrates this point.[206] The tribunal favoured a positivistic interpretation of Rule 37(2)(a), in which NDPs are only seen as legal clerks to assist it in making the 'correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided.'[207] As a result, the tribunal determined that the NDPs[208] were insufficiently independent or neutral, given that the indigenous communities (one of the NDPs) were at odds with the claimants' primary position in the proceedings – namely, in relation to some of the lands over which the claimants assert exclusive control.[209] Nevertheless, a conflict of interests should not *per se* disallow NDPs from submitting an *amicus* briefing. If anything, it is the very conflict that makes it relevant to hear NDPs' voices, because arbitration decisions affect parties beyond those involved in the dispute. This is why the Habermasian paradigm provides a venue for legitimacy. Rather than favouring exclusion and secrecy, it understands that a real process of argumentation welcomes transparency for concerned parties and adjudicators cooperating in an intersubjective process of finding common solutions.[210]

A paradigmatic example is Philippe Sands' Partial Dissenting Opinion in the *Bear Creek Mining* case. In this case, the rights of local communities of indigenous peoples to use, manage and conserve their lands in an area of Peru known as Santa Ana, collided with the investor's right to exploit and extract silver in those lands.[211] Due to massive and growing protests caused by the Santa Ana Project, the Peruvian government was left with no option but to revoke the licence it had granted to the investor to operate it.[212] Sands considered that the investor contributed to the social unrest, given that it had failed to reach the necessary understanding with those living in the communities most likely to be affected by its project.[213] However, he also took into account that the government violated the obligation to offer FET to the investor.[214] Measuring both interests at play, he concluded that the amount of damages and the allocation of the costs of the arbitration procedure should have been reduced by half based on the theory of contributory fault.[215]

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[205] *Methanex Corporation v. United States of America* (n 172) para 49.

[206] *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 89) paras 63–64.

[207] Ibid, 49; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic* [2006] ICSID ARB/03/17, Order Response Petition Particip Amic Curiae [23].

[208] The European Center for Constitutional and Human Rights and four indigenous communities of Zimbabwe.

[209] *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 89) paras 51, 56.

[210] Habermas, *Moral Consciousness and Communicative Action* (n 196) 67.

[211] *Bear Creek Mining Corporation v. Republic of Peru* (n 156) para 288.

[212] *Bear Creek Mining Corporation v Republic of Peru* [2017] ICSID ARB/14/2, Partial Dissent Opin Philippe Sands 2.

[213] Ibid, 6.

[214] Ibid, 2.

[215] Ibid, 4.

Sand's argumentation shows the importance of arbitrators giving a fair hearing to every voice affected by their decisions.[216] However, black-letter positivism, as advocated by Born and Forrest or the *Bernhard von Pezold* tribunal, is a formalism *sans peur et sans reproche*; one that refuses to criticise legally valid rules and principles, even when they coexist with injustice,[217] which lead us to a state in which everything is admissible only because the law says so. [218] In this sense, the Habermasian paradigm does not advocate a particular legal or political position; rather, an ethical one.[219] The underlying idea is to provide arbitrators with an ethical standing from which they can start their investigations and participation in legal and political processes.[220]

V Conclusion

To begin with, the debate over investment arbitration's legitimacy crisis is haphazard. Furthermore, given the variety of views on the causes of the legitimacy crisis in investment arbitration, it is critical to conduct a theoretical crisis diagnosis to reach, at least, a sensible prognosis.[221] This helps us to avoiding superficial analysis as to the roots and solutions to this legitimacy crisis.[222]

Second, the Habermasian theory of the role and legitimacy of constitutional adjudication serves to avoid endorsing positivists views that have rendered the investment arbitration process lacking trust and transparency. As Cross and Schliemann-Radbruch argue, incorporating the views of NDPs would have the beneficial effect of offsetting the effects of a legal regime that remains mute on the issue of increased transparency,[223]

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[216] Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 189) 501.

[217] Ibid, 496.

[218] Ibid, at 431.

[219] Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27 Temple International and Comparative Law Journal 417, 420.

[220] Ibid.

[221] Such as Franck (n 49), Sheldon Leader, 'Human Rights, Risks, and New Strategies for Global Investment' (2006) 9 Journal of International Economic Law 657, and Gus Van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 Review of International Political Economy 600, DOI: https://doi.org/10.1080/09692290500240305.

[222] For example, Butler believes that incorporating NDP submissions into investment arbitration could boost its legitimacy and transparency. This paper clearly agrees with this viewpoint. However, the reasons of agreement are not the same. While she bases her thesis on what 'commentators' such as Frank and Leader have alleged, even if those scholars have divergent views on the origins of the crisis, While for Franck the crisis stems from contradictory rulings (n 49) 1568. Leader argues the crisis arises as a result of the failure to include the interests of all affected members of civil society in investment agreements (n 221) 664.

[223] Ciaran Cross and Christian Schliemann-Radbruch, 'When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations' (2013) 6 The Law and Development Review 67, 77–78, DOI: https://doi.org/10.1515/ldr-2013-0021.

because if positivist positions continue to dominate NDPs' faith in arbitral proceedings, we would be condoning the externalities of an international economic order that produces a particular kind of law that acts as a safety valve, favouring corporate trade and investor rights enforcement at the expense of the international legal order's democratic legitimacy.[224]

Finally, this paper proposes a viable alternative for how investment arbitration tribunals can become custodians of investment arbitration legitimacy through constructive interpretation while giving life to the architectonic principles of the international legal order. This is why, to ensure the effective exercise of communicative and participatory rights of divergent and marginal voices, investment arbitrators should allow *amicus* participation while avoiding positivists' positions under the pretext of safeguarding the stability and legality of the proceedings, otherwise there is a real danger that investment awards will harbour despotism.[225] Naturally, there will always be those concerned with the high cost of *amici* briefs submission,[226] even when '[t]here shall be no order as to costs'.[227] Keep in mind that *it's not the economy, stupid*,[228] but rather the democratic legitimacy of the international legal order that is at stake!

[224] Claire Cutler, 'Legal Pluralism as the "Common Sense" of Transnational Capitalism' (2013) 3 Oñati socio-legal series 719, 730.

[225] Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 138) 122.

[226] Lion Fritsche, 'Amicus Curiae Interventions in Investment Arbitration – Legitimacy at Whose Costs?' [2020] Bucerius Law Journal 40.

[227] *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 89) para 65.

[228] Stuart N Soroka, Dominik A Stecula and Christopher Wlezien, 'It's (Change in) the (Future) Economy, Stupid: Economic Indicators, the Media, and Public Opinion' (2015) 59 American Journal of Political Science 457, 459, DOI: https://doi.org/10.1111/ajps.12145.

Bálint Ferencz* – Bettina Büki**

Three Ways of Secure Data Reusability in Europe: German Research Data Centres, Finnish Findata and the French Secure Access Data Centre

Abstract

The importance of the data economy has been recognised by the European Commission (hereinafter: Commission); hence, since the release of the data strategy, a set of legislative initiatives has been launched. One of these is the Data Governance Act (hereinafter: DGA) which intends to persuade Member States to set up or strengthen their already existing data intermediaries. In order to understand the motivations of the Commission, this article presents its digital agenda alongside the measures implemented to enhance the reuse of data. The article then provides an assessment of three data sharing services which are highlighted in the DGA's impact assessment. These intermediaries are the German Research Data Centres ***(Forschungsdatenzentrum)***, the Finnish Findata and the French Secure Access Data Centre ***(Centre d'accès sécurisé aux données)***. The article introduces the main characteristics and *modus operandi* of these bodies and finally provides a comparison of them. The comparison identifies the focal points these bodies face, such as non-profit objectives, the legal background and accessibility and security issues. As a conclusion, it seems that the main structure and principles underlying their functioning of these bodies are rather similar.

Keywords: data centre, data governance, data sharing, data intermediaries, Findata, CASD, *Forschungsdatenzentrum*

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DOI: 10.54148/ELTELJ.2022.1.81

I Introduction

As one of the most common analogies holds (despite its inadequacy[1]), data are considered the new oil, that is needed for Europe in order to help strengthen its economy amidst cruel economic competition with China and the USA. One of the hardest enterprises of the current Commission is to create the Digital Single Market through several legal initiatives.

While the General Data Protection Regulation (hereinafter: GDPR)[2] already put the European data protection policy on the global centre stage, it is apparent that the Commission would like to take a step further and aims to arrange a structure where both economic goals and data protection measures could co-exist in order to raise the EU to become a global challenger to China and the USA. In the last two years, the 'legislative pentagon'[3] (i.e. Digital Services Act, Digital Market Act, Artificial Intelligence Act, Data Governance Act and the forthcoming Data Act) has shown the main aims of the Commission and key actions which are about to be taken.

The article briefly presents the above-mentioned legislative initiatives without providing any remarks. The main focus of the article is three institutions which are highlighted by the impact assessment of the Data Governance Act (hereinafter: DGA) as good examples of data intermediaries.[4] Although the DGA gives a special role to these types of bodies (see for instance its recital 22), these have not yet been examined deeply from the perspective of legal scholarship. As such, the article's primary aim is to provide an overview of the RDC (Germany), Findata (Finland) and Secure Access Data Centre (France). It will describe the key features, such as the legal status and tasks of these institutions, their modus operandi and other peculiarities which are worth mentioning. Furthermore, the three bodies will be compared and assessed based on common patterns, such as their primary aims, their legal background and the mode of data accessibility. Although it is clear that there are other similar hubs, one-stop-shops and resembling institutions in Europe, due to their exemplary status in the DGA's impact assessment, only these are considered here.

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1 Lauren Scholz, 'Big Data Is Not Big Oil: The Role of Analogy in the Law of New Technologies' (2018) SSRN Electronic Journal <https://www.ssrn.com/abstract=3252543> accessed 12 April 2021, DOI: https://dx.doi.org/10.2139/ssrn.3252543.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119/1.

3 The expression is used by Floridi, although he holds the GDPR as one of the pentagon's elements. See: Floridi L, 'The European Legislation on AI: A Brief Analysis of Its Philosophical Approach' (2021) SSRN Electronic Journal <https://www.ssrn.com/abstract=3873273> accessed 15 December 2021, DOI: https://dx.doi.org 10.2139/ssrn.3873273.

4 European Commission, Commission Staff Working Document Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) COM(2020) 767 final 13.

As regards the methodology applied and sources used, it must be noted that, in addition to the relevant laws, the website of the given body served most often as the primary source. Since these bodies are rather new, the online sources could serve as the most up-to-date information.

II European Digital Agenda

In the European Union (hereinafter: EU), there is currently a high level of willingness to implement the EU data strategy that was unveiled on 19th February 2020[5] in order to create a single market for data, where data can flow easily across sectors and countries while respecting EU values.[6] One of the six main priorities of the European Commission (hereinafter: Commission) for 2019–2024 is to create a Europe that is fit for the digital age and to empower people with a new generation of technologies.[7] Since digitalisation has a huge impact on people's lives, the Digital Decade aims to strengthen Europe's digital sovereignty while setting standards and focusing on data, technology and infrastructure.[8] The Commission's target is to make the EU a role model for a society empowered by data, where data flows freely in order to help businesses, researchers, public administrations and people to make better decisions based on non-personal data available to all.[9] While it seemed earlier that the Commission based its strategies not only on economic considerations but also on common European values, this strategy has already been criticised, as it brings back the standard approach of the Commission by intending to tackle the digital challenges by economic means mainly.[10]

Since 2013, the Commission has taken several steps to facilitate the development of the data-agile economy, such as the Public Sector Information (hereinafter: PSI) Directive, the Regulation on the free flow of non-personal data, the Open Data Directive and the General Data Protection Regulation.[11] At the same time, supporting the data-centric

[5] 'Shaping Europe's Digital Future' <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_273> accessed 15 December 2021.

[6] '23 November 2021 – EU Open Data Days – Publications Office of the EU' <https://op.europa.eu/en/web/euopendatadays/23-november-2021/#The-EU-data-strategy-towards-a-single-European-market> accessed 15 December 2021.

[7] 'The European Commission's Priorities' <https://ec.europa.eu/info/strategy/priorities-2019-2024_en> accessed 13 December 2021.

[8] 'A Europe Fit for the Digital Age' <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en> accessed 13 December 2021.

[9] 'European Data Strategy' <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en> accessed 13 December 2021.

[10] Paul Keller, Alek Tarkowski, 'Digital Public Space – A Missing Policy Frame for Shaping Europe's Digital Future' (2021) Open Future <https://openfuture.pubpub.org/pub/digital-public-space-policy-frame/release/2> accessed 21 November 2021.

[11] 'A Europe Fit for the Digital Age' (n 8).

economy serves a greater aim as 'one of the EU's main strategic questions in the 21st century is how control over its data asset may be taken back and how technological vulnerability leading to data loss may be decreased'.[12]

The Commission focuses on generating value through the reuse of public sector information that has a significant potential in new services, increases the transparency of governments or simply helps to address societal challenges. The 2003/98/EC Directive on the reuse of public information was created in order to stimulate the further development of a European market for services based on information flowing from the public sector, strengthen competition and enhance the use and application of PSI in business processes.[13] The Commission first adopted a proposal for a revision of the PSI Directive in 2011 and then in 2018. The new Directive (2019/1024) supersedes the previous rules. Under the Open Data Directive, minimum rules are established – with regard to the exceptions –, for the re-use of existing documents held by public sector bodies of the Member States in order to stimulate innovation.[14]

III Reuse of Public Data in Europe

The European Strategy for data wants to ensure Europe's competitiveness and data sovereignty based on the belief that, with the right policies and investments, Europe can seize the opportunities associated with a paradigm shift and become a leader in data. From 2018 to 2025, the global data volume will grow from 33 to 175 zettabytes, the value of the data economy in the EU27 will growth from EUR 301 billion to EUR 829 billion, and the ratio between centralised computing facilities and smart connected objects will reverse (from 80% to 20% and from 20% to 80%).[15] Making data available for companies, individuals and public stakeholders helps economic growth, competitiveness, job creation, sustainability improvement and societal progress.[16] The strategy intends to create fair and clear rules for access and use of data while data can flow within the EU and across sector for everybody's benefit and respect privacy and data protection and competition law.[17]

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[12] Tóth András, 'A Tisztességes Adatkereskedelmet Biztosító Szabályozás Szükségességéről' (2021) 62 Állam- és Jogtudomány 100–121, 112, DOI: https://doi.org/10.51783/ajt.2021.3.05.

[13] European Commission, 'Open Government Data & the PSI Directive' (2014) <https://data.europa.eu/sites/default/files/training_1-1_open_government-and-the-psi_en.pdf> accessed 13 December 2021.

[14] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (2019) OJ L 172/56.

[15] European Commission Directorate General for Communication, *The European Data Strategy: Shaping Europe's Digital Future* (Publications Office 2020) <https://data.europa.eu/doi/10.2775/645928> accessed 15 December 2021, DOI: https://doi.org/10.2775/645928.

[16] 'A European Strategy for Data' <https://digital-strategy.ec.europa.eu/en/policies/strategy-data> accessed 15 December 2021.

[17] Ibid.

As part of the data strategy, on 25 November 2020, the Commission proposed a regulation on data governance in order to boost data sharing across sectors and Member States and overcome technical obstacles to the reuse of data. The DGA focuses mainly on public sector data subject to the rights of others, such as personal data (e.g. health data) – but without affecting the application of the GDPR –, data protected by intellectual property rights, trade secret or statistically confidential data.[18] It sets conditions for the re-use of protected public sector data while increasing trust in data intermediaries. The DGA aims also to support European data spaces in the fields of health, environment, energy, agriculture, mobility, finance, manufacturing, public administration and skills involving not just public players but private ones, too. Where a sector-specific Union legal act requires public sector bodies, providers of data sharing services or registered entities providing data altruism services to comply with specific requirements, the sector-specific Union legal act should also apply.[19] The DGA complements not only the Open Data Directive but (since it addresses data held by public sector bodies that are subject to rights of others and therefore fall outside the scope of the Open Data Directive, which focuses on public sector data as well) also the Data Act, which is about to be issued at the time of writing. The DGA does not aim to grant, amend or remove the substantive rights on access and use of data, because such measures are envisaged for the Data Act.[20] The European Council and the European Parliament have already reached a provisional agreement on the DGA on 21 November 2021 under the Slovenian Presidency; therefore, the aim of the French presidency is the promulgation of the act.[21] After the final approval, the provisions will apply 15 months afterwards.

Unfortunately, data sharing in the EU is hampered by an absence of appropriate structures and processes; therefore there is limited data-handling capacity and data reuse in the public sector.[22] Even though, thanks to the GDPR, there is an increased awareness of personal data protection, this is not always matched in the public sector. Public sector bodies find it difficult to reuse public data since there is huge lack of technical capacity and legal competence to process requests to reuse public data.

In spite of this, there are some Member States which have already established various institutions in order to facilitate secure conditions for the reuse of public data. In Germany, Research Data Centres facilitate access to sensitive data for researchers, in France the Secure

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[18] A. van de Meulebroucke, L. Deschuyteneer, 'Data Governance Act Tackles Re-Use of Public Sector Data | Eubelius' (28 January 2022) <https://www.eubelius.com/en/news/data-governance-act-tackles-re-use-of-public-sector-data> accessed 22 February 2022

[19] 'European Data Governance Act' <https://digital-strategy.ec.europa.eu/en/policies/data-governance-act> accessed 15 December 2021.

[20] European Commission, Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act) COM(2020) 767 final.

[21] 'European Council and Parliament reach agreement on Data Governance Act' <https://eudatasharing.eu/news/european-council-and-parliament-reach-agreement-data-governance-act> accessed 13 February 2022.

[22] European Commission (n 4) 12.

Access Data Centre allows the secure processing of statistical micro-data, and the Finnish data permit authority Findata aims to provide researchers with a one-stop-shop service for receiving a permit to process data from a range of public registers for health and social protection.

IV Research Data Centres (Germany)

Research data are highly important for the scientific community and policy consulting, since these data help find answers to various research questions.[23] In the early 2000s, an intensive discussion went on in Germany on how to grant access to microdata from official statistics.[24] As an answer, the German Federal Ministry of Education and Research published the report 'Commission to Improve the Information Infrastructure between Research and Statistics (KVI)' after three professors, Richard Hauser, Gert G. Wagner, and Klaus F. Zimmermann, published a memorandum with the title 'Conditions for the success of empirical economic research and research-based policy advice in economic and social policy'.[25] The KVI aimed to improve the interrelation between researchers and statistics, and one of the recommendations of the report was to establish Research Data Centres (hereinafter: RDC) on the premises of the public data producers.[26]

In Germany, there are currently two RDCs of official statistics: the RDC of the Federal Statistical Office, which was established in autumn 2001 and funded by the Federal Ministry of Education and Research, and the RDC of the Statistical Offices of the Federal States, established in April 2002. Both RDCs have the same objective, the coordination of data and services for scientific use of official statistics microdata.[27] The RDCs' main aim is to support scientists who are working only on empirical scientific projects described within the data application process, such as master's or doctoral theses, and also research projects that are funded either by third parties with their own resources or on behalf of ministries. Furthermore, RDCs strive to improve microdata and to adapt to the changing needs of

[23] Daniela Hochfellner and others, 'Datenschutz Am Forschungsdatenzentrum' 4–5 <https://www.researchgate.net/profile/Daniela-Hochfellner/publication/254421148_Datenschutz_am_Forschungsdatenzentrum/links/02e7e535704e4a6468000000/Datenschutz-am-Forschungsdatenzentrum.pdf> accessed 14 December 2021.

[24] Sylvia Zühlke and others, 'The Research Data Centres of the Federal Statistical Office and the Statistical Offices of the Länder' (2004) 124 Schmollers Jahrbuch: Journal of Applied Social Science Studies / Zeitschrift für Wirtschafts- und Sozialwissenschaften 567, 567.

[25] 'Development' *(KonsortSWD)* <https://www.konsortswd.de/en/ratswd/german-data-forum-ratswd/development/> accessed 14 December 2021.

[26] 'About RDC | Research Data Centre' <https://www.forschungsdatenzentrum.de/en/about-rdc> accessed 14 December 2021.

[27] Ralf K. Himmelreicher, Hans-Martin Gaudecker, Rembrandt D Scholz, 'Nutzungsmöglichkeiten von Daten Der Gesetzlichen Rentenversicherung Über Das Forschungsdatenzentrum Der Rentenversicherung (FDZ-RV)' (Max-Planck-Institut für demografische Forschung 2006) MPIDR WORKING PAPER WP 2006-018 <https://www.demogr.mpg.de/papers/working/wp-2006-018.pdf> accessed 15 December 2021, DOI: https://doi.org/10.4054/MPIDR-WP-2006-018.

scientists. The data infrastructure, which needs continuous improvement, is based mostly on functionally centralised data storage and the regionalised infrastructure.[28]

Centralised data storage is required, since the scientific analyses mostly relate to more than one federal state; therefore, the RDCs of the Statistical Offices of the Federation and the federal states make it possible for centralised data storage to allow official microdata from every federal state to be provided and used in all regional locations of both RDCs. This is a very important improvement, since the majority of official statistics in Germany are compiled in a decentralised manner by the Statistical Offices of each federal state.[29] The regionalised infrastructure enables RDCs to be close to science, since data users have various opportunities to visit safe centres (see them in details in part 2 of this chapter) that are distributed over all of Germany. In order to achieve these objectives, RDCs offer different ways of data access via which differently anonymised data products are provided.[30]

1 Legal Framework

The legal background of the use of RDCs are laid down in the Federal Statistics Law (*Bundesstatistikgesetz* – BstatG.) of Germany.[31] Section 16 (1) item 4 and 16 (6) are the most relevant parts – with regard to of absolutely, formally and factually anonymised data – of the law that regulates the use of data for scientific projects. In order to ensure the provisions in Section 16 (6), RDCs check all statistical results based on the data provided to ensure statistical confidentiality. With the amendment of the BstatG. in 2005, it is possible now to merge data from, for example, different environmental and economic statistical sources.[32] According to Section 16 (1), linking data from different data producers is possible only with the prior written consent of the data subject.[33] Moreover, Section 16 (6) guarantees the legal requirements for a broader access to individual data from official statistics: researchers from independent scientific institutions who are bound by secrecy are allowed to access factually and formally anonymised data.[34]

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[28] Statistische Ämter Des Bundes Und Länder Forschungdatenzentren, 'General terms of use' (19 February 2020) <https://www.forschungsdatenzentrum.de/sites/default/files/rdc_general_terms_of_use.pdf> accessed 15 December 2021.

[29] 'Statistics' *(Federal Statistical Office)* <https://www.destatis.de/EN/About-Us/Our-Mission/bundesstatistik.html> accessed 14 December 2021.

[30] 'Über Die FDZ | Forschungsdatenzentrum' <https://www.forschungsdatenzentrum.de/de/ueber-die-fdz> accessed 14 December 2021.

[31] Bundesstatistikgesetz <https://www.gesetze-im-internet.de/bstatg_1987/BJNR004620987.html> accessed 15 December 2021.

[32] Anja Malchin, Ramona Pohl, 'Firmendaten der amtlichen Statistik: Datenzugang und neue Entwicklungen im Forschungsdatenzentrum' (2007) 76 Vierteljahrshefte zur Wirtschaftsforschung 8, 13, DOI: https://doi.org/10.3790/vjh.76.3.8.

[33] Florian Köhler, '10 Jahre Forschungsdatenzentren Der Statistischen Ämter – Angebot Und Nachfrage Nach Amtlichen Mikrodaten –' (2012) (June) Statistische Monatshefte Niedersachsen 333.

[34] Ibid.

In order for a scientific institution to have access to microdata, an RDC legally checks the eligibility of the applicant, since the data may be only used by persons who are enrolled in the institution, if their thesis or dissertation is supervised by the institution, they are employees of it or have a guest researcher's status. One further criterion is that users are committed to statistical confidentiality in accordance with section 16 (7) of the BStatG when using a Scientific Use File or visiting a safe centre.[35]

RDCs are bound to specific users, meaning that RDCs may only give access to official microdata to higher education or other institutions entrusted with tasks of independent scientific research. Those who are fall outside that scope have the possibility to keep in contact with the enquiry services of the respective Statistical Offices of the Federation and the Federal States.[36]

2 Use of RDC

Entitled users have two ways of accessing official microdata such as the on-site and off-site use that also can be combined with each other's. They are different from each other mainly in the anonymity of the usable data as well as how they are provided.

The on-site use means that guest researchers can analyse microdata inside the RDC PC workplace (i.e. safe centre). The data in the centres are already protected, not just through the regulation of data access but also through the equipment that researchers can use in the PC workplace; therefore, the microdata – depending on the data sensitivity – can be provided factually or formally anonymised. The PC workplaces are equipped with the common statistical programs, and a separate PC workplace is also available for e-mail communication and internet searches. Throughout their on-site use, researchers have the opportunity to execute remotely when there is no direct access to the data. During this procedure, data users receive data structure files instead that help program codes – that are applied by staff at the statistical offices to analyse the original data – to be prepared using the statistical programs SPSS, SAS, Stata or in some cases R.[37]

For a researcher who wants to use datasets off-site, RDCs offer different Use Files, such as Scientific Use Files (hereinafter: SUF), Public Use Files (hereinafter: PUF) and Campus Files. SUF are standardised datasets that contain factual anonymised microdata.[38] In contrast with the on-site use, SUF offer a lower potential for analyses, but they are suitable

[35] Statistische Ämter Des Bundes Und Länder Forschungdatenzentren (n 28).

[36] 'Terms of Use | Research Data Centre' <https://www.forschungsdatenzentrum.de/en/terms-use> accessed 14 December 2021.

[37] 'Access | Research Data Centre' <https://www.forschungsdatenzentrum.de/en/access> accessed 14 December 2021.

[38] Maurice Brandt, Anja Crössmann and Christopher Gürke, 'Harmonisation of Statistical Confidentiality in the Federal Republic of Germany' (Joint UNECE/Eurostat work session on statistical data confidentiality, 2009) 3–8 <https://unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.46/2009/wp.5.e.pdf> accessed 14 December 2021.

for large scientific projects, since the factual anonymisation of the microdata can be used outside the statistical offices. Only researchers who are working for registered research institutions located in Germany have permission to use SUF. Due to legal restrictions, those researchers who do not fit these instructions are obliged to access microdata on-site, except if they are using SUF that are offered for the SAS, SPSS, and Stata analysis programs or are provided with the according input routines. For legal reasons, SUF cannot be sent to foreign countries.[39]

PUF's microdata are absolutely anonymised; therefore, only selected variables are available, and variables with high degree of subject-related detail are aggregated. Deeper special delimitations can usually not be made on the basis of PUF. Registered users can have access to agriculture, household, and social welfare statistics.[40] In order to encourage the use of microdata in university teaching, RDCs also offer Campus Files that contain anonymised microdata that can be used by students to acquire methodological knowledge of analysing official microdata.[41] Campus Files are provided for free and for scientific teaching purposes.[42] Currently there are only two categories on the website: Health and Household. Under the category of Health, users can find diagnosis-related group statistics that can be requested starting from the survey year 2005, while microdata concerning Microcensus fall under the Household category.[43]

Working with German microdata in RDC is not free, since the fee depends on the number of used statistics (i.e. number of different data sets provided), survey years and ways of data access. It can easily happen that, for the given project, the data have to be processed in a particular form and only for the project, in which case additional costs can arise. The use of data sets is not unlimited, because the project is tied to a specific purpose; they can be used normally for a period of three years, with the possibility of extension for another three years.[44]

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[39] Köhler (n 33) 335–336.

[40] 'Public Use Files | Research Data Centre' <https://www.forschungsdatenzentrum.de/en/node/6065#> accessed 14 December 2021.

[41] Markus Zwick, 'CAMPUS-Files – Kostenfreie Public Use Files für die Lehre' (2008) 2 AStA Wirtschafts- und Sozialstatistisches Archiv 175, DOI: https://doi.org/10.1007/s11943-008-0035-x.

[42] Heike Wirth, 'Microdata Access and Confidentiality Issues in Germany' (2008) <https://www.gesis.org/fileadmin/upload/forschung/programme_projekte/sozialwissenschaften/Amtliche_Mikrodaten/wirth_manchester_census_final.pdf> accessed 14 December 2021.

[43] 'Campus Files | Research Data Centre' <https://www.forschungsdatenzentrum.de/en/campus-files> accessed 14 December 2021.

[44] 'User Charge | Research Data Centre' <https://www.forschungsdatenzentrum.de/en/user-charge> accessed 14 December 2021.

3 Anonymity of Microdata

Anonymisation is the way of rendering personal data anonymous.[45] According to Preamble (26) of the GDPR, anonymous data is 'information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable'. Microdata of official statistics are subject to strict confidentiality, therefore RDC makes only anonymised data available that can be absolute, factual or formal.

The above-mentioned PUF and Campus Files are absolutely anonymised, meaning that data are modified by coarsening or by removing individual variables to a degree that the identification of the respondents is no longer possible. Absolutely anonymised microdata are available to all interested persons or institutions and for methodological teaching. If de-anonymisation cannot be ruled out completely and if only unreasonable time, cost and manpower effort make the allocation of data to the respective statistical unit possible, we talk about de-facto anonymised microdata. Different anonymisation procedures can be applied in order to achieve this; for example, the reduction of information or the modification of information.[46]

Based on German law, only de-facto anonymised data can be made available to scientific institutions for the exclusive purpose of scientific projects and may only be used by foreign scientists on the secure premises of the statistical offices. At the RDC, factual anonymity is a matter of the remaining informational value of the data, the parameters of a use of data, the concomitant possibilities for-deanonymisation and the access conditions.[47] Formal anonymity means that the direct identifiers and auxiliary characteristics are deleted from the data set, but, at the same time, the functional and regional structures and all other characteristics remain unchanged. In safe centres and remotely, through remote performance, data users have the opportunity to analyse formally anonymised microdata.[48]

4 Evaluation

The right to data privacy and data confidentiality are important issues in Germany; the more data are collected and merged with other data sources, the higher attention to data security is needed by statistical agencies and researchers.[49] Since the existence of RDCs, there is a successfully implemented data infrastructure in Germany that makes access to

[45] Agencia Española de Protección de Datos and European Data Protection Supervisor, 'AEPD-EDPS Joint Paper on 10 Misunderstandings Related to Anonymisation' (27 April 2021) <https://edps.europa.eu/data-protection/our-work/publications/papers/aepd-edps-joint-paper-10-misunderstandings-related_en> accessed 15 December 2021.

[46] Brandt, Crössmann and Gürke (n 38) 5–8.

[47] Zühlke and others (n 24) 572–573.

[48] Köhler (n 33) 334.

[49] Wirth (n 42) 24–26.

numerous scientific analyses of microdata in all fields of official statistics possible. There is a huge potential in German microdata provided by RDC, because they reflect valid information about different German enterprises, a wide variety of sectors or fields (see the data list provided[50]) – such as health care – that are reliable sources for scientific research or policy decisions.[51]

V Findata

Not only do statistical data have great potential, but also the role of artificial intelligence (hereinafter: AI) is highly important, since it may be applied effectively in the field of health care. Since medical data can be produced every second, they may be aggregated and analysed in order to tackle diseases or only to provide some assistance to people for making their lives healthier. As a recent study by the World Health Organization (hereinafter: WHO) observed, '[i]n recent years, artificial intelligence has made great progress in the detection, diagnosis, and management of diseases'.[52] Although this method may seem straightforward, the reality always reminds us that real world is more complex than that: despite expectations, during the Covid-19 pandemic there was no AI system which could have helped to spot the virus[53] and, in Singapore, using AI in order to replace missing medical doctors turned out to be less successful than it promised before.[54] These findings prove that making these systems work in real life needs high quality data from a trustworthy environment.

Health care, as a sector where data-economy may flourish, is also in the focus of the Commission: in their 2018 study, a chapter was devoted to this sector.[55] Possible

[50] 'Alle Daten | Forschungsdatenzentrum' <https://www.forschungsdatenzentrum.de/de/alle-daten> accessed 16 March 2022.

[51] Malchin and Pohl (n 32).

[52] Digital Health and Innovation, Medical Devices and Diagnostics, *Generating Evidence for Artificial Intelligence Based Medical Devices: A Framework for Training Validation and Evaluation* (World Health Organization 2021) 7 <https://www.who.int/publications/i/item/9789240038462> accessed 16 March 2022.

[53] Will Douglas Heaven, 'Hundreds of AI Tools Have Been Built to Catch Covid. None of Them Helped.' MIT Technology Review (30 July 2021) <https://www.technologyreview.com/2021/07/30/1030329/machine-learning-ai-failed-covid-hospital-diagnosis-pandemic/> accessed 15 November 2021.

[54] Will Douglas Heaven, 'Google's Medical AI Was Super Accurate in a Lab. Real Life Was a Different Story.' MIT Technology Review (27 April 2020) <https://www.technologyreview.com/2020/04/27/1000658/google-medical-ai-accurate-lab-real-life-clinic-covid-diabetes-retina-disease/> accessed 15 November 2021.

[55] European Commission. Directorate General for Communications Networks, Content and Technology and Deloitte, *Study on Emerging Issues of Data Ownership, Interoperability, (Re-)Usability and Access to Data, and Liability: Final Report.* (Publications Office 2018) <https://data.europa.eu/doi/10.2759/781960> accessed 21 November 2021 DOI: https://doi.org/10.2759/781960.

applications are also named, such as predicting infection, analyse patient population etc.[56] The Commission aims to create data space in the medical field as well.[57]

Even though the medical AI field stands in front of a steep development boom, this is one of the most sensitive and problematic fields in terms of data sharing/usage. As a recent experiment showed, on the one hand, there are major privacy concerns when it comes to sharing medical data (even in anonymised form) and, on the other hand, there are fears as regards data quality.[58] The data quality worries are echoed in the recent WHO study as well, which states that 'unforeseen errors at data entry level can lead to catastrophic effects when deployed at scale if performance errors go unchecked'.[59] In the study, a set of recommendations are provided for researchers in order to conduct data management properly.[60] Proper data management is needed in order to render it possible for medical AI services to provide adequate explanations expected by the GDPR and the forthcoming Artificial Intelligence Act.[61]

The sensitive nature of medical data is why Findata may be seen as one of the most innovative initiatives among data intermediaries, since its goal is to share medical data held by the public sector. Due to this enterprise, Finland is one of the leading countries in secondary use of health data in Europe, according to the Open Data Institute.[62] As they put it in their specific country report, 'Finland should be rightfully proud of the global leadership shown in creating a legislative framework for the secondary use of health and welfare data'.[63]

1 Overview of Procedure and the Legal Framework

Findata's procedure is based on the Act on secondary use of health and social data, enacted in 2019.[64] Besides that, useful guidelines are provided on the official Findata site, from which

[56] Ibid.

[57] 'European Health Data Space' (Public Health – European Commission, 18 September 2020) <https://ec.europa.eu/health/ehealth/dataspace_en> accessed 28 November 2021.

[58] Annie Sorbie and others, 'Examining the Power of the Social Imaginary through Competing Narratives of Data Ownership in Health Research' (2021) Journal of Law and the Biosciences, DOI: https://doi.org/10.1093/jlb/lsaa068.

[59] Digital Health and Innovation, Medical Devices and Diagnostics (n 52) 3.

[60] Ibid 41.

[61] Miranda Mourby, Katharina Ó Cathaoir and Catherine Bjerre Collin, 'Transparency of Machine-Learning in Healthcare: The GDPR & European Health Law' (2021) 43 Computer Law & Security Review, DOI: https://doi.org/10.1016/j.clsr.2021.105611.

[62] Mark Boyd and others, 'Secondary Use of Health Data in Europe' Open Data Institute 38, 6.

[63] The Open Data Institute, 'Finland Profile FINAL' *(Google Docs)* 2 <https://docs.google.com/document/d/1qnK7wlK3gPLBRoPaRw1yGNKWsNW6VMuRIuzwQ-Vtztw/edit?usp=drive_web&ouid=117576810781307564193&usp=embed_facebook> accessed 30 November 2021.

[64] Act of secondary use of the health and social data (552/2019).

the pre-screening criteria for data permit applications document[65] was its main use in this report.

Overall, the Act is comprehensive and clear on nearly all aspects of the procedure. It sets out the main definitions, the parties involved on behalf of the Finnish public sector, the requirements to submit an application, the combination and process for the requested dataset, and the most crucial deadlines for conducting the procedure. Although the most important detail omitted here is the exact method for calculating the fees, this information may be found on the website as well.

2 Key Players

In this legal relationship, three key players may be identified: the applicant, Findata and the data holder controllers. The Act only describes in detail the tasks and rights of Findata and the controllers. The applicant is mentioned only in relation to certain obligations. Thus, the Findata and the controllers shall be presented below according to their roles based on the Act.

Findata can be found in the Act as the 'Data Permit Authority'. Although it seems to be some independent legal person (with a public law background), in reality it is only a separate unit within the National Institute for Health and Welfare. The operational guidance belongs to the Ministry of Social Affairs and Health. At first sight, this arrangement may seem rather inflexible since Findata is not an autonomous legal person that may run its own business. Nevertheless, this solution serves both flexibility and the expected guarantees related to medical data: the National Institute for Health and Welfare is an independent institution under the Ministry of Social Affairs and Health and this relationship is based on a four-year performance agreement.[66] Moreover, inside the Institute, Findata enjoys nearly complete independence;[67] its leadership is intertwined with the Ministry, given that the Ministry appoints the director. As a critical assessment, the political influence may be brought up as a negative factor, since the Ministry could interfere in the functioning of Findata.[68] On the other hand, there is a broad list of organs which supervise the activities of Findata, most importantly the Parliamentary Ombudsman and the Data Protection Ombudsman, to which an annual report shall be submitted 'regarding the processing of

[65] Finnish Social and Health Data Permit Authority, 'Pre-Screening Criteria for Data Permit Applications' (25 October 2021) <https://findata.fi/findata-pre-screening-criteria-for-data-permit-applications/> 15 December 2021.

[66] 'Administrative Branch' (Ministry of Social Affairs and Health) <https://stm.fi/en/administrative-branch> accessed 28 November 2021.

[67] 'Data Permit Authority – THL' [Finnish Institute for Health and Welfare (THL), Finland] <https://thl.fi/en/web/thlfi-en/about-us/organisation/departments-and-units/data-permit-authority> accessed 28 November 2021.

[68] 'About Us' (Findata) <https://findata.fi/en/about-us/> accessed 28 November 2021.

health and social data and the related log data'.[69] In short, the political influence is balanced by the professional supervision and the body's independence, so this structure should not lead to the conclusion that political considerations could jeopardise the data protection measures. As regards the entire system, it could be observed that a proper balance has been formed by giving it rather broad economic and professional freedom but still keeping Findata's activities within the state's administrative structure with all of its guarantees and transparency obligations.

Additionally, by virtue of the Act, a steering group assists and guides the functioning of Findata. The steering committee makes proposals to the institution and the Ministry on various matters which concern the operations of Findata in an annual action plan, with an associated budget, report on operations, financial statements etc. (Section 8). Besides that, a high-level expert group has been set up in order to 'provide guidelines on anonymisation, data protection and data security for Findata's operations'.[70]

Regarding the operational competences of Findata, it is basically the heart of the whole secondary usage procedure. Findata may be deemed a 'one-stop-shop' body, which is responsible for providing security environments for applicant identification (Section 21-22), remote access to the disclosed data (Section 17), examining and deciding on data permits and data requests and combining data from controllers' registers, and anonymising or pseudonymising the data sets (Section 14). Whereas Findata is the central player, its effectiveness relies heavily on the controllers' willingness to cooperate since they provide the data from which Findata serve the final products.

For the controllers, Section 6 gives an exhaustive list which covers virtually all actors which stores medical data (for instance the Social Insurance Institution of Finland, Finnish Medicines Agency Fimea and public services organisers of social and health care). The Act burdens these bodies in particular with four main obligations: 1) providing descriptions for its datasets 2) maintaining advisory services in order to satisfy applicants' enquiries (Section 10) 3) providing Findata with the necessary information during the decision-making phase in order to make a well-founded decision on the feasibility of the data permit/data request (Section 36) and 4) in the event of a granted data permit, provide the desired data for Findata (Section 36). According to Section 36, Findata may also request data from those private providers set forth in the Client Act.

3 Summary of the Act and Findata's Procedure

In line with the Act, the main service of the Findata is to combine datasets from several state databases and provide them to the applicant. Since this type of service could be very

[69] Ibid.

[70] Johanna Seppänen, 'Social and Health Data Permit Authority – Johanna Seppänen PhD, Director' <https://www.ehalsomyndigheten.se/globalassets/dokument/seminarier/finland_findata.pdf> accessed 15 December 2021.

attractive to so many businesses, the combination and processing may be served only for a 'greater good,' such as statistics, scientific research or education (for other examples see Section 2). Although the list of potential applicants is not given (i.e. it could be a for-profit business or a natural person as well), in order to demonstrate the purpose of the application, a data utilisation plan must be submitted to Findata. For instance, according to the pre-screening criteria, in case of a scientific research the following are essential to get approval: 1) an appropriate research plan, 2) the name of the principal investigator, 3) that the results shall be published in scientific publications and 4) the research produces new information.

The Act distinguishes two main types of service among the definitions provided: data permit and data request. The difference lies in the outcome: while someone who was eligible for a data permit shall be awarded secret personal data (i.e., in most cases, a combined database), the data request holder obtains aggregated statistics. In order to put some flexibility in the procedure, Findata is entitled to reclassify a data permit as a data request on the bases of the consent of the applicant (Section 43). The reason for this one-way channel may be is that most applicants seek a data permit since greater value lies in a given database than in receiving aggregated statistics.

The permit application shall be detailed and it must contain all essential information, from billing details through a thorough description of the data requested up to data processing specifics. In order to provide effective assistance in setting the data description (such as giving the register-specific lists of variables and extraction-related delimitations), by virtue of the law, the relevant authorities are obliged to provide a data description, which is available on a dedicated website[71] although only in Finnish (Section 13). Besides that, both the relevant authorities and Findata maintain an advisory service, through which the aspiring applicant may gain information from the controllers as regards the data content of the available registers and the suitability of the data in the registers for their needs and additional information on various matters related to their application (Section 13).

The application shall be submitted via the data request management system (Section 16). Findata has three months to take the decision which may be extended by an additional three months. During this phase, Findata gathers information about the feasibility of the application from the controllers (Section 36) and the applicant may be asked for further clarification. The controllers' contribution is vital also for calculating a fee (they must deliver an estimated cost), which is communicated, together with the final extraction description, to the applicant. The applicant may accept or reject them both; in other words, it is not possible to request some sort of decrease in the fee or reduce the service already offered.

Although the fees are not specified in the Act, they are also based on the law, namely Decree 1168/2020 of the Ministry of Social Affairs and Health on charges for work carried out by the health and social data permit authority Findata. The fees are fully transparent since they are published in a clear manner on the website (for example a data request and

[71] 'Etusivu – Aineistokatalogi' <https://aineistokatalogi.fi/catalog> accessed 27 November 2021.

a data permit for EU business is 1,000 EUR, while the processing fee is 115 EUR/hour). According to the information set forth there, the first invoice and payment are due after the decision on the data request or the data permit. The price for processing and delivering the data (which was given along with the decision) shall be invoiced after the delivery of the results to the applicant.

Having granted the data permit (and received the first payment), Findata takes the necessary steps to deliver the desired outcome. It collects the necessary data from the controllers, combines them, makes them secret via anonymisation or pseudonymisation[72] and then make the final result available via a secure hosting service (Section 51). By virtue of the law, this procedure shall be conducted within 60 days from which the controllers have 30 working days for the data handover. As the main rule, the secure hosting service is a remote access environment (Kapseli) provided by Findata, for which there is a monthly charge as well and exception may be made only 'if the data utilisation plan and the data permit state a separate reason that necessitates it'. After the disclosure, the applicant has 30 working days to review the delivered data and indicate any problems which it has experienced. According to Section 43, a data permit can only be granted for a fixed period. This is elaborated more in the pre-screening criteria, which explicitly state that the maximum period is five years unless there is a proven justification for a longer period.[73]

4 Findata and the GDPR

As mentioned before, due to the sensitive nature of medical data recognised by virtue of Article 9 Paragraph 1, compliance with the GDPR is essential. Nonetheless, the Act mentions the GDPR when it states that 'the provision of this Act is supplementary to those laid down in' the GDPR (Section 2). The harmonisation between the Act and the GDPR has been criticised by the assessment drafted by the Commission in which it observes that the Act 'does not stipulate the legal basis that should be used for further processing in public sector research'.[74]

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[72] While personal data loses its personal nature due to anonymisation, pseudonymised data still qualifies as personal data according to the GDPR at first glance (Recital 26). This opinion has been debated by Mourby and others, who claim that pseudonymised data could qualify as non-personal data if the relationship could be restored only with substantial difficulty. See in detail: Mourby M and others, 'Are "Pseudonymised" Data Always Personal Data? Implications of the GDPR for Administrative Data Research in the UK' (2018) 34 Computer Law & Security Review, DOI: https://doi.org/10.1016/j.clsr.2018.01.002.

[73] Finnish Social and Health Data Permit Authority, 'Pre-Screening Criteria for Data Permit Applications' (25 October 2021) <https://findata.fi/findata-pre-screening-criteria-for-data-permit-applications/> accessed 28 November 2021.

[74] Consumers, Health, Agriculture and Food Executive Agency, *Assessment of the EU Member States' Rules on Health Data in the Light of GDPR* (Publications Office 2021) 70 <https://data.europa.eu/doi/10.2818/546193> accessed 28 November 2021, DOI: https://doi.org/10.2818/546193.

Given the fact that one of the duties of Findata is to anonymise or pseudonymise the data received from the controllers, it is rather clear that the Findata works with personal data. In that case however, on the one hand the legal role of Findata should be stipulated (is it a controller or a processor?); on the other hand, the legal basis of the data processing must be based on the GDPR.

As regards the first question, the difficulty of the situation derives from several factors: Findata receives data for its own purposes therefore 1) it has no data unless it is provided 2) Findata acts as dictated by the applicant and not by the controllers. By virtue of the GDPR, Findata could be controller, joint controller or processor.

Findata could be classified as a processor if there would be some sort of hierarchical relationship between Findata and the controller in which 'the processor obeys the dictates of the controller'.[75] In this particular case, it cannot be true since Findata acts in the name of the applicant and the controller cannot prescribe any order to Findata. One key factor which is often highlighted by the relevant commentaries is that data controllers must determine rather precisely the task(s) of the data processor.[76] If that were the case, Findata may not fulfil its obligations towards the applicant since Findata should strictly follow the controllers' instructions.

In line with the GDPR, the controllers and Findata may be joint controllers together. Although this seems a viable options at first glance, in order to apply this provision Findata and the controllers must jointly determine the purposes and means of processing. It is rather clear, however, that Findata and the controllers have different aims and different activities and so they cannot perform processing together.

This type of cooperation resonates to the example of where several companies use the same camera system (hence the same records) but the decisions regarding the data processing are taken independently, in which case the companies do not qualify as joint controllers.[77] It can be applied in this case: Findata and the controllers use the same data, although for different aims. Nevertheless, this analogy is not perfect either: it is debatable in a narrow sense whether they use the same database (since probably a modified one is provided for Findata which can hardly be used for the daily operation of the controller) and their independence is not full in the sense that Findata is the one that makes requests to the controller. Even if it may be concluded that the legal status could be clarified as more in line with the GDPR regime in the Act, the website of Findata explicitly says that Findata is a data controller[78] which is quite evident according to the reasoning above.

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[75] Christopher Kuner, Lee A. Bygrave and Christopher Docksey (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2019) 160.

[76] Péterfalvi Attila, Révész Balázs and Sziklay Júlia (eds), *Magyarázat a GDPR-ról [Commentary of the GDPR]* (Wolters Kluwer Hungary 2018) 85.

[77] Ibid, 83.

[78] 'Data Protection and the Processing of Personal Data' (Findata, 10 September 2021) <https://findata.fi/en/data-protection-and-the-processing-of-personal-data/> accessed 12 December 2021.

Another essential topic is the legal basis under which the Findata processes personal data since there is a general prohibition on processing personal data concerning health. This general prohibition can only be overwritten in certain cases given in the GDPR itself.

Three exceptions could be considered applicable to the activities of Findata: Article 9 (2) h), which defines exceptions for medical cases and the management of health or social care systems and services and Article 9 (2) i), which prescribes exceptions for public health matters, and lastly Article 9 (2) j), which creates exceptions for scientific reasons.

The first exception seems the most suitable, since it provides a wide discretion in terms of medical matters. Although a medical research project may not fall under this provision,[79] other bodies could claim for the services of Findata if it is needed in order to develop their functioning pursuant to Section 41. The reference for the GDPR's exception is included in this section of the Act.

Article 9 (2) i) may be understood in a rather narrow way 'that is intended for use by public health authorities, NGOs and other entities working in areas such as disaster relief and humanitarian aid, and similar bodies'. Since there is no indication in the Act that Findata has some sort of obligation to provide services in such grave situations, this exception does not seem applicable.[80]

The third exception, namely scientific research, aligns perfectly with Findata's goals. This provision requires appropriate safeguards in order to guarantee high standards regarding data protection, although it is a rather vague obligation and 'it is not specified what is meant by "suitable and specific measures to safeguard the fundamental rights and the interests of the data subject"'.[81] According to the cited authors,

> In light of the lack of specificity in the text, and absent more detailed guidance from the EDPB, controllers and processors will have to design safeguards based on principles underlying the GDPR, such as proportionality, data minimisation and data security. This can include a variety of measures based on the purposes of processing and the sensitivity of the data, such as encryption, minimising the amount of sensitive data processed, training personnel who handle personal data and placing personnel under a duty of confidentiality.

As we have seen from Findata's procedure, these principles prevail during the whole procedure: for example a detailed research plan must be given, the claimed set of data must be as limited as possible and the (anonymised or pseudonymised) data is delivered only via the secured environment provided by Findata for certain people and for fix period to avoid any chance to reidentification.

Given this reasoning, it is rather surprising that this provision is not directly invoked by the Act. Although Section 38 covers the data permit for scientific research and statistics,

[79] Kuner, Bygrave and Docksey (n 75) 379.
[80] Ibid 380.
[81] Ibid.

it points only to the Data Protection Act (1050/2018) effective in Finland. According to Section 6, Article 9 (1) of the GDPR is not applicable to data processing for scientific or historical research purposes or for statistical purposes, and in there is a wide range of measures which must be implemented in order to safeguard the rights of the data subject. Although, from Findata's side, these safeguards have been adopted (for instance one of the measures is the pseudonymisation of personal data, which is already performed by Findata), the from controllers' side this raises some questions as regards the meaning of the provision (i.e. whether all the measures must be taken or is it only a set of recommendations instead).

There are some other use-cases where the Act invokes another GDPR provision. In order to produce educational materials (Section 39) and client data necessary for the planning and reporting duty of authorities covered in Section 6 (Section 40) the legal basis for processing personal data is Article 9 (2)(g). This is rather curious in light of the following: 'To process sensitive data, the public interest must be 'substantial', in contrast to the conditions for processing personal data based on a task carried out in the public interest under Article 6(1)(e), where there is no such requirement'.[82] It is added that some examples may be found in Recital 46, none of which seems to be applicable to the case of Findata (for instance 'humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters'). In both clauses the requirement of having a data permit is included so most probably – in line with the information found on the website[83] – the legal basis for processing data to serve the data permit is Article 9(2)(g).

Another GDPR-related issue is the transfer of the data. Whereas the primary option for data delivery is Findata's own Kapseli secure environment, hypothetically, an applicant may request transfer to other platform. According to the information found on the Findata website, in this case the GDPR rules prevail in other words the transfer may be carried out only in certain cases outside the EU/EEA in line with Chapter V of the GDPR.[84]

5 Current State of Play

Findata started to build up its structure and organisation in 2019 and it took nearly a year to begin to operate. From 1st January 2020, it started to receive data requests and, from 1st April 2020 data permit applications began to arrive.[85] According to their statistics published on their website, in the course of its history (up until 23rd November 2021) the number of submitted applications was rather high (598), nevertheless the number of pending applications and application under process are quite high as well (198).[86]

[82] Ibid 379.

[83] 'Data Protection and the Processing of Personal Data' (n 78).

[84] 'Data Permits' (Findata) <https://findata.fi/en/data-permits/> accessed 12 December 2021.

[85] 'What Is Findata?' (Findata) <https://findata.fi/en/what-is-findata/> accessed 28 November 2021.

[86] 'Findata' (Findata) <https://findata.fi/en/> accessed 12 December 2021.

According to the assessment cited above, 'Findata has an indicative budget of 1 million EUR' (which was higher in the starting years), which seems quite high but still rather modest compared with other similar bodies; for instance, Health Data Hub France was granted initial funding of 36 million euros for four years.[87]

6 Evaluation

By establishing Findata, Finland created a popular, transparent and secure process in order to provide medical data for scientific research. Although the full potential of this organisation may be exploited later, it seems that the whole arrangement from the applicants' submission up to the delivery of the results has been considered deeply and wisely. The only criticisms that could be brought up are the relative slowness (as regards the above-mentioned timelines and waited applications) and the possible political influence through Findata's leadership.

VI The Secure Access Data Centre

The role of AI is indispensable, since the development of machine learning algorithms depends on large volumes of data, which overall boost the data economy; therefore it is not surprising that AI is not only used by Findata, but also plays a significant function in the French data policy. France represented its AI strategy in 2018 for a 5-year period based on the French AI policy report[88] that aims to establish an open data policy in order to implement AI applications and pool assets together. The French strategy has a huge focus on infrastructure, highlighting data policy initiatives such as the CASD secure Data Hub aiming to help exchange sensitive protected data for research and development projects securely [89] by hosting private data from the bank, service, transport and private health industry and by making them available to researchers or private operators on a voluntary database to support the development of value-added services.[90]

The Secure Access Data Centre (hereinafter: CASD) is a public interest group in France aiming to organise and implement secure access services for confidential data[91] – that

[87] Consumers, Health, Agriculture and Food Executive Agency (n 74) 111.

[88] Cédric Villani, 'For a Meaningful Artificial Intelligence. Towards a French and European Strategy' (2018) <https://www.aiforhumanity.fr/pdfs/MissionVillani_Report_ENG-VF.pdf> accessed 15 December 2021.

[89] 'France AI Strategy Report | Knowledge for Policy' <https://knowledge4policy.ec.europa.eu/ai-watch/france-ai-strategy-report_en> accessed 14 December 2021.

[90] CNL, 'Topics for Consideration 2019' 8, <https://www.cnil.fr/sites/default/files/atoms/files/topics-for-consideration-2019.pdf> accessed 15 December 2021.

[91] Jean-Pierre Le Gléau and Jean-François Royer, 'Le centre d'accès sécurisé aux données de la statistique publique française: un nouvel outil pour les chercheurs' (2011) 130 Courrier des statistiques 1, 2.

cannot be published as open data[92] – for non-profit research and study and to promote the technology developed to secure access to data in the private sector. In 2010, the Group of National Schools of Economics and Statistics (hereinafter: GENES) and the National Institute of Statistics and Economic Studies (hereinafter: INSEE) jointly carried out the CASD project in the framework of the 'Investment of the Future Programme' with the recognition of the Equipment of Excellence. CASD was granted funding managed by the National Research Agency through to the end of 2019.[93] As part of a consortium agreement in 2012, other institutions endorsed the objectives pursued by the project in order to allow the development of CASD as a service for access to confidential data for research, study, evaluation and innovation.[94]

The ECOO1832598A interministerial decree by the Ministry of Economy and Finance of 29th December 2018 created CASD as a public interest group – having a legal change in its status – in order to bring together the State, represented by the Director General of the National Institute of Statistics and Economic Studies (INSEE), the Group of National Schools of Economics and Statistics (GENES), the National Centre for Scientific Research (CNRS), the Polytechnic School *(L'école politechnique)* and HEC Paris.[95] These institutions represent ministries, public establishments of a scientific, cultural and professional nature, science and technology and higher education; as such, the General Assembly of the Group is able to make informed decisions for the orientation of the group since the members have experience from several spheres and several disciplines.

In the scope of CASD, there are three advisory committees, namely the Scientific Council, the Data Producers Committee and the Information System Security Policy Monitoring Committee. In the Scientific Council – as the governance body – there are 14 experts with an international background in the field of data analysis, data processing and dissemination. Their main tasks are to give scientific orientation, ensure technological, methodological, legal and ethical oversight of access to confidential data related to international developments and suggest partnerships with similar centres while ensuring that CASD is represented well in France and on abroad. The Council has an important role in assisting the General Assembly and the director of the organisation in innovation,

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[92] Emile Marzolf, 'Comment l'État veut s'emparer des données pour améliorer la gestion de ses RH | À la une | Acteurs Publics' (Comment l'État veut s'emparer des données pour améliorer la gestion de ses RH | À la une | Acteurs Publics, 4 October 2021), <https://www.acteurspublics.fr/articles/comment-letat-veut-semparer-des-donnees-pour-ameliorer-la-gestion-de-ses-rh> accessed 14 December 2021.

[93] 'Equipex – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/le-centre-dacces-securise-aux-donnees-casd/partenaires/> accessed 14 December 2021.

[94] 'Convention Constitutive Groupement d'Intérêt Public CASD' (8 October 2018) <https://www.casd.eu/wp/wp-content/uploads/CASD-conv-const-20181008_V3.00_signee.pdf> accessed 14 December 2021.

[95] Arrêté du 20 décembre 2018 portant approbation de la convention constitutive du groupement d'intérêt public « Centre d'accès sécurisé aux données » Journal officiel de la République française, texte 53 sur 202, 29 decembre 2018; <https://www.casd.eu/wp/wp-content/uploads/joe_20181229_0301_0053.pdf> accessed 15 December 2021.

ethics and scientific strategy. The Data Producers Committee helps the main bodies related to data access conditions, documentation, archiving and dissemination of information, while the Information System Security Policy Monitoring Committee assists in matters of information system security governance.[96]

The group – as part of its research service missions – is responsible for implementing secure services access to confidential data. Its participation in the operations of matching and anonymising data, documenting and archiving confidential data and in developing access to confidential data at national, European and international level in connection with other data provision mechanisms are also key elements.[97]

As part of its valuation missions, in particular with the competitive sector, the group initiates the provision of advice and expertise in its areas of expertise to the State and other French entities, to provide tools or security services in its areas of competence and to provide the technology for securing access to data for private interest purposes. CASD aims to ensure that data depositors store, make available and use their data and protect the confidentiality of such data, maintain a high level of infrastructure and quality of service that allows users to access data under good conditions; and provide secure and equitable access to accredited data users, allowing for advanced processing and analysis under the best working conditions.

1 Technology

CASD is a benchmark in the very sensitive and complex world of data security, since the Group anticipates needs, innovates and helps build a regulatory framework compatible with a digital society that is open and protective. If the individual data produced by the public sphere are increasingly voluminous and of high added value from a scientific point of view, their use has so far remained difficult for reasons of confidentiality. These personal data are generated and produced by CASD partners, but mostly by INSEE, official statistics, administration and health data producers.[98]

CASD offers a secure infrastructure, called 'secure bubbles,' to data producers, guaranteeing a very high level of security. The so-called SD-Box – which can only be installed in the premises of a legal entity[99] – is an autonomous terminal designed by CASD, which very simply consists of a single unit with all elements necessary for the

[96] 'Governance and Missions – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/le-centre-dacces-securise-aux-donnees-casd/gouvernance-et-missions/> accessed 14 December 2021.

[97] 'Convention Constitutive Groupement d'Intérêt Public CASD' (n 94).

[98] Kamel Gadouche, 'The Secure Data Access Centre (CASD), a Service for Datascience and Scientific Research – Courrier Des Statistiques N3 - 2019 | Insee' (22 June 2021), <https://www.insee.fr/en/information/5014754?sommaire=5014796> accessed 14 December 2021.

[99] Jean-Pierre Le Gléau, 'L'accès aux données confidentielles de la statistique publique – De la sensibilité des données économiques à la sensibilité des données de santé' (2014) 2 Statistique et société 27, 30.

services it must provide enclosed.[100] It allows remote access to a secure infrastructure where confidential data are safeguarded. Due to the SD-Box, users return to the familiar interface of a workstation, but they only have access to data for which authorisation has been granted.[101] The SD-Box meets key IT security requirements while it is easy to install; it has automated maintenance, low dependence on local IT infrastructure and has a low impact on the user IT environment.[102]

The SD-Box is a key tool for accessing the whole CASD environment from outside, since it establishes a secure web link with the CASD central infrastructure that is designed to enable the processing of detailed confidential data. The main principles are guaranteeing the highest level of security to preserve the confidentiality and integrity of data, enabling users to benefit from workspace and minimising the SD-BOX's impact on their IT systems.[103]

2 Compliance with GDPR and Security

Since CASD grants access to confidential data and hosts personal data from several major institutions, it is a key requirement that the Group meets the requirements for data protection. CASD is ISO 27001 compliant in the field of Information Security Management, which is a reference to taking into account the best practices in the field of personal data protection. By being certified, CASD assures users that any information relating to an identified or identifiable person, directly or indirectly within this infrastructure, is based not just on legislation but on certifications issued by competent and authorised agents.[104] In November 2021, CASD participated on the Club 27001 annual conference to share experiences of the implementation of the ISO 27001 standard and discuss best practices.[105]

Health Data Hosting certification has also been obtained by CASD, which is highly valuable for the organisation since it is very active in granting access to health data collected during healthcare activities such as prevention or diagnosis. The management system of the IT infrastructure protects sensitive data and secures all information while preventing the

[100] Nathalie Picard and Kamel Gadouche, 'L'accès aux données très détaillées pour la recherche scientifique', (Université de Cergy-Pontoise 2017, THEMA Working Papers 2017/06) 9–10.

[101] 'Secure Data Access Center | ENSAE Paris' <https://www.ensae.fr/centre-acces-securise-aux-donnees/> accessed 14 December 2021.

[102] 'SD-Box – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/technologie/sd-box/> accessed 14 December 2021.

[103] 'Infrastructure – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/technologie/infrastructure/> accessed 14 December 2021.

[104] 'L'ISO 27701, une norme internationale pour la protection des données personnelles | CNIL' (2 April 2020) <https://www.cnil.fr/fr/liso-27701-une-norme-internationale-pour-la-protection-des-donnees-personnelles> accessed 14 December 2021.

[105] Célia Seramour, 'La conférence annuelle du Club 27001 se tiendra le 4 novembre' (Le Monde Informatique) <https://www.lemondeinformatique.fr/actualites/lire-la-conference-annuelle-du-club-27001-se-tiendra-le-4-novembre-84699.html> accessed 14 December 2021.

risks of cyber-attacks; therefore a trusted e-health and patient follow-up environment can by promoted by CASD. It also has Health Data Security Standard certification, which was developed on the basis of a rigorous risk analysis in order to put the appropriate security measures in place. The Standard is applicable to the National Health Data System. Based on a decree (22 March 2017), the data that is available in the System classified sensitive data.[106] These certifications guarantee secure hosting and data processing infrastructure services via the SD-Box – ensuring biometric access control and encrypted connection – installed in the establishment under a contract with CASD.[107]

3 Access to Data

In order to access confidential data as a user, it is necessary to be authorised either by the Statistical Secrecy Committee (hereinafter: CSS) in France or directly by the data depositor. Through the Confidential Data Access Portal, it is necessary to create an account while signing a confidentiality agreement. The complete file must be submitted to the Committee, which conducts its deliberation and sends its result to the project leader. After the project is greenlighted, it is compulsory to sign an agreement with data producers and the French Archives, which sends it back not just to the project leader but also to the CASD, which concludes the legal procedure. When requesting the right to access some data sources (justice, higher education, housing, baking, rural development, marine, etc.), it is necessary to contact the data depositor, who will send an authorisation document to CASD, that can start the process of creating access.[108]

At the end of both procedures, project members have to sign a contract – since the CASD is a paid service that must be contracted in advance – and participate in an enrolment session; this is a mandatory step. During the awareness training, users will receive essential information on legal, statistical and IT issues while getting an Access Card to the SD-Box with the applicant's encrypted own fingerprint, allowing CASD to grant users access to confidential data[109] and that cannot be lent to anyone under any circumstances.[110] It is very important that data provided by CASD are accessible from abroad too, since all countries in the European Union are subject to the ongoing accreditation.[111]

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[106] 'Certifications & Security – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/technologie/securite-certifications/> accessed 14 December 2021.

[107] Marcel Goldberg and Marie Zins, 'Le *Health Data Hub* (fin). De multiples problèmes et des solutions alternatives?' (2021) 37, 277, DOI: https://doi.org/10.1051/medsci/2021017.

[108] 'Procédures d'habilitation – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/gerer-son-projet/procedures-dhabilitation/> accessed 15 December 2021.

[109] 'Contractualisation – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/gerer-son-projet/contractualisation-2/> accessed 14 December 2021.

[110] 'Séance d'enrôlement – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/gerer-son-projet/seance-denrolement-2/> accessed 14 December 2021.

[111] 'FAQ' <https://www.casd.eu/gerer-son-projet/faq/> accessed 15 December 2021.

4 Projects

With its technology, CASD is active both in the public and in the private sector, since it makes data available for tax data from INSEE and the Ministries of Justice, National Education, Agriculture and Food, Economy and Finance and access must be provided by them. In the private sector, there is a long list of companies that are in cooperation with CASD.[112] Since CASD is a division of GENES, secure dissemination of data is allowed through it, because GENES is a trusted third party. The data producers provide access to their data through CASD while keeping complete ownership of the data. These factors result in a rising demand on the user's side: since the beginning of the project there has been a 30% increase in the number of projects: 80% of the requests come from public institutions and 20% from private organisations in the energy, transport, banking and insurance sector which can analyse, process and cross-reference data with several sources and collaborate with other users from different countries involved in the same project.[113] Furthermore, CASD is highly active in projects based on health data; for example, it has already provided SNDS data to identify drugs that protect against Parkinson's disease,[114] or evaluate the impact of comedications on chemotheraphy efficacy for breast cancer,[115] medicine, surgery and odontology data in order to evaluate hospital activities[116] or administrative data in order to develop an algorithm for tracking fragility and dependence in health insurance; such ant indicator will lead to relevant conclusions in the field of health surveillance, research and disease prevention among the elderly.[117] Proving that CASD strives to open up new opportunities for scientific research and statistical studies, it has signed a partnership agreement with the Banque de France in order to make nearly 75 sources of banking data available on the CASD.[118]

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[112] 'CASD – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/le-centre-dacces-securise-aux-donnees-casd/le-casd> accessed 14 December 2021.

[113] 'Secure Data Access Center | ENSAE Paris' (n 101).

[114] 'Use of the SNDS for the Identification of Drugs Protective of Parkinson's Disease – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/en/project/use-of-the-snds-for-the-identification-of-drugs-protective-of-parkinsons-disease/> accessed 14 December 2021.

[115] 'Analyse des relations entre comédications et réponse à la chimiothérapie pour un cancer du sein – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/project/analyse-des-relations-entre-comedications-et-reponse-a-la-chimiotherapie-pour-un-cancer-du-sein/> accessed 14 December 2021.

[116] 'Traitement des données du PMSI par la société IRIS CONSEIL SANTE – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/project/traitement-des-donnees-du-pmsi-par-la-societe-iris-conseil-sante/> accessed 14 December 2021.

[117] 'Développement d'un algorithme de repérage de la fragilité et de la dépendance dans les bases médico-administratives de l'Assurance Maladie – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/project/developpement-dun-algorithme-de-reperage-de-la-fragilite-et-de-la-dependance-dans-les-bases-medico-administratives-de-lassurance-maladie/> accessed 14 December 2021.

[118] 'Les données de la Banque de France bientôt disponibles sur le CASD – Le CASD – Centre d'accès sécurisé aux données' <https://www.casd.eu/les-donnees-de-la-banque-de-france-bientot-disponibles-sur-le-casd/> accessed 14 December 2021.

5 Evaluation

The main objectives of the organisation are to maintain a high level of infrastructure, allowing users to access data safely and analyse them under the best working condition while guaranteeing the data protection rules. CASD, as a trusted third party, underpins its activity by these strong imperatives that remain at the heart of the approaches it undertakes.[119]

VII Common Patterns

In this section some of the identified common patterns for all three institutions will be presented in order to demonstrate the main challenges and issues with which they face. This is not intended to be a comprehensive enumeration, although these are the most essential concerns which it is advised to consider while establishing bodies like these.

1 Primary Aims

All of these organisations have been founded to provide appropriate data and services for scientific, statistical research and non-profit goals. This may be seen most clearly in the case of RCD, since the main condition for eligibility is enrolment in an institution with an ongoing thesis or dissertation under professional control. Findata provides data primarily for scientific research and, besides that, there is a lower price for data needed for a thesis. The consortium agreement of CASD back in 2012 highlighted the importance of research as well.

Paradoxically, this approach underlines the importance of the Commission's main purpose, which is opening data to the for-profit private sector in a wider manner. While the priority character of academic scientific research is indisputable, in order to strengthen the European economy the private sector should benefit from these services and data sets.

2 Legal Background

The most basic similarity may be spotted in terms of the 'big picture': there is some sort of legal background behind all these bodies. Nevertheless, the solutions vary from country to country: Finland dedicated a sectoral, separated act in order to regulate the process and cooperation of the relevant bodies, Germany inserted these types of activities to laws in effect and France arranged it by a decree. Given the fact that all legal systems have their own standards and peculiarities, the differences are not surprising. As a matter of fact, from an outer 'perspective' the Finnish model seems the most straightforward in terms of its clarity

[119] 'Governance and Missions – Le CASD – Centre d'accès sécurisé aux données' (n 96).

and comprehensibility (i.e. the relevant rules may be found in one source, and it may be found quite easily since acts generally have the highest legislative rank).

This legal arrangement entails some kind of centralisation as well. Whereas the desire to set up a one-stop shop is obvious in the case of Findata, it is fairly evident in the case of RCD and CASD too: RCD takes care of the centralisation of the data and CASD provides an Access Card to the SD-Box with confidential data from various sources.

Although this centralisation makes the process and the access to data easier, it may raise some privacy concerns as well. This is where conceptual problems occur: data access is highly important (and it is effective if the individual elements may be reached, too) but effective safeguards are needed in order to make sure that one cannot misuse these opportunities (given the fact that it is getting harder to find the boundary between personal and non-personal i.e. anonymised data as Purtova, for instance, demonstrated[120]).

3 Accessibility

Due to the above-mentioned privacy issues, all of the bodies need to take serious security measures. One of the common solutions is that the institutions rarely give the data to the client without constraints: Findata makes it available only for certain person/s via its secure environment, registering all the logs related to operations there, RCD provides full potential to the data in on-site premises and CASD devised its own tool to keep the data safe.

Additionally, there is a selection process for the aspiring applicant, during which the aims of the applicant and the applicant himself/herself/itself are examined. This raises the question whether these services should be available to persons/business outside the EU. While fair competition would demand equal terms, this could raise security and digital sovereignty issues as well. In this regard practices also diverge: whereas the German core services are available only for domestic students, Findata provides services with higher prices for outside the EU.

On the one hand, these safeguards seem quite appropriate, on the other hand there is a hazard in joint data generated by data intermediaries possessed by them (and in this way indirectly by the state). In order to prevent any misuse from the state's side, there must be established a proper institutional check as implemented in the case of Findata.

VIII Conclusion

The aim of the article was to present how the three bodies indicated in the impact assessment of the DGA have been set up by the three Member States. In order to get an

[120] Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40, DOI: https://doi.org/10.1080/17579961.2018.1452176.

overall point of view, the European Digital Agenda has been introduced with the most important milestones.

The first example was the German RCD with the main purpose of providing data for academic research. As was shown, the background of the RCD is more traditional, in the sense that it has been incorporated into the existing institutional structure rather than creating new networks. This example demonstrates how crucial is the anonymisation and the confidentiality of data, as it is a major issue tackled by the relevant German laws.

The second example was the Finnish Findata, which is a specific sectorial intermediary with the sole purpose of providing services in the medical field. The functioning and the structure of Findata is rather clear due to the dedicated Act and there are also available materials on its website which makes its process rather transparent. The establishment of Findata put emphasis on compliance with GDPR and created effective safeguards as well.

The third example was the French CASD. While the Finnish and the German examples were more conservative in terms of their obligations and services, CASD plays a role in legislative work by providing assistance on various matters and it provides data via a special tool which has been produced in order to prevent the misuse of confidential data.

Finally, the main points were analysed, aiming to identify the primary hurdles which may occur related to these bodies. Three common patterns have been demonstrated: the primary aims of the organisations, their legal background and the accessibility of data. It has been shown that the primary aim is to contribute to scientific and statistical research (thus private, profit-orientated activities are not backed up by these services), their legal background is settled but using various modes and the accessibility (security) of the data provided are extensively safeguarded.

Balázs Völcsey*

Analysis of the Material Scope of Substantive Finality Based on the Hungarian Codes of Civil Procedure

Abstract

The regulation of finality is based on the fact that the main purpose of any procedural law, whether at domestic or international level, is to strive for finality; namely that courts decide on the dispute brought to them finally, thus ensuring the legally regulated order of social relations. That is, the need for finality is the common core of the procedural law of each country.

Finality necessarily incorporates the tension that every legal system (and its constituent civil procedural law) has to face: the fact that the legislator cannot aim for the facts reflected in the final judgment at the end of the proceedings to be the same as the actual historical facts.

Instead, the state may commit itself to ensuring that claimants have the right to a fair trial.

This task necessarily implies that the State must establish a procedural order, in which even the inability to establish the facts (as the case may be) may not prevent the adoption of a substantive decision. This is most manifest in the standard of the burden of proof and substantive finality.

In my study, I will search the material scope of finality with regard to judgments dismissing or upholding the action.

Keywords: finality, substantive finality, right enforced by an action, judgments dismissing the action, judgments upholding the action

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I The Concept of Substantive Finality in the Aspect of Public Law and Constitutional Law

The regulation of finality is based on the fact that the main purpose of any procedural law, whether at domestic or international level, is to strive for finality; namely that courts decide on the dispute brought to them finally, thus ensuring the legally regulated order of social relations. That is, the need for finality is the common core of the procedural law of each country.

Finality necessarily incorporates the tension that every legal system (and its constituent civil procedural law) has to face: the fact that the legislator cannot aim for the facts reflected in the final judgment at the end of the proceedings to be the same as the actual historical facts. In civil lawsuits, the principles of disposition and trial prevail; in other words, what facts are presented and what motion for taking evidence is made depend on the will of the parties. In view of the fact that, in a civil procedure, there is only a very limited scope wherein the court acts *ex officio*, there is no legal possibility for the court to 'investigate' facts that the parties do not intend to present.

Instead, the state may commit itself to ensuring that claimants have the right to a *fair trial*. This is a requirement that appears internationally and globally in Article 6 para (1) of the Rome Convention,[1] Article 47 para (1) of the Charter of Fundamental Rights of the European Union, and Article XXVIII para (1) of the Fundamental Law of Hungary.

In addition, the content of a fair procedure has been interpreted in several cases in the practice of the Hungarian Constitutional Court. Accordingly, the essence of the right to a fair trial is that

> all the requirements detailed in the Constitution – the constitutionality, independence and impartiality of the court, that trials should be fair (using the specific wording of international conventions: *fair, équitablement, in billiger Weise*) and public – serves this purpose; only by fulfilling these requirements may a decision on the merits be delivered that qualifies as constitutionally final and establishes a subjective right.[2]

The right to a fair trial enforced through *finality* is not only of significance in constitutional law and legal theory but also gives effect to legal certainty, and legal certainty, as one of the basic prerequisites for the rule of law, is in the fundamental interest of both natural and non-natural persons. Legal certainty and the right to a fair trial are also essential for the efficient

[1] Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the eight additional protocols thereto.

[2] Decision 7/2013. (III. 1) AB of the Constitutional Court of the Republic of Hungary, ABH 2013, 293–311.; Statement of Reasons [24] – with reference to Decision 39/1997. (VII. 1) AB of the Constitutional Court of the Republic of Hungary, ABH 1997, 263–281., also with identical content: Decision 6/1998. (III. 11) AB of the Constitutional Court of the Republic of Hungary, ABH 1998, 91–101; Decision 34/2014. (XI. 14) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 964–1063, Statement of reasons [142]; Decision 8/2015. (IV. 17) AB of the Constitutional Court of the Republic of Hungary, ABH 2015, 195–232, Statement of reasons [65].

functioning of a market economy, as it is also important for economic operators that their legal dispute, if any, is finally (!) and fairly settled within a reasonable time.

In addition to legal certainty, which is part of the rule of law, the institution of finality is also protected by the right to a fair trial.[3] The right to a fair trial manifests itself not only in the formal guarantee of access to the courts, but also in the fulfilment of the safeguards through which the court may deliver a decision on the merits with the need for finality.[4]

Civil procedure serves two purposes, to enforce specific individual subjective rights and to provide the objective, abstract protection of rights; that is, to protect the legal institutions defined by the substantive legislation. The individual level ensures the protection of subjective rights rooted in private law, the possibility to settle disputes related to them in a definitive way, and thus the right of recourse to courts [Article XXVIII (1) of the Fundamental Law]. The implementation of the objective, abstract protection of rights, as an aim, is already ensured by the existence of civil procedure, since the awareness of enforceability motivates compliance while deterring any infringement.[5]

Ideally, these two purposes (functions) are accomplished at the same time and affect each other; therefore, civil procedure must establish a procedure that guarantees the fulfilment of both functions. However, there is necessarily a conflict between these two, since, for the reasons explained above, the State cannot, through its courts, assume responsibility for ensuring that the facts reflected in the final judgment correspond to the actual historical facts of the case.

In contrast, the ultimate requirement of legal certainty stemming from the rule of law is the final settlement of disputes and thus guaranteeing legal peace. 'Substantial justice[6] and the requirement of legal certainty are reconciled by the institution of finality.'[7]

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[3] Decision 3027/2018. (II. 6) AB of the Constitutional Court of the Republic of Hungary, ABH 2018, 127–145, Statement of Reasons [59] – with reference to Decision 30/2014. (IX. 30.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 863–908, Statement of reasons [81].

[4] Varga István, 'Preambulum' in Varga István (ed), *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja (Commentary on the Code of Civil Procedure and Related Legislation)* (HVG-ORAC 2018, Budapest) 4, paragraph 6.

[5] Ibid, 6, paragraph 10.

[6] In this dissertation, I do not intend to deal in detail with the pair of concepts of substantial truth and formal truth and their significance. This may be set as a task for an independent dissertation. For details on this issue, see in detail: Plósz Sándor, 'A keresetjogról' (On the capacity to bring proceedings) (1876) 5 Magyar Igazságügy; Kiss Daisy, 'A fair eljárás' (A fair procedure) in Papp Zsuzsanna (ed), *A magyar polgári eljárásjog a kilencvenes években (Hungarian Civil Procedural Law in the 1990s)* (ELTE Eötvös Kiadó 2003, Budapest); Kengyel Miklós, *Bírói hatalom és a felek rendelkezési joga a polgári perben (Judicial Power and the Parties' Rights of Disposal in Civil Litigation)* (Academic Doctoral Dissertation 2003, Pécs); Gadó Gábor 'Az eljárási igazságosság a polgári perben' (Procedural Justice in Civil Procedure) (2000) 1 Magyar Jog 18–43; Czoboly Gergely, *A perelhúzás megakadályozásának eljárási eszközei (Procedural Tools for Preventing Delays in litigation)* (2013 Pécs); Virág Csaba 'Az alaki igazságosságot előtérbe helyező fair eljárás nem zárja ki a jó és helyes döntés lehetőségét' (A Fair Trial that Promotes Formal Justice does not Exclude the Possibility of a Good and Correct Decision) in Varga István (ed), *Egy új polgári perrendtartás alapjai (Foundations of a New Code of Civil Procedure)* (HVG-ORAC 2014, Budapest) 362–376.

[7] Decision 5/1999. (III. 31.) AB of the Constitutional Court of the Republic of Hungary, ABH 1999, 75–89, – referring to Decision 9/1992. (I. 30) AB of the Constitutional Court of the Republic of Hungary, ABH 1992, 59–71.

It follows from the above that there is a conflict between these two functions, for which the Code of Civil Procedure must propose a resolution.

From this, it is reasonable to conclude that the State must develop a civil procedure and, within that framework, a rule on finality that provides for a fair compromise in order to settle disputes with the intention of finality. This requirement includes the establishment of a procedural order that, having regard to the fundamental right to a fair hearing within a reasonable time [Article XXVIII (1) of the Fundamental Law], allows the parties to make their statements of law, claims, statements of fact and motions for evidence-taking.

In this context, it must be borne in mind that

> civil justice must be based on reality. However, this is not a question of procedural law, but follows from the hypothesis of a substantive civil law rule: the hypothesis of a civil law rule governing a subjective right defines the legal facts which open, change or terminate the subjective right. Given that the civil procedural law serves the purpose of enforcing substantive legislation, any legal system that separates the basis of judgment from reality, that is to say from the facts, is defective.[8]

At the same time, however, even if the actual facts cannot be established for any reason, the Code of Civil Procedure must guarantee that each dispute will calm down (to be closed with final effect) and that legal peace may be resumed.

The case law of the Constitutional Court also confirms this interpretation:

> The precise definition of the institution of finality as formal and substantive finality is a constitutional requirement as part of the rule of law. […] Respect for finality serves the security of the entire legal order. […] If the conditions for reaching finality are satisfied, it will be effective irrespective of the correctness of the decision in terms of its content.[9]

Accordingly, it may be stated that the ultimate aim of a civil action must be to ensure the protection of rights. From the plaintiff's point of view, protection of rights appears against the defendant who infringes the law while, from the defendant's point of view, it is against the plaintiff who is suing baselessly.[10]

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[8] Éless Tamás, 'A tárgyalás szerkezete, perfelvétel, perhatékonyság' (Structure of Trial, Preparation of Trial, Efficiency of Litigation) (2017) 5 Közjegyzők Közlönye 17.

[9] Decision 9/1992. (I. 30) AB of the Constitutional Court of the Republic of Hungary, ABH 1992, 59–71, – Following the entry into force of the Fundamental Law, the same principle was confirmed by Decision 30/2014. (IX. 30.) AB of the Constitutional Court of the Republic of Hungary, ABH 2014, 863–908, Statement of reasons [76].

[10] Éless (n 8) 13.

This task necessarily implies that the State must establish a procedural order, in which even the inability to establish the facts (as the case may be) may not prevent the adoption of a substantive decision. This is most manifest in the standard of the burden of proof.

Final settlement also requires the regulation of finality (substantive finality). The institution of the burden of proof guarantees the absolute establishment of the finality and the legal effects connected with it (that is to say, the definitive nature of the substantial finality effect).[11]

In addition to the burden of proof, finality has a close correlation with the concept of the subject matter of the action, which gives the essence and characteristic feature of procedural law, since finality (effect of substantive finality) means the sameness of parties-facts-rights. The notions of law and statements of facts are decisively influenced by the concept of the subject matter of the action (monomial, binominal or trinomial), which in turn influences the definitions of the amendment of the action or the joinder of claims. With regard to the material scope of finality (effect of substantive finality), defining statements of law and statements of fact is unavoidable.

The scope of the most important legal effect, the scope of the effect of substantive finality in the Hungarian Code of Civil Procedure, is also related to the changed procedural law concept of set-off.

However, the notions of finality and the subject matter of the action is also an unavoidable legal institution, not only in the procedural law of Hungary, but also in the German and Swiss codes of civil procedure that played a decisive role in the Hungarian codification. Indeed, the German procedural law literature has consistently held that the notion of the subject matter of the action also determines the interpretation of the amendment of the action, the joinder of claims and the effect of substantive finality.

Furthermore, the intention to settle disputes with a view to bringing them to an end is also apparent at EU level, as the European Court of Justice (ECJ) has, in several judgments, sought to define the concept of subject matter of the claim that applies at EU level.

Following the above summary, it may be concluded that finality is one of the most important legal institutions of civil procedural law, the basis of the legal order [BH 2015. 14]. Namely, the regulation of finality fundamentally determines the regulations governing civil contentious and non-contentious proceedings.

In my essay, I use the term 'finality' to refer in general to finality, without distinguishing between formal and substantive finality. The term of the effect of finality is applied when the legal effect specifically related to the (formal or substantive) finality is relevant.

> The precise definition of the institution of finality as formal and substantive finality is a constitutional requirement, as part of the rule of law. Respect for the finality that occurred subject to the remedies provided for in accordance with the Constitution serves the security of the legal system as a whole. (Constitutional Court Decision No. 9/1992. (I. 30).

[11] Varga 'Preambulum' (n 4) 6–7, paragraphs 10 to 12.

The above cited decision of the Constitutional Court also points out that finality and its precise definition is a fundamental guarantee element in civil procedural law. In addition to this definition, the material scope of the effect of substantive finality, i.e. which parts and provisions of the individual decisions may become final, is also of key importance.

II Finality in Hungarian Legal Environment

Before the analysis of the material scope of substantive finality, it is practical to give an overview of the Hungarian legal framework, which leads to the following main conclusions:

1. Only judgments and decisions that have the effect of a judgment may have the effect of substantive finality. Orders may have it only in the specific case[12] where that order is the only lawful decision; that is, any judgment that may be rendered would have purely pretence finality.

2. With regard to the concept of the effect of substantive finality, it should be noted that, in my view, it does not include enforceability, but this is a different legal effect, which in most cases pertains to judgments with an effect of substantive finality.

3. Under the temporal scope of the 1952 Pp.,[13] there was a lively debate in the legal literature on the meaning of the concepts of cause of action-title-right enforced. Section 7 para (1) item 11. of the Pp.[14] provides some normative guidance in this debate, with the proviso that, in my opinion, the statutory definition is not entirely correct.

According to the 2016 Code of Civil Procedure, the right enforced by an action is the subjective right; the enforcement is ensured by the law. The grammatical meaning of this wording is positive (enforcement is ensured), i.e. it assumes that if the plaintiff (in the case of a counterclaim, the defendant) is successful, the court will decide according to his claim, because this is the only way to ensure enforcement. Conversely, the plaintiff may have a subjective right granted by the objective legislation (such as damages), but its enforcement will not be successful, and the court will dismiss the action.

For all these reasons, and also from a dogmatic point of view, it would have been more fortunate if the Code of Civil Procedure did not contain a specific interpretative provision or definition in connection with the term 'right enforced by an action'.

However, if the legislator decides that a normative definition of this term is warranted, then, in my view, in light of the above, Section 7 para (1) item 11. of the Pp. would need to be reasonably drafted as that the right enforced through an action is the subjective right, for which *the possibility* of enforcement is provided by the substantive legislation. By including the word 'possibility', the law would not say anything more than something occurring in numerous cases, namely that the plaintiff has a right granted by substantive legislation (such as for damages), so it is possible to enforce it, but it does not necessarily follow that it will be

[12] I deliberately used the term 'case' as there is no litigation in these cases, and no claim has been communicated.
[13] Act III of 1952 on the Code of Civil Procedure.
[14] Act CXXX of 2016 on the Code of Civil Procedure.

successful, since it is also possible that the claim may be dismissed by the court, for example because of an objection on the ground of statute of limitation.

Based on the above, I would consider reasonable the following wording for Section 7 para (1) item 11. of the Pp: '*right enforced by an action*: means a subjective right, the enforcement *possibility* of which is secured by a provision of substantive legislation'.

With this in mind – *de lege ferenda* –, I have tried to create my own concept of title, i.e. it is a substantive concept, which may be interpreted in the system of substantive law. From a procedural law point of view, this means that the title appears in procedural law terms in the statements and statements of law. The rights to be enforced may be identified and defined through making statements of law, also in view of Section 7 para (1) item 8. of the Pp.

4. In my opinion, in the Pp.'s system, it is necessary to consider whether the legal literature reference to the subject of the action being 'the right enforced, which may be a substantive law claim or another right or a legal relationship' will continue to prevail.[15] To be specific, the legal relationship is not equal to the right enforced;[16] i.e. the subject of an action cannot be a legal relationship, since the action stems from the legal relationship [cf. Pp., Section 173 para (1)].

5. The effect of substantive finality, its concept and its material scope are largely determined by the fact that, as of 1 January 2018, the Hungarian system of the law of civil procedure follows the trinomial concept of subject matter of the action (statement of law, application, statement of fact).

6. The notion of a trinomial subject matter of the action not only entails a substantive change in connection with the material scope of the effect of substantive finality, but in parallel the legislator changed the concept of an amendment of the action (amendment of the counterclaim) [cf. Pp., Section 7 para (1) item 4.[17] and item 12.[18]].

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[15] Kiss Daisy, *A polgári per titkai – Kérdések és válaszok a polgári perrendtartás Általános Részéből (Secrets of civil procedure – Questions and Answers from the General Part of the Code of Civil Procedure)* (2nd edn, HVG-ORAC 2009, Budapest) 418, with identical content: Kengyel Miklós 'A felek és más perbeli személyek' (The parties and other litigants) in Németh János, Kiss Daisy (eds), *A polgári perrendtartás magyarázata (Explanation of the Code of Civil Procedure)* (Complex 2007, Budapest) 488.

[16] Dr. Mátyás Parlagi's lecture on 20 February 2018.

[17] 4. 'change of defence' shall mean where the party – in connection with his defence, including the defense against a counterclaim and set-off,
a) offers different or further facts relative to his factual claims previously presented,
b) presents different or further substantive objections and/or legal arguments relative to his previous legal allegations or legal arguments, or
c) has withdrawn his statement issued in acknowledgment of the factual claim, legal allegation, application in part or in whole, or not to contest them, including if an uncontested or unchallenged factual claim, legal allegation or application is later contested.

[18] 12. 'change of action' shall mean where the party – in connection with his action – including a counterclaim and set-off,
a) offers different or further facts relative to his factual claims previously presented,
b) presents different or further pursued rights and/or legal arguments relative to his previous legal allegations or legal arguments, or
c) changes the amount or the contents of the application, and/or any part thereof, or submits further applications relative to his claims.

7. It is relevant that Section 342 para (3) clearly establishes the principle of title limitation, which in turn restricts the material scope of the effect of substantive finality, since, if the plaintiff invokes a different statement of law compared to the one invoked in the first case then Section 360 para (1) of the Pp. is no longer applicable, because the sameness of rights cannot be established in the two cases.

8. The conceptual innovation, which clearly applies to set-off decided on in the merit, also substantially affects the effect of substantive finality. In addition to content criteria, its significance is also relevant from a formal approach.

Thus, the submission of set-off, in view of Section 242 para (1) of the Pp., does not qualify as initiation of an independent procedure, in that the submission of a document containing set-off is not subject to court fee payment. On the set-off – due to its application nature [Section 342 para (1) of the Pp.] – the court must rule in all cases in the operative part of its judgment. Given the substantive law and procedural law specificities of set-off, a conditional set-off may not be interpreted (a set-off is dismissed in the operative part, not in the statement of reasons).

9. The Hungarian legal literature has always and still emphasises the formal approach, namely which structural element of the judgment is covered by the effect of substantive finality. With this in mind, I tried to analyse – hereinafter – the individual decisions of first instance, which have the ability to produce a substantive finality effect, and their structural units, and to draw conclusions.[19]

1 Judgments Dismissing the Action

In this case, the operative part shall contain the following statement: 'The court dismisses the action.'[20]

Because of the negative content of the operative part, both the relevant facts (statements of fact) and the statements of law must necessarily be contained only in the statement of reasons: the statements of fact are in the factual part of the statement of reasons and the statements of law are in the legal arguments.

It should be noted, however, that this does not mean that the factual and legal argument parts of the statement of reasons may be capable of producing the effect of substantive finality in their entirety; the material scope of the effect of substantive finality may only be interpreted in connection with the statements of fact and law that are relevant in terms of the right enforced.

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[19] Regarding proceedings of second instance and review procedures see: Balázs István Völcsey, *Comparative analysis of the material scope of substantive finality, based on the Hungarian, German and Swiss codes of civil procedure* (ELTE Eötvös Kiadó 2021, Budapest).

[20] To this effect, see the judgments of the Fővárosi Törvényszék 8.G.43.185/2015/19.; Fővárosi Bíróság P.20.136 /2011/17.; Debreceni Törvényszék P.21.678/2015/8.; Pesti Központi Kerületi Bíróság 24.P.85.045/2008/47.; Veszprémi Törvényszék 1.G.40.107/2010/46.; Veszprémi Törvényszék 1.P.20.505/2012/10.; Miskolci Törvényszék P.22.942/2015/12.; Tatabányai Törvényszék 9.G.40.001/2014/51.; Szigetvári Járásbíróság 3.P.20.259/2013/27.

2 Judgments Upholding the Action

a) In the case of an the judgment granting the claim, the operative part of *the judgment* contains an order to the defendant ('The court orders the defendant to pay the applicant HUF 5,000,000 within 15 days'), without specifying the facts and title serving as a basis for condemnation).[21] That is, the statements of fact and statements of law relevant to the later litigation (for the purposes of establishing the sameness of facts and rights) are not identifiable on the basis of the operative part alone.

In my view, however, a restrictive interpretation should be adopted in this regard; in other words, the effect of substantive finality may only cover the most necessary elements of the facts and the legal arguments, in order to avoid unjustified factual elements or legal conclusions having the effect of substantive finality.

b) In the case of an *action for declaration*, it is necessary to distinguish the *sui generis* declaration *petitum* from the content of Section 172 para (3) of the Pp.

A glaring example of a *sui generis* declaration claim is:[22]

ba) declaration of the invalidity of a contract [Civil Code,[23] Section 6:108 para (2)],

bb) in the context of personality rights cases, the declaration of the infringement by the court [Civil Code, Section 2:51 para (1) item *a)*] *petitum* [BH 2018. 332.], and

bc) the declaration of the invalidity of a will (Civil Code, Section 7:37).

(ba) The operative part of a judgment declaring a contract invalid states that the (specific provision of a) contract concluded under the number XY *or on the* date ZV is[24] invalid.[25]

It follows from this that, apart from the operative part, the legal justification of the statement of reasons (which is necessarily linked to that operative part) may have material scope with the effect of substantive finality.

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[21] Veszprémi Törvényszék 1.P. 20.526/2014/47.; Fővárosi Bíróság P.28.493/2005/11.; Miskolci Törvényszék 21.G.40.084/2013/13.; Fővárosi Bíróság 22.G.41.768/2009/18.; Veszprémi Törvényszék 1.G.40.022/2013/17.; Pesti Központi Kerületi Bíróság 10.P. 88.616/2011/114.; Tatabányai Törvényszék 4.P.21.579/2011/4.; Miskolci Törvényszék P.20.787/2012/75.; Pesti Központi Kerületi Bíróság 2.P.93.919/2013/11.; Pécsi Városi Bíróság P.20.707/2007/11.; Pécsi Törvényszék P.20.289/2015/17.; Fővárosi Bíróság 11.G.41.774/2007/5.; Pesti Központi Kerületi Bíróság 41.P.90.886/2006/49.

[22] A number of additional *sui generis* declaration *petita* are known in the legal system (e.g. copyright cases); in this dissertation I highlight only the examples occurring the most frequently in practice.

[23] Act V of 2013 on the Civil Code.

[24] This is included in the operative part only in the case of the declaration of partial invalidity.

[25] So for example: Budapest Környéki Törvényszék 25.P.25.224/2010/27.; Zalaegerszegi Törvényszék 4.P.20.094/2014/38. Fővárosi Törvényszék 30.G.41.702/2015/33.; Győr-Moson-Sopron Megyei Bíróság 16.P.20725/2006/57.; Szegedi Városi Bíróság 26.P.21.742/2007/14.; Fővárosi Törvényszék P.25.603/2010/20.; Tatabányai Törvényszék 20.P.20.645/2011/12.; Pesti Központi Kerületi Bíróság 17.P.91.935/2013/9.; Szegedi Törvényszék 7.G.40.179/2012/23.; Hajdú-Bihar-Megyei Bíróság 7.G.40.162/2005/21.; Fővárosi Törvényszék 10. G.43230/2013/13.

A similar approach is followed in the case of claims for annulment of a general meeting resolution in condominium lawsuits (BH 2016. 15). As such, the above may also be relevant *mutatis mutandis* in these cases.

(bb) If the plaintiff seeks only the declaration of the violation of his personality rights, the court will declare in the operative part that the defendant has violated the plaintiff's particular personality right(s) on a specified date, by a specified course of action.[26]

This content limitation of the operative part follows partly from Section 172 para (3) of the Pp., and partly from the title limitation set out in Section 342 para (3); that is, the court may decide on a personality right infringement claimed by the plaintiff.

It also follows that, in this case, the operative part clearly sets out both the factual and cause of action, that is to say, the scope of the effect of substantive finality may only (!) extend to the operative part and none of the elements of the statement of reasons.

(bc) In the event of the declaration of a will's invalidity, under Section 7:37 para (3) of the Civil Code, the invalidity or ineffectiveness of the will may be declared on the basis of the right enforced in the challenge and to the benefit of the challenging person.

This means that the operative part of the upholding judgment contains, in addition to the particulars necessary for the unequivocal identification of the will, also the reason for invalidity(!).[27] In other words, not only the factual basis but also the cause of action may be identified solely from the operative part.

Again, in my view, we must conclude that only the operative part may have the effect of substantive finality, and none of the elements of the statement of reasons.

However, in addition to the *sui generis* declaration claims, there are *petita*, for which the existence of conditions set out in Section 172 para (3) of the Pp. must be assessed. Thus, for example, there is no legal impediment to a party seeking the declaration of invalidity of an already terminated contract (BH 2013. 221); in the same way, the declaration of the non-establishment of a contract may also be requested [BH 2012. 294).

With regard to these types of lawsuits, the stricter requirements detailed above for the operative part are not generally identifiable and, consequently, no general conclusions may be drawn for the material scope.

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[26] Miskolci Törvényszék P.22.643/2011/5.; Fővárosi Törvényszék 33.P.23.274/2016/6.; Kaposvári Törvényszék 8.P.21.562/2015/9.; Budapest Környéki Törvényszék 20.P.20.291/2015/72.; Fővárosi Törvényszék P.20.723/2015/6.; Fővárosi Törvényszék P.25.003/2014/6.; Fővárosi Törvényszék P.24.324/2015/4.; Fővárosi Törvényszék P.20.229/2015/3.; Fővárosi Törvényszék P.24.933/2015/13.; Miskolci Törvényszék P.22.113/2015/15.

[27] Fővárosi Bíróság P.27.299/2009/16.; Borsod-Abaúj-Zemplén Megyei Bíróság 23.P.21.943/2009/37.; Kiskunhalasi Városi Bíróság P.20.743/2010/8., Győri Városi Bíróság P.20.541/2010/10.; Fővárosi Törvényszék P.25.524/2010/32.; Fővárosi Bíróság P.24.561/2006/77.

c) A classic example of claim for constituting a right are claims submitted in actions related to personal status (Section 429 of the Pp.). The essence of the right constitution judgments adopted at the end of these lawsuits is that 'the creation, modification or termination of a legal relationship or status shall constitute the establishing degree of the judgment […] that is, the judgment of the court shall be a fact that creates, amend or terminates a right'.[28]

A common feature of these cases is that the judgment clearly defines the factual basis and the cause of action. For example, in paternity lawsuits, the court declares that the child of a specified mother registered on a given day by a particular registrar under a registration number, with a specified name, originates from the specific defendant (personal data). In an action brought to settle the exercise of parental responsibility, the operative part of the judgment contains the name of the child, for which one of the parties is authorised by the court to exercise parental responsibility.[29]

In my view, it follows from this that, in the case of a constitutive *petitum*, only the *operative part* may become final, but not the statement of reasons.

III Summary

It should be highlighted that the interpretation of the substantive force has appeared in the Hungarian legal literature more emphatically which, in connection with its material scope, has definitely aimed to find the optimal solution between the operative part and statement of reasons.[30]

In my opinion, this interpretation can involve, in countless cases, practical solutions for law enforcement.

Of course, this does not mean that the Hungarian legal literature and legal practice did not deal with the material scope of substantive finality in content. In this study, this issue is not discussed for reasons of length.

As such, on this basis, it can be concluded that a uniform definition of substantive finality that may be applied to all judgments cannot be given, but it can be argued that, in certain cases, certain parts of the statement of reasons also have an equivalent effect.

[28] Bajory Pál, 'A jogalakító ítéletek' [Judgment constituting a right] (1978) 9 Jogtudományi Közlöny 540.
[29] Budai Központi Kerületi Bíróság P.30.971/2014/41.
[30] From this mind – partly – different view represents the German civil procedure. In detail: Völcsey (n 19).

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