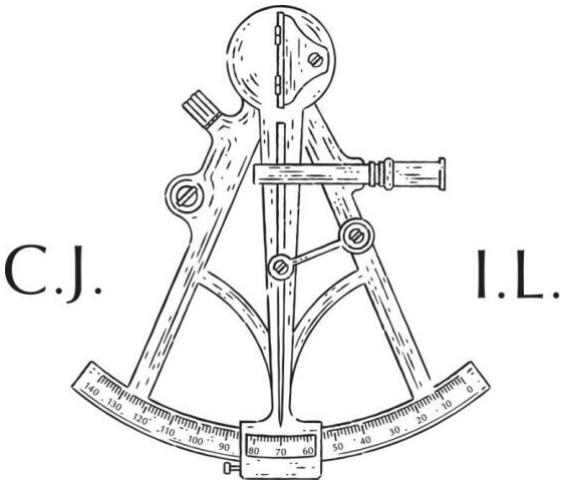

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EUROSCEPTICISM AND THE FADING DREAM OF A "FEDERAL" EUROPE: THE DRIVING FORCES BEHIND THE CONFLICT BETWEEN EU LAW AND INVESTMENT ARBITRATION?

*Emma Iannini**

ABSTRACT

After nearly eighty years as a key promotor of public international law, European law, and the values of individual human rights, democracy, and the rule of law more generally, why has the Court of Justice of the European Union ("**CJEU**" or "**the Court**")—with other European Union ("**EU**") institutions and Member States—rendered a series of decisions in the last five years dismantling one of the post-World War II public international legal system's crowning achievements in Europe: the system of investor-State investment dispute settlement ("**ISDS**") before independent arbitral tribunals? This piece argues that the Court, as well as the European Commission's, recent hostility towards ISDS, is in part a well-intentioned but potentially misjudged effort to bolster the EU against perceived threats to its "supremacy." These threats have been lifted to the CJEU's direct attention through the *courant* of Euroscepticism that has rushed across Europe since the defeat of the referenda on the draft European Constitution in the Netherlands and France in 2005 and culminated in Brexit and efforts in Poland, Germany, Hungary, and elsewhere to disregard the EU law principle of primacy. The Court's impulse to wield its jurisprudential might to block rule of law "backsliding" through strict application of Articles 267 and 344 TFEU and Article 19 TEU (which the CJEU deploys to delineate EU courts' "exclusive" jurisdiction over issues of EU law) and its application of this philosophy to ISDS can be witnessed through the similar reasoning and references present in the Court's "anti-ISDS" decisions *Slovak Republic v. Achmea*, *Republic of Moldova v. Komstroy*, and *European Foods,* as well as *Portuguese Judges* and other decisions aiming to curtail misbehavior of "backsliding" governments in Poland, Hungary, and other EU Member States. Despite the CJEU and the EU's seemingly positive intentions to reinforce the "rule of law" in the EU through these actions, this article queries whether the CJEU's increasing *volonté* to unilaterally expand the jurisdiction of EU courts and issue decisions that ostensibly violate bedrock principles of customary public international law, such as *pacta sunt servanda*, is a healthy development for the post-World War II international legal order.

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I. INTRODUCTION

It is a premise that provokes little doubt: Jean Monnet, Robert Schuman, Konrad Adenauer, Alcide De Gasperi and the other fathers of the European Union ("**EU**" or "**Union**"), whose "messianic" vision of an integrated Continent on which destructive war on the scale of the mid-20th century would "never again" be possible, would abhor the suggestion that the political community they established is undermining the principles of public international law, human rights, and the rule of law.[1] What would Monnet and his fellows think of *Slovak Republic v. Achmea*, *Republic of Moldova v. Komstroy*, *Poland v. PL Holdings*, and other recent decisions of the European Court of Justice ("**CJEU**") which encourage, and presume to oblige in the name of the "supremacy" of EU law, EU Member States' nonobservance of their international legal obligations under *intra*-EU bilateral investment treaties ("**BITs**" or "**BIT**"), the Energy Charter Treaty ("**ECT**"), and other multi-lateral investment agreements ("**MIAs**")?

This piece does not dare suggest an answer to this question on the part of Jean Monnet, Robert Schuman or the other founding fathers of the EU. The less audacious, yet perhaps more prescient inquiry for international lawyers, EU citizens, and advocates of human rights, democracy and the rule of law generally is: why has the CJEU, supported by the European Commission and many EU Member States, sought to inflict a potentially damaging blow to the legitimacy of public international law in (and perhaps beyond) the EU Member States in the early 21st century? What has led us to this clash of legal regimes? This piece will suggest one possible answer to that question.

The analysis in this paper proceeds as follows: **Section II** sets the stage with a brief discussion of the history of European integration from approximately 1951 to the present, with a key focus on the crucial role of the CJEU as a *moteur d'intégration* through its doctrines of primacy[2] and direct effect; **Section III** details the concurrent rise of political and legal Euroscepticism since the mid-2000s, the CJEU's mounting disdain for investor-State dispute settlement ("**ISDS**") and public internationally law more generally, and how the court's analysis in "*anti*-ISDS" decisions such as *Achmea*, *Komstroy* and *PL Holdings* curiously track its reasoning in its so-called Article 19 TEU "rule of law" jurisprudence rebuking democratically backsliding EU Member States; **Section IV** concludes with a brief summary of arguments and speculates upon the possible implications of EU law's clash with ISDS and public international law, both within the Union and abroad.

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[1] *See e.g.* Joseph H.H. Weiler, *In the Face of Crisis – Input Legitimacy, Output Legitimacy, and the Political Messianism of European Integration*, 1 PEKING U. TRANSNAT'L L. REV. 292, 307 *et seq*. (2013); Thomas Hoerber, *The Nature of the Beast: the Past and Future Purpose of European Integration,* 1 L'EUROPE EN FORMATION 17 (2006); Franco Piodi, *From the Schuman Declaration to the Birth of the ECSC: The Role of Jean Monnet*, CVCE, https://www.cvce.eu/en/education/unit-content/-/unit/c3c5e6c5-1241-471d-9e3a-dc6e7202ca16/aa47bf8a-e49a-4318-9489-c4c61deff0bd/Resources (last visited Mar. 12, 2022).

[2] The author will refer interchangeably throughout this piece to the doctrine of "primacy" ("*primauté*" is the French word employed by CJEU itself, whose working language is French) as well as the doctrine of "supremacy" (the term for the same doctrine from *Costa v. ENEL* developed by English-speaking scholars interpreting Luxembourg's jurisprudence).

II. *PAX EUROPA* (1951-2004): THE DREAMS OF MONNET TO THE "END OF HISTORY"

Ideas about uniting Europe and projects for doing so trace back to the Roman Empire and run both triumphantly and tragically through the course of history, from Charlemagne, Otto I, Immanuel Kant, Jeremy Bentham, Napoléon, Jean-Jacques Rousseau and the Third Reich, up until the present day's EU.[3] In 1951, after nearly four decades of devasting war from the assassination of Archduke Franz Ferdinand of Serbia in June 1914 until the surrender of the Third Reich to the Allies in May 1945, six countries, France, Italy, the Federal Republic of Germany, Belgium, the Netherlands, and the small kingdom of Luxembourg, came together to establish the European Coal and Steel Community ("**ECSC**").[4] By delegating and monopolizing production and control over fundamental industrial resources—coal and steel—to a neutral supranational entity, European leaders such as Robert Schuman, the foreign minister of France, and Konrad Adenauer, then the Prime Minister of West Germany, aspired to make war in Europe not only unthinkable, but physically unachievable.[5] Increased and centralized production of the vital materials for war would also aid the ECSC countries' ally, and critical benefactor for European reconstruction through the Marshall Plan, the United States, in its endeavor to push back communism in the newly begun conflict over the Korean Peninsula.[6] The United States, France, Western Germany, Italy and other Western European nations additionally hoped that the existence and strength of the ECSC would deter Soviet encroachment beyond the Eastern bloc.[7]

In light of the initial success of the ECSC and with the support of the United States for further European integration, in 1956, the six founding member states of the ECSC signed two new treaties in Rome, Italy, collectively known as the Treaty of Rome.[8] Together, the two treaties established the European Economic Community ("**EEC**"), which endeavored to develop common economic policies and merge national markets into a single market for goods, people, capital and services, and the European Atomic Energy Community, which would replace the old ECSC and assume its functions.[9] Another key EU institution birthed by the Treaty of Rome was the Court of Justice of the European Communities, which, since the 1993 Treaty of Maastricht, has assumed the official title of the CJEU.[10]

Founded with the explicit mandate to "improv[e] continuously the standards of living and working of [European] peoples… in conformity with the principles of the Charter of the United Nations" through its jurisprudence, the CJEU in the early days of the European Communities established itself as arguably the most effective of the Community institutions

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[3] *See* Dan Vataman, *History of the European Union*, 17 LEX ET SCIENTIA INT'L J. 107, 107-08 (2010) [hereinafter *History*]; Gerard Labuda, *The Concepts of "Eternal Peace" and the Unification of Nation States in European History*, 3 POL. FOREIGN AFF. DIG. 53, 56 (2003).

[4] *History*, at 114-15.

[5] *Id.* at 112-14.

[6] Dean Rusk, *Perspectives on European Unification*, 37 L. & CONTEMP. PROBS 221, 221-22 (1972).

[7] *Id*.

[8] *History*, *supra* note 4, at 116.

[9] *Id.*

[10] *Id*.

at actually achieving European "integration."[11] Less than a decade after the signing of the Treaty of Rome in 1963, the CJEU held in *Van Gend en Loos* that the European Community ("**EC**") constituted a "new legal order of international law" that had a "direct effect" in Member States.[12] That is to say that citizens or legal entities of Member States could, independently of their governments, rely upon any provision of EC law in national court if that provision was sufficiently clear, precise, and unconditional to be considered justiciable. Leaping beyond the traditional rule of public international law, which obliged individuals and legal persons to rely on the support of their home States to bring claims before international tribunals in the system known as "diplomatic protection,"[13] the CJEU held that:

> **Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage…** According to the spirit, the general scheme, and the wording of the EEC Treaty, **Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.**[14]

In the 1964 *Costa v. ENEL* decision, the CJEU proclaimed that the exclusive force of EC law could not vary from one State to another in deference to domestic laws. Incongruence between Member State laws would jeopardize one of the key goals of the EC Treaties, which was to create an "ever closer Union" amongst the peoples of the Member States.[15] The CJEU warned in *Costa v. ENEL* that a Member State unyielding to the doctrine of "primacy" of EC law would give rise to discrimination in violation of Article 7 TEU.[16] In a series of decisions in the 1970s, the court confirmed the non-negotiable and sweeping application of the primacy doctrine to all lower courts within the EC. In the 1970 judgment *Internationale Handelsgesellscahft mbH* (also known as *Solange I*), the CJEU held that not even a fundamental rule of a Member State's constitution could displace a directly applicable provision of EU law.[17] Likewise, in *Simmenthal*, the court opined that even domestic courts of first instance, not only appeals courts or courts of cassation, must immediately give effect to EC law without awaiting the decision of a higher national body.[18]

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[11] Paul Craig, *Constitutions, Constitutionalism and the European Union*, 7 EUR. L.J. 125, 129 (2001).

[12] Case 26/62, Van Gend & Loos, 1963 E.C.R. 13 [hereinafter *Van Gend & Loos*].

[13] *See* ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 6 (2009).

[14] *Van Gend & Loos*, at ¶¶ 3–4 (emphasis added).

[15] Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 594 [hereinafter Costa v. ENEL].

[16] Costa v. ENEL, at 594 ("The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.")

[17] Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide, 1970 E.C.R. 1126.

[18] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, 1978 E.C.R. 629, ¶ 4 ("A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting

The CJEU's potency in this early period of the EC's existence was crucial in fostering "integration through law" when European integration through politics and economics faced significant hurdles.[19] With the President of the French Republic, Charles de Gaulle, opposed to several of the EC's key "federal" projects, such as the establishment of any European defense force, the approval of a Community power for direct taxation, and the expansion of the EC to include prospective Member States such as the United Kingdom, the European Council and Commission achieved little progress from approximately the mid-1960s to the early 1980s.[20] France under de Gaulle's stead adopted the "Empty Chair" policy and refused to participate in European Council meetings - a stubborn political strategy that torpedoed most progress since the Council's intergovernmental structure required unanimity of Member States for approving Council decisions.[21]

With Brussels mired in this intergovernmental quagmire, the CJEU in Luxembourg made significant contributions to European integration with decisions like *Van Gend & Loos*, *Costa v. ENEL,* and their progeny, adopting a "teleological methodology" reminiscent of the doctrinal approach of early international criminal law tribunals (*e.g.*, Nuremburg) and the International Court of Justice.[22] In this way, the CJEU filled gaps in the EC treaties to clarify and evolve the aims of the EC enterprise as a whole and became, as its own institution, the key motor of European integration between approximately 1964 and 1989.[23] Observers commended the court's achievements during this period as an encouraging example of how public international law could overcome political and economic stagnation and advance the rule of law, democracy, and respect for human rights through its own persuasive force and clever procedural adaptions.[24] Overall, the CJEU in these decades was an institution pioneering and propelling public international law's legitimacy not only within the EC

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provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.")

[19] *See, e.g.*, PAUL CRAIG AND GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 163 (4th ed. 2008) (stating that much of "the development of the Community's legal system has been brought about not by the express agreement of the States which founded the Community nor by means of a detailed plan for an integrated legal system, but through the interpretative practice and influence of the European Court of Justice."); Craig, *supra* note 11, at 129.

[20] Dean Rusk, *Perspectives on European Unification*, 37 L. & CONTEMP. PROBS. 221, 222-23 (1972).

[21] David M. Cohen, *The Cold War and the Peaceful Settlement of Disputes: A Comment*, 6 DUQ. U.L. REV. 117, 121 (1967).

[22] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Barrie Sander, *The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT. L. 299, 308, 316, 322 (noting the teleological, gap-filling method employed by judges at the International Military Tribunal at Nuremberg, the International Military Tribunal in the Far East in Tokyo, and later by the ICTY, SCSL and ICTR).

[23] Craig, *supra* note 11, at 129.

[24] Peter Hay, *The Contribution of the European Communities to International Law*, 59 AM. SOC'Y INT'L L. PROC. 195, 195, 200-01 (1965) ("The European Communities have made many specific contributions to the development of international law… Potentially the greatest contribution of the Communities lies in their policies and in the value goals [*e.g.*, the maintenance of treaty obligations and a potential "the existence or emergence of a principle of international responsibility of states to promote international development"] which they give to the international community."); Jean Allain, *The European Court of Justice Is an International Court*, 68 NORD. J. INT. L. 249 ("The achievements of the European Court of Justice in instilling the rule of law within the domain of economic integration is to witness to what extent public international law can be dynamic."); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 354 (1997).

Member States but beyond their borders: the CJEU engaged in frequent and mostly harmonious legal dialogue with the International Court of Justice, the European Court of Human Rights, and other international tribunals.[25]

The fall of the Berlin Wall in 1989 and the dismantling of the Soviet Union in 1991 ushered in a wave of hope across the West that the values of liberal democracy, human rights, and free markets had achieved a historic victory and would soon sweep across and transform the remaining "non-free" States of the world. Famously (or perhaps infamously, in retrospect), scholar and political scientist Francis Fukuyama proclaimed in a 1992 book entitled *The End of History and the Last Man* that humanity had reached "not just… the passing of a particular period of post-war history, but the end of history as such: That is, the end-point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government."[26] Unsurprisingly, a renewed fervor for integration also began to stir in the EC capital of Brussels; the potential expansion of the EC to include the Eastern and Central European States of the former Soviet bloc was a particularly exciting and inspiring prospect and would unite the formerly divided Continent to complete Monnet and Schuman's vision.[27] It was time to re-welcome the Eastern and Central European States into the grand project of European integration, and the EC's values of liberal democracy, human rights, and the rule of law, now that the Iron Curtain had been lifted.

Propelled by this *courant* of optimism, in 1989 a committee chaired by French Foreign Minister Jacques Delors set out a three-stage plan for a common currency that would be known as the "Euro" and would launch across the EC Member States at the turn of the new millennium in 2000.[28] Four years later, in 1993, the Treaty on the European Union (also known as the Maastricht Treaty or the "**TEU**") came into effect, renaming the former EC to become the modern-day European Union ("**EU**"). Among its other achievements, the Maastricht Treaty established the Eurozone and the European Central Bank and delegated new areas of competence to the EU such as culture, public health, consumer protection and trans-European networks.[29] In 1995, the Schengen Agreement, which had originally been

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[25] *See, e.g.*, Case C-286/90, Anklagemyndigheden v. Peter Michael Poulsen, 1992 E.C.R. I-6048, ¶ 10 (citing *Gulf of Maine (Canada v. United States*), *Continental Shelf (Libya v. Republic of Malta)* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States*)); Case T-115/94, Opel Austria GmbH v. Council of the European Union, 1997 E.C.R. II-43, ¶ 77 (noting that the Vienna Convention on the Law of Treaties of 1969 had been found to represent customary international law for the ICJ and "hence the Community [was] bound by the rules codified by the [Vienna] Convention" under the rules of public international law, which was part of binding EU law); Case C-400/10 PPU, J. McB v. L.E., 2010 E.C.R. I-8992, (citing the Eur. Ct. H.R.); Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, 2010 E.C.R. I-11117 (same); Case C-351/04, IKEA Wholesale Ltd. v. Comm'rs of Customs & Excise, 2007 E.C.R. I-7771 (citing the WTO Appellate Body).

[26] Francis Fukuyama, *The End of History?*, 16 THE NAT'L INT. 3, 4 (1989).

[27] *See, e.g.*, Heather Grabbe, *EU Expansion and Democracy*, 5 GEO. J. INT'L AFFAIRS 73, 74 (2004); Craig, *supra* note 11, at 135-36.

[28] *The Delors Report*, CVCE, https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/021072be-929c-4ca0-ad76-32760b5dc2ff (last visited Mar. 12, 2022).

[29] *See* Neil B. Murphy, *European Union Financial Developments: The Single Market, the Single Currency, and Banking*, 13 FDIC BANKING REV. 1, 6 (2000); Christian Salm & Wilhelm Lehmann, *Jacques Delors: Architect of the modern European Union*, EUROPEAN PARLIAMENT (2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652009/EPRS_BRI(2020)652009_EN.pdf; Michael

signed in June 1985 by only five of the ten Member States of the EEC, was officially made into EU law, eliminating the requirement for individuals traveling within EU borders to show passports or visas at the signatories' common borders.[30] In that same year, Austria, Finland, and Sweden acceded to the EU.[31]

Meanwhile, the EU and its Member States explicitly encouraged Central and Eastern European States such as the Czech Republic, Estonia, Hungary, Latvia , Lithuania, Poland, Slovakia, Slovenia and others to sign bilateral investment treaties ("**BITs**" or "**BIT**") and MIAs in order to foster respect for the rule of law, liberal democracy, and human rights, including and importantly, the property rights of EU investors.[32] That the Central and Eastern European States sign BITs and MIAs with EU Member States and offer ISDS to foreign investors was seen as a key and necessary step for those States to prepare themselves for eventual EU accession.[33]

Further, the EU itself in 1994 became a party to the Energy Charter Treaty ("**ECT**") along with all its then-Member States and most of the former Soviet bloc States. The European Commission, the executive arm of the EU's governing structure, was a key proponent of the ECT, which it saw as a crucial tool for protecting its Member States' investments in Central and Eastern Europe following the collapse of the Soviet Union and considering the unstable nature of the new, post-communist legal orders in former Soviet bloc countries.[34] In order to discourage these States and their newly established—and often tumultuous—democratic institutions from taking arbitrary, discriminatory, and financially harmful measures towards investors from EU Member States, Article 26 ECT granted investors the right bring claims to vindicate their property rights before international investment arbitration tribunals, which would decide disputes in accordance with the ECT and applicable rules of public international law.[35] At the time of the ECT's conclusion, there was no hint that the EU considered the ECT inapplicable as between EU Member States *inter*

H. Abbey & Nicholas Bromfield, *A Practitioner's Guide to the Maastricht Treaty*, 15 MICH. J. INT'L L. 1329, 1331-34 (1994).

[30] Elizabeth Whitaker, *The Schengen Agreement and Its Portent for the Freedom of Personal Movement in Europe*, 6 GEO. IMMIGR. L.J. 191, 192 (1992).

[31] *The accession of Austria, Finland, and Sweden to the European Union*, CVCE, https://www.cvce.eu/en/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/ff4dba1b-7691-48a8-b489-51393c82c951 (last visited Mar. 12, 2022).

[32] *See e.g.* Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Final Award, ¶¶ 324-25 (Dec. 11, 2013) (noting that Article 74 of Romania's Europe Agreement with the EU, which paved the way for its later accession to the Union, encouraged Romania and then-EU Member States to conclude "Agreements for the promotion and protection of investment […]") [hereinafter Micula Final Award]; Nikos Lavranos, *Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence to Permanent Conflict*, KLUWER ARB. BLOG(Jan. 13, 2022), http://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-eu-law-from-peaceful-co-existence-to-permanent-conflict/ [hereinafter *Regime*].

[33] *See Regime*, *supra* note 32; Micula Final Award, *supra* note 32; Kenneth R. Propp, *Bilateral Investment Treaties: The U.S. Experience in Eastern Europe*, 86 AM. SOC. INT'L L. PROC., 540, 542-43 (1992) [hereinafter *Bilateral Investment*].; Andrew E.L. Tucker, *The Energy Charter Treaty and Compulsory International State/Investor Arbitration,* 11 LEIDEN J. INT'L L. 513, 514 (1998) [hereinafter *Energy Charter*].

[34] *See Regime*, *supra* note 32; *Bilateral Investment*, *supra* note 33, at 542-43; *Energy Charter*, *supra* note 33, at 514.

[35] The Energy Charter Treaty, art. 26(3)-(6), Apr. 16, 1998, 2080 U.N.T.S. 100.

se.[36] Nor was there any concern, with the accession of many former Soviet bloc States in 2004 to the EU—including the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, and Slovakia as well as Cyprus and Malta—that those countries' hundreds of now *intra*-EU BITs posed a problem from the perspective of EU law and *Costa v. ENEL*'s supremacy doctrine.[37]

III. THE RISE OF EUROSCEPTICISM AND THE EU'S OPPOSITION TO INTERNATIONAL INVESTMENT ARBITRATION (2005-PRESENT)

The early 2000s dealt the first significant blow of the post-Cold War period to the EU's burgeoning confidence that further European integration was inevitable and might even transform the Union into a world hyperpower on par with the United States.[38] In 2002, with Brussels' blessing, former French president Valéry Giscard d'Estaing, along with Giuliano Amato, the former Prime Minister of Italy, and Jean-Luc Dehaene, the former Prime Minister of Belgium, convened and presided over the Convention on the Future of Europe, which produced a draft Constitution for Europe in 2004.[39] The draft Constitution contained 448 articles, most notably an explicit Supremacy Clause, Article I-6.[40] The Convention adopted the draft Constitution in October 2003 and outlined a schedule for the document to be put before the national legislatures of the then 25 Member States for ratification in the spring and summer of 2005.[41] In April and May 2005, however, during national referenda taken within less than a week from each other, voters in France and the Netherlands rejected the draft Constitution on 29 May 2005 and 1 June 2005 respectively.[42]

Although the draft Constitution received the support of the major center-right and center-left political parties in each country and initial polling predicted the document would be approved by voters with significant majorities,[43] the French and Dutch electorates revealed certain profound and long-harbored anxieties about the delegation of further authority to Brussels. In both countries, exit polling and retrospective analysis revealed citizens' skepticism for the admission of more Central and Eastern European countries and

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[36] One of the most convincing pieces of evidence in this regard is the lack of inclusion of a disconnection clause in the ECT; a disconnection clause has been included in certain treaties to make them, in whole or in part, inapplicable between EU Member States. *See e.g.,* THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 91 (2011); Christian Tietje, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*, MARTIN LUTHER UNIV. INSTITUTE OF ECON. L. (2008), https://ssrn.com/abstract=1625323.

[37] *See Regime*, *supra* note 32.

[38] *See generally, e.g.,* T.R. REID, THE UNITED STATES OF EUROPE: THE NEW SUPERPOWER AND THE END OF AMERICAN SUPREMACY (2005).

[39] Ina Sokolska, *The Treaty of Nice and the Convention on the Future of Europe*, FACT SHEETS ON THE EUROPEAN UNION, https://www.europarl.europa.eu/factsheets/en/sheet/4/the-treaty-of-nice-and-the-convention-on-the-future-of-europe (last visited Mar. 12, 2022).

[40] Treaty Establishing a Constitution for Europe art. I-6, Dec. 16, 2004, 2004 O.J. (C-310/1), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:C2004/310/01&from=EN.

[41] European Parliament, Brochure on the European Constitution, 10 Jan. 2005, 6.

[42] Sara Binzer Hobolt & Sylvain Brouard, *Contesting the European Union? Why the Dutch and the French Rejected the European Constitution*, 64 POL. RSCH. Q. 309, 309 (2011).

[43] *See e.g.*, *id.* at 312 (a December 2004 poll taken in France shortly after President Chirac announced there would be a referendum on the draft Constitution showed 60% approval for the document).

even potentially a non-Judeo-Christian Member State, Turkey, into the Union.[44] Voters also perceived Brussels, EU leaders, and even their own *européiste* domestic politicians as removed and alienated from the potential damage that expansion and immigration would inflict upon Member States' unique national identities, local languages, and the quality of social services.[45] Lacking the unanimous consent from all Member States required for ratification, EU leaders abandoned the draft Constitution project within several months and instead resolved to negotiate a watered-down version of the Constitution, a new TEU which would be called the Lisbon Treaty.[46] Four years later, in 2005, the Lisbon Treaty was finalized and ratified without significant opposition by all of the EU Member States. The Lisbon Treaty granted Brussels new competences (including, importantly for this piece, competence over foreign direct investment ("**FDI**") and trade negotiations) and retained many of the Constitution's original provisions.[47] However, Article 4 TEU, in an explicit rebuke to the supporters of a more federalist and integrated Europe, obliged the Union to:

> **respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including the territorial integrity of the State, maintaining law and order and safeguarding national security**. In particular, national security remains the sole responsibility of each Member State.[48]

The rejection of the draft Constitution presaged the gravest blow that the 2016 Brexit referendum would deal to EU leaders' dream of an "ever closer union" and put into the global spotlight many EU citizens' growing disillusionment with Brussels. Although participation rates in European Parliamentary elections since their inception in 1979 dropped nearly twenty percentage points (from 62% in 1979 to 43% in 2009),[49] as Fukuyama's 1992's book and its widespread popularity among global elites and the academy demonstrated, many EU leaders before the 2005 referenda believed the achievement of Schuman and Monnet's vision of an "ever closer Union" and establishing a federal "United States" of Europe to be the inevitable and natural result of the West's

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[44] *Id*. at 315.

[45] *Id*. at 315–17.

[46] Eeva Pavy, *The Treaty of Lisbon*, FACT SHEET ON THE EUROPEAN UNION, https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon (last accessed Mar. 12, 2022).

[47] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 188 C(4), Dec. 13, 2007, 2007, O.J. (C 306) 1 [hereinafter TEU].

[48] *Id*. art. 4. This provision has been described by scholars as an "identity lock" or "identity clause." *See e.g.*, Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 45 NETH. J. OF LEGAL PHIL. 82, 84 (2016).

[49] *Quality of life indicators – governance and basic rights*, EUROSTAT, https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=420994#Voter_turnout (last accessed July 13, 2023).

triumph over communism and the fall of the Soviet Union.[50] The very public eruption of French and Dutch voters' long-simmering Euroscepticism was a rude awakening for *européiste* leaders in Brussels and national capitals as well as the judges of the CJEU in Luxembourg, whose rulings had been so crucial to the integration process since *Van Gend & Loos* in 1963.

Indeed, before the referenda of 2005, the thought that Eurosceptic politicians would ever occupy executive offices in key European capitals or that national courts would expressly disapply long-settled principals of *Costa v. ENEL* (supremacy of EU law) or *Van Gend & Loos* (direct effect) was not seriously considered. In France, for example, when the far-right politician Jean-Marie Le Pen shocked both domestic and international political elites by reaching the final, *deuxième tour* of the French presidential election in April 2002, Le Pen was a Holocaust denier and ridiculed for his suggestion that France would be better off leaving the EU.[51] A month later, French voters would reject Le Pen and re-elect incumbent President Jacques Chirac by an overwhelming margin of 82% to 18% in May 2002.[52] Twenty years later, in the second round of the 2022 French presidential election, Marine Le Pen, Jean-Marie Le Pen's daughter, scored just seventeen percentage points behind incumbent President Emmanuel Macron, doubling her father's score from 2002.[53] Like her father, Le Pen disfavors a federal Europe and has previously supported France's exit from the Union and/or the Eurozone.[54] Le Pen's gains and her now near-constant presence in the final rounds of French presidential elections demonstrates how Euroscepticism, in merely two decades, has gone from a fringe to a very much mainstream political ideology in France and elsewhere across the EU.

Elsewhere, since the 2005 rejection of the draft Constitution, voters have elected Eurosceptic politicians to high executive offices in Member States such as Hungary, Poland, Italy, and of course, the UK.[55] Eurosceptic political parties in the past decade have also garnered significant shares of the vote in national and regional elections in Germany, Greece, Austria, Slovenia, Spain, Denmark, Sweden and other Member States.[56] Even the

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[50] *See, e.g.*, *Dutch say 'devastating no' to EU constitution*, THE GUARDIAN, https://www.theguardian.com/world/2005/jun/02/eu.politics (last updated June 2, 2005).

[51] Angelique Chrisafis, *Jean-Marie Le Pen fined again for dismissing Holocaust as 'detail,'* THE GUARDIAN, https://www.theguardian.com/world/2016/apr/06/jean-marie-le-pen-fined-again-dismissing-holocaust-detail (last updated Apr. 6, 2016).

[52] *2002: Chirac-Le Pen, le choc inattendu*, RADIO FRANCE INTERNATIONALE, (2017), *available at* https://savoirs.rfi.fr/fr/comprendre-enrichir/histoire/2002-chirac-le-pen-le-choc-inattendu.

[53] *Présidentielle 2022 : Résultats nationaux, 2ème tour, Mis à jour le 28/04/2022 à 14h24*, BFMTV, https://elections.bfmtv.com/resultats-presidentielle/ (last updated Apr. 29, 2022).

[54] *See France's Marine Le Pen hails Brexit, urges 'Frexit' vote*, AGENCE FRANCE PRESS, https://news.yahoo.com/frances-marine-le-pen-hails-brexit-urges-frexit-003751371.html (last updated June 23, 2016). In preparation for the 2022 presidential election, in moves termed by the French political press as a "*dédiabolisation*," Le Pen has rescinded her previous support for "Frexit" and the return to the franc, France's pre-Euro currency. *See* Anne Damiani & Mathieu Pollet, *Abandon du Frexit et écologie : pourquoi le programme du Rassemblement national fait peau neuve*, EURACTIV, https://www.euractiv.fr/section/elections/news/abandon-du-frexit-et-ecologie-le-programme-du-rassemblement-national-fait-peau-neuve/ (last updated Apr. 7, 2021).

[55] Jon Henley, *Support for Eurosceptic parties doubles in two decades across EU*, THE GUARDIAN (Mar. 2, 2020, 2:15 PM), https://www.theguardian.com/world/2020/mar/02/support-for-eurosceptic-parties-doubles-two-decades-across-eu.

[56] *See id.*; *see also* Georgina Prodhan, *Austria's Freedom aims to enlarge Eurosceptic bloc*, REUTERS (Dec. 14, 2013, 1:58 PM), https://www.reuters.com/article/us-europe-right-austria-idUSBRE9BD0DD20131214;

European Parliament has not been immune to the wave of Euroscepticism sweeping the Continent in the early 21st century.[57] Belief in the theory of the "end of history" and a federal Europe being the natural result of the victory of the West over fascism and communism has quickly been dampened—if not wholly extinguished—in certain corners.

A. EU NATIONAL COURTS CONTEST *COSTA V. ENEL'S* DOCTRINE OF SUPREMACY

Coinciding with the rise of Eurosceptic political parties has been national courts' pushback on the CJEU's perceived jurisdictional overreach and the core EU law doctrines of primacy and direct effect. The constitutional court of Germany, the Bundesverfassungsgericht ("**BVerfG**"), since 1994 has produced a series of decisions cautioning Brussels and Luxembourg not to overstep their mandates under the EU Treaties. In *Brunner v. the European Treaty*, the BVerfG rejected the petitioner's argument that Germany's ratification of the Maastricht Treaty constituted a breach of Article 38 of the Constitution of the Federal Republic of Germany, which prohibits the Bundestag from surrendering its general legislative powers; however, in this carefully worded decision, the BVerfG also warned European lawmakers, as well as the CJEU, that the BVerfG would not abandon its constitutional duty to ensure that the EU did not stray beyond the express competences delegated to it by the Member States in the Maastricht Treaty.[58] The BVerfG stated that it would continue to monitor EU institutions' exercise of power to verify that regulations, decisions, and other presumptive forms of lawmaking complied with the terms of the EU Treaties and the German Constitution.[59]

In a 2009 decision nearly fifteen years after *Brunner* on a petition challenging the legality of Germany's ratification of the Treaty of Lisbon, the BVerfG again emphasized that European integration on the basis of the EU Treaties' must not be undertaken in such a way that there was not sufficient space for Member States to construct the political formation of unique economic, cultural, and social living conditions.[60] This judgment, resonant with the spirit of the French and Dutch referenda of 2005, noted that domains of

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Nikolaj Nielsen, *Anti-immigrant party wins Slovenia election*, EU OBSERVER (June 4, 2018, 9:29 AM), https://euobserver.com/eu-election/141981; Danielle Lee Tomson, *The Rise of Sweden Democrats: Islam, Populism and the End of Swedish Exceptionalism*, THE BROOKINGS INSTITUTION, https://www.brookings.edu/research/the-rise-of-sweden-democrats-and-the-end-of-swedish-exceptionalism/ (last updated Mar. 25, 2020); Robin-Ivan Capar, *Wall in: The Eurosceptic challenge in Croatia*, EUR. COUNCIL ON FOREIGN REL., https://ecfr.eu/article/commentary_wall_in_the_eurosceptic_challenge_in_croatia/ (last updated Jan. 16, 2019); Sabina Zawadzki & Teis Jensen, *Danish centre-right opposition wins election, PM quits party*, REUTERS (June 18, 2015, 8:18 PM), https://www.reuters.com/article/us-denmark-election-idUSKBN0OY0T120150619.

[57] *Euroskeptic Parties Gains in European Parliament Elections*, NBC NEWS (May 25, 2014, 8:48 PM), https://www.nbcnews.com/news/world/euroskeptic-parties-gains-european-parliament-elections-n114361.

[58] Cases BvR 2134/92 & 2159/92, Brunner v. Eur. Union Treaty, 1 C.M.L.R. 57 (1994).

[59] *Id.*

[60] BVerfGE, June 30, 2019, 2 BvE 2/08, ¶ 1, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

citizenship; civil and military monopoly on the use of force; taxation; protection of national languages and culture; family and education; freedom of the press and association; and religion, would continue to come under the exclusive law-making and regulatory competence of the Member States.[61]

More explicit challenges to *Costa v. ENEL* and the CJEU's primacy doctrine have also sprung forth from the Danish, German, Italian, Polish, and Hungarian courts in the last decade. The Danish Supreme Court ("**SCDK**") in 2016, after receiving orders from the CJEU after an Article 267 TFEU reference to disapply contrary provisions of the Danish Salaried Employees Act ("**DSEA**") to give primacy to Directive 2000/80/EC, held instead that it would not yield to the CJEU's conclusion that the "judge-made" general principles of EU law on non-discrimination could be binding upon Denmark.[62] In the so-called *Ajos* case, the claimant, Mr. Rasmussen, was a former industrial worker who had been dismissed by his employer, Ajos, at age sixty, without any severance.[63] Mr. Rasmussen's heirs argued in trial court that Mr. Rasmussen's employer's refusal to provide Mr. Rasmussen with at least three months' severance amounted to discrimination on the ground of age, in violation of Directive 2000/80/EC and the general principle of non-discrimination for reasons of age in EU law.[64] Ajos objected to Mr. Rasmussen's heirs' request in court by relying on the DSEA, which does not require an employer to pay severance to dismissed employees when they are (i) entitled to an old-age pension under Danish law; and (ii) had joined a pension scheme before the age of fifty.[65] The case reached the SCDK, which referred two questions on these issues to the CJEU through Article 267 TFEU's preliminary reference mechanism.[66]

In its response to the CJEU's Article 267 TFEU decision, the SCDK justified its findings by noting that the general principle of EU law on non-discrimination on grounds of age had no basis in any specific provision of either the TEU or the TFEU.[67] The SCDK opined that it had a duty under the Danish Constitution to interpret the EU Treaties and so-called "general principles of EU law" in light of the limited competences delegated to the EU under the Danish EU Accession Act.[68] Thus, even after the Article 267 TFEU reference encouraged the court to allow the claimant to rely on Directive 2000/70/EU to force his employer to grant him three months' severance, SCDK demurred and validated the employer's defense based on the DSEA.[69] This was one of the first explicit rebukes of the CJEU's doctrine of primacy emanating from the court of a Western European Member State.

In a judgment that same year, the BVerfG also engaged in a tense conversation with the CJEU regarding the legality of the European Central Bank ("**ECB**")'s Outright

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[61] *See, e.g.*, *id.* ¶¶ 249–53.

[62] Martina Benackova, *Ajos (Dansk Industri) –A Challenge to the Primacy of EU Law?* KSLR EU L. BLOG, https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1150 (last updated Sept. 4, 2017).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

Monetary Transactions Program ("**OMT Program**").[70] The ECB, which is an independent and neutral body according to Article 282(3) TFEU, devised the OMT Program in 2012 with the goal of preventing the break-up of the Eurozone in the wake of the Greek, Italian, Portuguese, and Spanish debt crises; under the auspices of the OMT Program, which received near-unanimous approval from the Governing Council of the ECB (the sole dissenting vote being from the President of Germany's federal bank, the Bundesbank), the ECB would purchase bonds of struggling EU Member States in secondary markets in order to decrease borrowing rates for those countries.[71] In Germany, a country where the risk of irresponsible fiscal and monetary policy has haunted the national psyche since the hyperinflation of the 1920s and early 1930s during the Weimar Republic, the OMT Program was met with more skepticism than any other EU Member State. Bundestag representative Peter Gauweiler and the left-wing socialist party Die Linke quickly challenged the compatibility of the OMT Program with the EU Treaties and the German Constitution in German trial court.[72] Their case, *Gauweiler*, eventually made its way to the BVerfG, which referred several questions on the OMT Program to the CJEU in January 2014.[73]

After receiving the Article 267 TFEU reference back from the CJEU affirming the legality of the OMT Program under EU law, the BVerfG, in its *Gauweiler* judgment, did not hesitate to voice its doubt on the correctness of Luxembourg's decision. The BVerfG cautioned that should EU organs such as the ECB act beyond their mandates, the German court would not hesitate to rule that such acts would not be democratically legitimate and would violate the principle of popular sovereignty as enshrined in the German Constitution.[74] In such a scenario where an EU institution acted in breach of the German Constitution, the BVerfG would exert its duty to render the disputed act void in Germany, regardless of whatever the CJEU had to say according to the doctrine of primacy under *Costa*.[75] The court opined that Article 38(1) of the German Constitution would additionally grant a right to German petitioners to challenge alleged *ultra vires* acts of the EU before the BVerfG in a situation where the EU organ's transgression of competences was sufficiently serious.[76] Although this time the BVerfG accepted the CJEU's holding that the ECB's OMT Program did not violate either the EU Treaties or the German Constitution, it criticized the CJEU for not properly analyzing policymakers' contention that the program pursued proper monetary policy objectives and failing to strictly review the extent of the ECB's competences.[77] The CJEU's failures were even more troubling, according to the BVerfG, in light of the non-elected character of ECB officials.[78] The court

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[70] Case C-62/14, Gauweiler v. Deutscher Bundestag, 2015 E.C.L.I. 400 [hereinafter Gauweiler].

[71] Mehrdad Payandeh, *The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture*, 13 EUR. CONST. L. REV. 400, 400-02 (2017).

[72] Gauweiler, *supra* note 70, at ¶¶ 1-3, 19-24.

[73] *Id*. at ¶¶ 1-2.

[74] *Id*.

[75] BVerfG, 2 BvR 2728/13, June 21, 2016, ¶ 81, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html.

[76] *Id*. at ¶¶ 83-88.

[77] *Id*. at ¶¶ 181-89.

[78] *Id*. at ¶ 189.

also warned the CJEU that it would reserve the right to review and declare EU organs' to have exceeded their competences in the EU Treaties even if the CJEU delivered a "thorough and well-reasoned interpretation" to the BVerfG in an Article 267 TFEU preliminary reference response.[79]

In a May 2020 decision, the BVerfG followed through on its warning that it would declare actions of EU institutions *ultra vires* even if the CJEU had ruled to the contrary in an Article 267 TFEU reference.[80] In this decision, for the first time since *Ajos*, the highest court of an EU Member State declared that it would disapply *Costa*'s supremacy principle with regard to the OMT Program. In its ruling, the BVerfG held that the CJEU had "exceed[ed] its judicial mandate" since its interpretation of the EU Treaties was "not comprehensible," "arbitrary" and thus lacked the "minimum of democratic legitimation necessary" under Germany's Basic Law.[81] The court added that it was highly concerned that the CJEU only analyzed the ECB's actions according to a "limited standard of review," a practice it feared might lead to the "continual erosion of Member State competences."[82] As a result, the BVerfG declared that neither it nor any of the German lower courts would be bound by the CJEU's finding that the ECB had not exceeded its competences in promulgating the OMT Program.[83] It also ordered Germany's Central Bank, the Bundesbank, to withdraw from the OMT Program unless a new proportionality assessment was undertaken by the ECB within three months.[84]

The Italian Constitutional Court similarly clashed with the CJEU over a question of fundamental rights, the principle of legality, and the doctrine of supremacy of EU law in the 2017 *Taricco II* judgment. In 2015, the CJEU issued a judgment, known as *Taricco I,* after a preliminary reference from the trial Court of Cuneo ordering Italian courts to disapply the domestic statute of limitations barring prosecution for individuals accused of VAT fraud to uphold the supremacy of Article 325 TFEU, which protects the financial interests of the EU.[85] Apparently concerned that the Italian judicial system was working too slowly to prosecute financial miscreants and that such delay should not prejudice EU entities' proper collection and redistribution of taxes, the CJEU in *Taricco I* omitted any consideration of the principle of legality, under which the State must treat accused persons in a fair and non-arbitrary manner and conduct prosecutions within the set timeframe according to the applicable law.[86] The Italian Constitutional Court observed this gross

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[79] *Id*. at ¶ 150.

[80] BVerfGE, 2 BvR 859/15, May 5, 2020, ¶¶ 1-10, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

[81] *Id*. at ¶ 2.

[82] *Id.* ¶ 4.

[83] *Id*. ¶ 10.

[84] *See also* Nick Kenny, *The German Constitutional Court vs the European Court of Justice: The Fracturing of the European Legal Order?*, JURIST, (June 2, 2020, 3:22 PM), https://www.jurist.org/commentary/2020/06/nick-kenny-german-constitutional-court-eu/.

[85] Case C-105/14, *Ivo Taricco and others*, E.C.L.I:EU:C:2015:555, ¶¶ 49-52 (Aug. 9, 2015).

[86] In Italy as in many other countries, the statute of limitations increases in magnitude with the perceived gravity of the crime, allowing the State more leeway to prepare cases against those accused of having committed severe infractions vis a vis those accused of lesser crimes. *See* Giovanni Zaccaroni & Francesco Rossi*, Settling the dust? An analysis of Taricco II from an EU constitutional and criminal law perspective*, EUR. L. BLOG,

lacuna in *Taricco I* and, in the *Taricco II* judgment of January 2017, sent its own Article 267 TFEU preliminary reference to the CJEU, inviting Luxembourg to overturn or refine its *Taricco I* judgment.[87] The Italian Constitutional Court, like the BVerfG and the SCDK, fired a direct warning shot across the bow of the CJEU and *Costa v. ENEL*'s doctrine of primacy:

> It is not disputed that, when it comes to criminal law, the principle of legality does amount to a supreme principle of the legal order aimed at protecting inviolable rights of individuals to the extent that it requires criminal provisions to be precise and it prevents criminal provisions from having any retroactive effects in peius [i.e., the State cannot try and convict an accused after the statute of limitations set by law has run]…
>
> If Article 325 of the Treaty on the Functioning of the European Union results in a legal norm that is contrary to the principle of legality… **the Constitutional Court will have the duty to prohibit it.**[88]

After a second review, the CJEU noted the warnings of the Italian Constitutional Court and allowed Italian courts' effective disapplication of the doctrine of supremacy if granting Article 325 TFEU precedence in certain VAT fraud prosecutions would jeopardize the rights of Italian defendants under Articles 160(3) and 161(2) of the Italian Criminal Code and Article 25 of the Italian Constitution (both of which define the principle of legality as a fundamental right).[89]

The two latest EU Member States who have revolted against the doctrine of primacy of EU law are Poland and Hungary, whose far-right leaders have undertaken targeted measures to encourage (or even oblige) national courts to disapply certain decisions of the CJEU and other EU institutions.

On 7 October 2021, the Polish Constitutional Court rendered a long-awaited judgment in which it held that certain provisions of the EU Treaties would not be given precedence over the Polish Constitution.[90] The court specifically targeted two provisions of the TEU: Article 1, which establishes the EU and provides for the transfer of certain competences from the Member States to Brussels, as well as Article 19, which grants the CJEU the

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https://europeanlawblog.eu/2018/04/12/settling-the-dust-an-analysis-of-taricco-ii-from-an-eu-constitutional-and-criminal-law-perspective/ (last updated Apr. 12, 2018).

[87] Corte cost. [Constitutional Court], 23 novembre 2016, n. 24, Racc. uff. corte cost. 2017, n.5, ¶ 2 (It.); *see also* Pietro Faraguna, *The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna*, VERFASSUNGSBLOG, https://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna/ (last updated Jan. 31, 2017).

[88] Marco Bassini & Oreste Pollicino, *The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution*, VERFASSUNGSBLOG, https://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/ (last updated Jan. 28, 2017) (emphasis added).

[89] *Id*.; *see also* Zaccaroni & Rossi*, supra* note 86.

[90] Renata Uitz, *The Polish Constitutional Tribunal Asserts the Primacy of National Constitution over EU Law—In Words with No Legal Force*, DUBLIN CITY U.: THE BREXIT INST., https://dcubrexitinstitute.eu/2021/10/poland-constitution-eu-law/ (last updated Oct. 8, 2021).

authority to ensure EU law's uniformity and "full effectiveness" across the Member States.[91] In essence, and expanding upon the BVerfG's May 2020 decision that decided that at least one decision of the CJEU regarding the OMT Program would not be applied in Germany, the Polish Constitutional Court declared that *Costa v. ENEL* and the doctrine of supremacy of EU law were no longer fully in force in Poland.[92] In response to this decision and other intransigencies of the current Polish government, which is dominated by the far-right and Eurosceptic Law and Justice Party, the Commission and the CJEU have rebuked Poland by ordering it to pay Brussels EUR 1 million each day that Poland refuses to recognize the supremacy of EU law.[93]

Two months later, in December 2021, the Hungarian Constitutional Court in Budapest also questioned the doctrine of supremacy, albeit more obliquely than its Polish counterpart. In a ruling on a petition from Prime Minister Viktor Orban's government challenging the legality of the CJEU's order that Hungary cease and desist barring all asylum seekers from the country and deporting them without due process, the court held that in areas of shared competence between a Member State and the EU, Hungary maintained the right to set the prerogative for immigration policy.[94] Although the court declined to specifically rule on the government's petition or to challenge *Costa v. ENEL* in anything but *obiter dicta*, President Orban later declared in a press conference that Hungary would continue to ignore the CJEU's decision ordering Hungary to abide by the EU Treaties and the EU Charter on Fundamental Rights.[95] Such is the latest instance of an EU Member State and its Eurosceptic executive, assisted by its national courts, defying the doctrine of primacy of EU law.

Taken together, the decisions of Danish, German, Italian, Polish, and Hungarian courts have led commentators to observe that the EU and the CJEU particularly face the greatest "rule of law" crisis in the European integration project begun by Monnet, Schuman, de Gaspieri, and the other founders in the early 1950s.[96]

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[91] *Id*.

[92] *Id.*; s*ee also Polexit? Fury in Brussels after Warsaw court rules Polish Constitution overrides EU law*, EURONEWS, https://www.euronews.com/2021/10/07/polish-court-rules-some-eu-laws-clash-with-country-s-constitution (last updated Oct. 8, 2021).

[93] *EU court fines Poland 1 mln euros per day in rule of law row*, REUTERS, (Oct. 27, 2021, 9:28 AM), https://www.reuters.com/world/europe/eu-top-court-orders-poland-pay-1-million-euros-day-rule-law-row-2021-10-27/.

[94] Zoltan Simon & Marton Kasnyik, *Hungarian Top Court Ruling Emboldens Orban in Fight With EU*, BLOOMBERG, (Dec. 10, 2021, 10:33 AM), https://www.bloomberg.com/news/articles/2021-12-10/hungary-court-opens-way-to-challenge-eu-law-in-nuanced-ruling.

[95] Justin Spike, *Orban: Hungary will defy EU court ruling on asylum policy*, YAHOO! NEWS, https://news.yahoo.com/orban-hungary-defy-eu-court-155211592.html?soc_src=social-sh&soc_trk=ma (last updated Dec. 21, 2021).

[96] *See e.g.* Swedish Institute of European Policy Studies, *Webinar December 3rd The rule of law, the European Court of Justice, and the future of the EU*, YOUTUBE, at 13:15 (Dec. 22, 2021), https://youtu.be/TQKLx0h4sG4.

B. THE CJEU AND COMMISSION'S REINFORCEMENT OF THE DOCTRINE OF SUPREMACY AND OPPOSITION TO THE "THREAT" OF ISDS AND PUBLIC INTERNATIONAL LAW

As the primacy of EU law has become increasingly threatened within the Union's borders and the Article 267 TFEU preliminary reference mechanism has ceased to always yield results in the EU's favor, the Commission and the CJEU together have attempted to reinforce the EU's legal supremacy in other ways. One method is a newly emerged hostility towards ISDS and public international law more generally. This shift in attitude on the part of both the Commission and the CJEU, which has revealed itself in a series of actions over the past fifteen years, is perhaps viewed in the best light as a well-meaning attempt on the part of the EU and its highest court to shield the Union from perceived "threats" to the EU's legitimacy and primacy originating outside the EU legal order. Although the CJEU in its early decades maintained a mostly harmonious and collaborative relationship with public international law, it does not seem to be a coincidence that EU law's attempted "divorce" from its public international law origins has coincided with the rise in Euroscepticism and national court backlash towards *Costa v. ENEL*'s doctrine of supremacy seen in the early 21st century, most especially after the draft Constitution's defeat in 2005. Luxembourg's combative and dismissive approach towards public international law and principles of treaty interpretation has perhaps most famously manifested itself in the CJEU and the Commission's attempt to dismantle ISDS within the EU since 2006.

i. MID-2000S: THE COMMISSION ANNOUNCES OPPOSITION TO *INTRA*-EU BITS

Despite the fact that Article 21(1) TEU itself mandates the EU to promote democracy, human rights, the principles of solidarity and equality, as well as "the principles of the United Nations and international law" and that the Commission itself in the 1990s had encouraged many Central and Eastern European States aspiring to EU membership to sign BITs and MIA,[97] certain EU Member States, and eventually the Commission, began to shift their attitudes with respect to the EU's relationship with international investment law starting in the mid-2000s.

In *Eastern Sugar v. Czech Republic*, a case which concerned French and British sugar companies' investments in the Czech Republic through a Dutch subsidiary and the Czech Republic's alleged violation of the Netherlands-Czech Republic BIT, the Czech Republic exhibited a letter from the European Commission to support a unique and new jurisdictional objection that had never been seen before in ISDS: the Czech Republic claimed on the basis of the Commission letter, addressed to the Czech Minister of Finance in January 2006, that *intra*-EU BITs such as the Netherlands-Czech Republic BIT, were contrary to the principles of uniformity and primacy of EU law and should thus be

[97] *See Regime*, *supra* note 32; Consolidated Version of the Treaty on European Union, art. 21(1), 2012 O.J. (C 326) 13, 28.

terminated by Member States in accordance with the termination procedure outlined in the BIT.[98]

Although the Commission in its letter did not (yet) contend that investment disputes concerning facts before an EU Member State's accession to the EU Treaties should fall within the exclusive jurisdiction of Member State courts, it advised that any arbitral tribunal constituted under the Netherlands-Czech Republic BIT (and presumably other BITs) should not opine on any area falling under EU competences.[99] Furthermore, the Commission announced its concern that the existence of the-then 150 *intra*-EU BITs might lead to discriminatory treatment in favor of investors of certain Member States having BIT-covered investments in other Member States as opposed to EU investors from and into States lacking BIT coverage, which would also be a violation of the EU Treaties.[100] The Czech Republic also submitted a November 2006 internal communication of the Commission in which the Commission warned that the continued existence of *intra*-EU BITs would lead to questions of EU law being considered and determined by *ad hoc* investment tribunals instead of by the CJEU, in violation of Article 344 TFEU.[101] However, in its March 2007 Preliminary Award, the *Eastern Sugar* tribunal dismissed the Czech Republic's *intra*-EU objection, finding that the Commission's communications had, at best, persuasive authority and that, regardless, the Commission had not even taken the view that *intra*-EU BITs were automatically suspended on a Member State's accession to the Union, as the Czech Republic argued during the course of the arbitration.[102]

In yet another arbitration brought by the Dutch investor Eureko B.V. (later Achmea B.V., famously, in the CJEU case of 2018) against Slovakia under the Netherlands-Slovakia BIT in October 2008, Slovakia and the Commission both urged the tribunal to dismiss jurisdiction based on the *intra*-EU objection.[103] The Commission, on behalf of Slovakia, contended the tribunal should find the CJEU's ruling in the *MOX Plant* case dispositive of the *intra*-EU issue: in *MOX Plant*, the CJEU had held that "exclusive jurisdiction in resolving a dispute between two EU Member States that was at least partially covered by EU law" and that, as a result, a dispute resolution mechanism conferring jurisdiction over EU law issues to an external tribunal was in breach of Article 344 TFEU.[104] In a particularly striking contravention of public international law and the principles of treaty interpretation under the VCLT, the Commission asserted that "where there is a conflict with EU law, the rule of *pacta sunt servanda* does *not* apply to agreements between EU Member States," because under *Costa v. ENEL* and the doctrine of supremacy, EU law and the EU Treaties supersede both national legal systems but also other "lesser" treaties concluded between the Member States.[105]

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[98] Eastern Sugar B.V. (Neth.) v. Czech, SCC Case No. 088/2004, Partial Award, ¶ 119 (Mar. 27, 2007).

[99] *Id*.

[100] *Id*.

[101] *Id*. ¶ 126.

[102] *Id*. ¶¶ 121-125, 128-129.

[103] Achmea (formerly known as Eureko B.V.) v. Slovk. (I), PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability, and Suspension, ¶ 133 (Oct. 26, 2010).

[104] *Id.* ¶ 178.

[105] *Id.* ¶ 180.

By contrast, the government of the Netherlands, which had also been asked by the tribunal to provide comments upon Slovakia's *intra*-EU objection as the home State of the investor and the other Contracting State to the BIT, noted that the EU according to the EU Treaties themselves and various CJEU decisions of the 1990s "must respect international law in respect of its powers, in particular with respect to the termination and suspension of international treaties."[106]

In its Award on Jurisdiction, the *Eureko* tribunal rejected Slovakia and the Commission's *intra*-EU objection, finding that, under the applicable law provision of the Netherlands-Slovakia BIT, the tribunal was only empowered to determine breaches of the BIT itself in accordance with the VCLT and general principles of public international law and treaty interpretation: the question of whether there had been a breach of EU law was not something the tribunal had the authority or jurisdiction to consider under the BIT.[107]

ii. LATE 2000S: THE CJEU INVOKES THE "SUPREMACY" PRINCIPLE TO CONTEST THE UN SECURITY COUNCIL & EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS ("ECHR")

The pushback began in the mid-2000s against public international law and principles of treaty interpretation by EU institutions and the CJEU was not limited to ISDS. In the so-called *Kadi* judgment of the Grand Chamber of the CJEU of 3 September 2008, the CJEU declared that a resolution passed under Chapter VII of the UN Security Council—which aimed to automatically freeze bank accounts and other financial assets of suspected Al-Qaeda officials determined by Security Council review— violated fundamental individual rights of due process as enshrined in the EU Treaties and the EU Charter on Fundamental Rights and thus would not have automatic, binding effect within the EU Member States.[108] Notwithstanding Article 103 of the UN Charter's supremacy clause, which stipulates that the UN Member States' obligations under the Charter prevail in event of conflict with Member States' obligations under any other international agreement, the CJEU purported to exercise judicial review over Security Council Resolution 1390 (2002) and its implementing measure, Regulation No. 881/2002, which had been proposed by the Commission and passed by the European Parliament.[109] Foreshadowing the later arguments it would make in its *Slovak Republic v. Achmea* and *Republic of Moldova v. Komstroy* judgments in 2018 and 2021 respectively, the CJEU justified Member States' non-compliance with the UN Charter on grounds that supremacy and "autonomy" of EU law required the EU Treaties to trump other binding treaty obligations of Member States under public international law.[110]

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[106] *Id.* ¶ 157 (citing Case C-162/96, Racke GmbH & Co. v. Hauptzollamt Mainz, 1998 E.C.R. I-03655, ¶¶ 45-46 and Case C-286/90, Anklagemyndigheden v. Peter Michael Poulsen, 1992 E.C.R. I-06019, ¶ 9).

[107] Achmea B.V. (formerly Eureko B.V.) v. Slovk. (I), PCA Case No. 2008-13, ¶¶ 290-93.

[108] Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi v. Council of the European Union & Comm'n., 2008 E.C.R. I-06351, ¶ 1.

[109] *Id.* ¶¶ 1, 168, 176-78, 183, 185, 187-91, 193.

[110] *Id.* ¶¶ 4, 281-82, 286-88.

Likewise, in its 2014 decision on the compatibility of the EU's draft agreement for accession to the ECHR, the CJEU ruled that the EU's accession to the Convention was inadvisable because the draft agreement, again, did not take into account the "autonomy" of EU law.[111] Again deploying many of the arguments it would make in the *Achmea*, *Komstroy*, and *PL Holdings* decisions to deemphasize the EU and the CJEU's alleged obligations to render judgments in accordance with public international law and international human rights law, the CJEU remarked that the draft agreement suffered from several crucial flaws, namely: (i) the agreement violated Article 19(1) TEU and Article 344 TFEU, which confers upon the CJEU exclusive jurisdiction to decide disputes between Member States involving EU law;[112] (ii) the ECHR would require each Member State of the EU to "check" one another to ensure compliance with fundamental rights, which would undermine the principle of "mutual trust" under EU law;[113] and (iv) the agreement provided no mechanism for coordinating the preliminary reference mechanism to the CJEU under Article 267 TFEU and the newly proposed reference mechanism for Member State national courts to the ECtHR under Protocol 16 of the agreement, a *lacunae* that the CJEU warned would damage the uniformity and autonomy of EU law.[114] The CJEU made such findings despite the fact that the 2009 Lisbon Treaty (*i.e.*, the TEU) Article 6 obligates the EU to accede to the ECHR.[115]

iii. EARLY 2012S-PRESENT: THE ROAD TO *ACHMEA*, *KOMSTROY*, AND FULL-ON CONFLICT BETWEEN ISDS AND EU LAW

The relationship of the CJEU with public international law and ISDS in particular came under further strain during the jurisdictional phase of the *Electrabel v. Hungary* ECT arbitration in 2012. Once again, the Commission intervened on behalf of Hungary to argue that the tribunal should dismiss the Belgian investor's claim on grounds that since Hungary's accession to the EU in 2004, any *intra*-EU arbitration was disallowed under the EU Treaties pursuant to Articles 267 and 344 TFEU, Article 19(1) TEU and also generally under the principle of supremacy of EU law derived from *Costa v. ENEL*.[116] The Commission further contended that the tribunal should consider the distinct possibility that the investor would never be able to enforce an arbitral award in EU courts, given that the

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[111] Case Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2014 E.C.L.I. 2454, ¶¶ 72, 82, 120, 170.

[112] *Id*. ¶¶ 93, 100, 163.

[113] *Id*. ¶¶ 168, 191-94, 258.

[114] *Id*. ¶¶ 90, 131-38, 176, 195-200; *see also* Antoine Buyse, *CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law*, ECHR BLOG, https://www.echrblog.com/2014/12/cjeu-rules-draft-agreement-on-eu.html#:~:text=In%20what%20can%20be%20characterized%20as%20a%20legal,to%20the%20ECHR%20is%20incompatible%20with%20EU%20law (last updated Dec. 20, 2014); Georgi Gotev, *Court of Justice rejects draft agreement of EU accession to ECHR*, EURACTIV, https://www.euractiv.com/section/justice-home-affairs/news/court-of-justice-rejects-draft-agreement-of-eu-accession-to-echr/ (last updated Jan. 14, 2015).

[115] Treaty on European Union art. 6, Feb. 7, 1992, 92/C 191/01.

[116] Electrabel v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability, ¶ 5.17 (Nov. 30, 2012).

"ICSID Convention is not binding on the EU" and that EU courts would be obligated under *Costa* to yield to the doctrine of supremacy of EU law.[117] The *Electrabel* tribunal rejected the Commission's *intra*-EU objection and held that:

> This Tribunal is an international tribunal established under the ECT and the ICSID Convention. From its perspective under international law, the Tribunal notes the establishment under international law of the Parties' consent to international arbitration under the ICSID Convention and also the effect of Article 26 of the ICSID Convention, providing for ICSID arbitration "to the exclusion of any other remedy." **It is therefore no answer for the European Commission to submit that the "proper avenue" for the Claimant lies only in "the Community courts," whether its own national courts or the ECJ (even assuming the Claimant's locus standi under the ECJ).**[118]

The Commission's stance against the compatibility of ISDS with Articles 267 and 344 TFEU became more entrenched following the *Eastern Sugar v. Czech Republic*, *Eureko v. Slovak Republic*, and *Electrabel v. Hungary* decisions. On 18 June 2015, the Commission issued a press release formally asking the then-28 EU Member States to terminate all of their *intra*-EU BITs.[119] In this press release, the Commission also announced its decision to refer Austria, Romania, Slovakia, Sweden, and the Netherlands to the CJEU for failure to heed the Commission's request to terminate their *intra*-EU BITs and its intention to initiate an "administrative dialogue" with the then-21 other EU Member States who still maintained *intra*-EU BITs.[120] While conceding that many EU Member States had signed these BITs with the intention of securing substantive protections for their investors in the 1990s as the former Soviet Republics of Central and Eastern Europe prepared for accession to the EU, the Commission now viewed these treaties as "out of date" and a threat to the supremacy of EU law within the Union.[121] Additionally, the Commission reasoned with investors that since the "EU 13"—including Hungary, Poland, Bulgaria, Romania, and other countries that the Commission and the CJEU now view as the prime instigators of the assault on the "rule of law" and the doctrine of primacy under *Costa v. ENEL*—had now completed their accession process through the EU enlargements of 2004, 2007, and 2013 respectively, such "'extra' reassurances" for the rule of law and non-discrimination were no longer "necessary."[122]

From the *Electrabel v. Hungary* Decision on Jurisdiction in 2012 to spring of 2018, the Commission sought to intervene in over a dozen investment arbitrations under both

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[117] *Id.* ¶ 5.19.

[118] *Id.* ¶ 5.38 (emphasis added).

[119] European Commission Press Release IP/15/5198, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties, (June 18, 2015), 1.

[120] *Id.*

[121] *Id.*

[122] *Id.*

intra-EU BITs and the ECT to plead the *intra*-EU jurisdictional objection: the Commission's arguments, however, were unanimously rejected by investment tribunals, all of which ruled that under the principles of public international law and treaty interpretation under the VCLT, it was impossible to retroactively vitiate Contracting States' consent to treaty arbitration with covered investors, regardless of if, when, or how those States' had acceded to the EU.[123] Even if the Lisbon Treaty of 2009 had conferred competence over FDI to Brussels, under public international law, it was clear to the over twenty tribunals that examined this issue that the EU Treaties could not have *ab initio* effect as an *inter se* agreement among the EU Member States to nullify their other, equally binding treaty commitments.[124] Such a finding would be a direct contravention of the termination of treaty principles codified by the VCLT, *pacta sunt servanda* and other binding principles of customary international law.

Finally, after nearly ten years of the Commission and certain Member States' pressing the court to clarify its own views on the *intra*-EU issue, the CJEU threw down the gauntlet with its judgment in *Slovak Republic v. Achmea* in June 2018.[125] In this landmark decision, the CJEU held that an *intra*-EU agreement such as the Netherlands-Slovakia BIT conferring jurisdiction over issues potentially governed by EU law (such as FDI) to *ad hoc* investment tribunals instead of Member States' national courts was not compatible with Articles 267 and 344 TFEU or the principles of supremacy, autonomy and uniformity of EU law.[126] In contrast to its past jurisprudence, nowhere in the *Achmea* judgment did the CJEU attempt to reconcile the alleged conflict between the Netherlands-Slovakia BIT and

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[123] *See, e.g.,* I.C.W. Eur. Inv. Ltd. (U.K.) v. Czech, No. 2014-22, PCA Case Repository ¶ 38 (2019) (Procedural Order No. 2, 27 Feb. 2015, granting the European Commission's leave to intervene as *amicus curiae*); Voltaic Network GmbH (Ger.) v. Czech, No. 2014-20, PCA Case Repository ¶ 38 (2019) (Procedural Order No. 2, 27 Feb. 2015); Photovoltaik Knopf Betriebs-GmbH (Ger.) v. Czech, No. 2014-21, PCA Case Repository ¶ 38 (2019) (Procedural Order No. 2, 27 Feb. 2015, same); Charanne B.V. v. Kingdom of Spain, Case No. 062/2012, Final Award, SCC Arb. (Jan. 21, 2016); RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Infrastructure Two Lux. S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, ¶ 16 (June 6, 2016); Isolux Infrastructure Neth. B.V. v. Kingdom of Spain, No. V2013/153, SCC Arb. ¶ 29 (July 12, 2016); Blusun S.A., Jean-Pierre Lecorcier v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 15 (Dec. 27, 2016); Eiser Infrastructure Ltd. & Energia Solar Lux. S.À.R.I. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 59, (May 4, 2017); Novenergia II -Energy & Env't (SCA), SICAR v. Kingdom of Spain, No. 2015/063, Final Arbitral Award, SCC Arb. ¶ 43 (Feb. 15, 2018); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 12 (May 16, 2018).

[124] *See*, *e.g.*, Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 318 (Dec. 11, 2013); Charanne B.V. v. Kingdom of Spain, No. 062/2012, Award, SCC Arb. (Jan. 21, 2016); RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, ¶¶ 71 (June 6, 2016); Isolux Infrastructure Neth., B.V. v. Kingdom of Spain, No. V2013/153, SCC Arb. ¶ 622 (July 12, 2016); Blusun S.A., Jean-Pierre Lecorcier v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 277 (Dec. 27, 2016); WNC Factoring Ltd. v. Czech No. 2014-34, PCA Case Repository ¶ 293 (2017); I.P. Busta v. Czech, No. V 2015/014, Final Award, SCC Arb. ¶ 113 (Mar. 10, 2017); Anglia Auto Accessories Ltd. V. Czech, No. V 2014/181, Final Award, SCC Arb. ¶ 113 (Mar. 10, 2017); Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, (May 4, 2017); Novenergia II – Energy & Env (SCA), SICAR v. Kingdom of Spain, SCC Arb. No. 2015/063, Final Arbitral Award, (Feb. 15, 2018); Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018).

[125] Case C-284/16, Slovak Republic v. Achmea BV, ELCI:EU:C:2018:158 (Mar. 6, 2017).

[126] *Id.* ¶ 31.

the EU Treaties by applying the rules of conflict of treaties as outlined in the VCLT.[127] In fact, *Achmea* did not mention the VCLT or the concept of "public international law" at all. Instead, the court recalled its opinion against the EU's accession to the ECHR and stated:

> [A]ccording to settled case-law of the Court, **the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law**, relating in particular to the constitutional structure of the EU and the very nature of that law. **EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves**. Those characteristics have given rise to a structured network of principles, rules, and mutually interdependent legal relationships binding to the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (accession of the EU to the ECHR) of 18 December 2014, EU :c:2014:2454, paragraphs 175 to 167 and the case-law cited).[128]

Later in the judgment, the CJEU curiously cited to its ruling in *Portuguese Judges* to recall that Article 19 TEU conferred exclusive responsibility to the CJEU and the domestic courts of Member States to "ensure the full application of EU law" and "judicial protection of the rights of individuals under that law."[129] It should not go unnoticed that the court has relied primarily upon Article 19 TEU and *Portuguese Judges* in nearly all of its major decisions responding to the "rule of law" crises in Poland and Hungary discussed above: for instance, in *Commission v. Poland*, a decision of 24 June 2019, the CJEU held that Poland was in breach of Article 19(1) TEU by (i) lowering the retirement age of judges appointed to Poland's Supreme Court and (iii) granting the Polish President discretion to extend certain judges' terms beyond the newly fixed retirement age.[130] The CJEU invoked

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[127] *See* Hay, *supra* note 24*;* Allain, *supra* note 24; Weiler & Trachtman, *supra* note 24; *see also, e.g.*. Case C-286/90, Anklagemyndigheden, 1992 E.C.R. I-6019, ¶ 10; Case T-115/94, Opel Austria GmbH, 1997 E.C.R. II-39, ¶ 77; Case C-400/10 PPU, J. McB v. L.E., 2010 E.C.L.I. 582; Cases C-92/09 and C-93/09, *Volker*, 2010 E.C.R. I-11063; Case C-351/04, IKEA Wholesale Ltd, 2007 E.C.R. I-7723.

[128] Case C-284/16, ELCI:EU:C:2018:158, ¶ 33 (Mar. 6, 2018) (emphasis added).

[129] *Id.* ¶ 36.

[130] Case C-619/18, European Commission v. Republic of Pol., ECLI:EU:C:2019:531, ¶ 42 (June 24, 2019). Further demonstrating the relationship between *Achmea*, the CJEU's opposition to *intra*-EU investment treaty arbitration, and the "rule of law" backlash, the court in this case also recalled its judgment in *Achmea* to state that the "[EU] Treaties have established a judicial system intended to ensure consistency and uniformity" and the "autonomy of the EU legal order." *See id.* ¶ 45. The court would also rely upon the *Portuguese Judges* decision in its holding in *Poland v. PL Holdings Sàrl* that even contract-based investment arbitration between EU Member States was in violation of Articles 19(1) TEU and Articles 267 and 344 TFEU. *See* Case C-109/20, Pol. v. PL

Article 19(1) in similar decisions against the Hungarian government for its attempts to bar Hungarian courts from exercising the Article 267 TFEU preliminary reference mechanism without the permission of the Hungarian Supreme Court in contravention of Article 2 TEU.[131] That the court placed *Achmea* within the same line of "rule of law" protection jurisprudence as its judgments against the wayward Central and Eastern European Member States by invoking Article 19(1) TEU is striking. From a certain point of view, the CJEU acted in *Achmea* to stave off what it and the Commission had come to regard as another serious (and perhaps more easily thwarted) threat to the supremacy of EU law: ISDS and public international law more generally.

Even as investment tribunals in the wake of *Achmea* unanimously rejected the Commission and respondent EU Member States' invocation of the decision as grounds for arbitral tribunals to decline jurisdiction, the CJEU further demonstrated its will to suppress another public international law "threat" to the supremacy of EU law, this time emanating from ECT tribunals. In the *Republic of Moldova v. Komstroy* judgement of September 2021, the CJEU extended the logic of *Achmea* to investment arbitrations between EU investors and EU Member States under the ECT, holding that Articles 344 and 267 TFEU as well as Article 19(1) TEU did not permit *intra*-EU arbitration under Article 26 of the ECT.[132] The court's approach in *Komstroy* was arguably more extraordinary compared to *Achmea* for several reasons: (1) ostensibly the dispute between Moldova and Komstroy, a Ukrainian company, was not an *intra*-EU dispute and did not touch upon issues of EU law;[133] (2) the *intra*-EU issue had not been raised by the parties during their pleadings before the Paris Cour d'Appel; (3) after the Cour d'Appel bowed to requests from the French, Spanish and Italian governments *inter alia* to refer several questions concerning the tribunal's *ratione materiae* under the ECT the case to the CJEU under Article 267 TFEU, the parties were not asked to brief the *intra*-EU issue either in oral or written form to the CJEU;[134] and (4) the CJEU raised the *intra*-EU issue *sua sponte*, as the three questions posed to it by the Cour d'Appel itself did not mention EU law or the *intra*-EU issue;[135] and (5) the CJEU declined to cite to any principles of public international law or treaty interpretation under the VCLT.

Most significant is perhaps this last above-mentioned point: the CJEU declined to put forth *any* argument to convince international investment tribunals—which will inevitably hear renewed and reinforced jurisdictional objections from EU Member States based upon *Komstroy*—that the CJEU's ruling can or should revoke or invalidate EU Member States' consent to arbitrate under the ECT and the ICSID Convention under international law. In

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Holdings Sàrl, ECLI:EU:C:2021:875, ¶ 45 (Oct. 26, 2021), https://curia.europa.eu/juris/document/document_print.jsf?mode=DOC&pageIndex=0&docid=248141&part=1&doclang=EN&text=&dir=&occ=first&cid=1830593 [hereinafter Pol. v. PL Holdings]. The cross-fertilization and common motivations of the CJEU to protect its "supremacy" within these lines of jurisprudence is clear and recognizable.

[131] Case C-564/19, Criminal proceedings against IS, ECLI:EU:C:2021:949, ¶ 83 (Nov. 23, 2021).

[132] Case C-741/19, Republic of Mold. v. Komstroy, ECLI:EU:C:2021:655, ¶ 66 [hereinafter Komstroy].

[133] *Id.* ¶¶ 8-11.

[134] *Id.* ¶ 20.

[135] *Id*. Rather, all the questions referred to the CJEU by the Cour d'Appel concerned the meaning of an "investment" under Articles 1(6) and 26(1) ECT and implicitly whether the tribunal had properly found itself to have subject matter jurisdiction under the ECT.

light of investment tribunals' unanimous rejection of the *intra*-EU objection based on *Achmea*, it was surprising that the Court did not seize its chance in *Komstroy* to fortify and at least somewhat anchor its reasoning in principles of public international law and treaty interpretation. By bowing even slightly to the hermeneutical approach of international investment tribunals,[136] the CJEU might have imbued the *Komstroy* decision with more persuasive force and credibility from an international law perspective. However, once again, in trend with its recent retreat from cooperative dialogue with other courts, institutions, and tribunals of public international law, the court declined to engage in any conversation in the "language" of the ECT tribunals empowered to determine the decision's initial force under international law.

Instead, the CJEU opined that since the ECT itself was an "act of EU law" and any investment tribunal constituted under the ECT was in its view "required to interpret and, even apply, EU law," it had jurisdiction to answer the *intra*-EU question even in this dispute between non-EU parties.[137] For the court, this was especially so in light of the fact that the seat of the arbitration between Komstroy and Moldova was France, an EU Member State, and that a French court had exercised its obligation under Article 267 TFEU to make the reference to the CJEU.[138] Again basing its decision on *Achmea*'s reasoning that only EU Member State courts and the CJEU are able to "ensur[e] the full effectiveness of the rules of the European Union," Article 26(6) ECT's provision of investment arbitration between EU investors and EU Member States could not be permitted under Article 19(1) TEU and the logic of *Portuguese Judges*.[139] For the sake of the protection of the autonomy and supremacy of EU law, Member States could not be deemed to be allowed to "agree to remove the jurisdiction of their own courts, and hence from the system of judicial remedies" under the EU Treaties and to instead vest authority in *ad hoc* investment tribunals to potentially decide issues of EU law under Article 26 of the ECT.[140]

Two recent further decisions of the CJEU on the legality of *intra*-EU investment treaty arbitration, *Poland v. PL Holdings* and *Commission v. European Food*, highlight several other points at which the CJEU has brought itself into direct conflict with the principles of public international law and treaty interpretation. In *PL Holdings*, the CJEU held that even consent to arbitration with an EU investor given from an EU Member State in a contract independent from the relevant BIT/MIA was prohibited under EU law, as removal of disputes concerning EU law from Member State courts and the CJEU would potentially damage the supremacy, autonomy, and uniformity of EU law.[141] Again, the CJEU declined to engage with any general principles of public international law or treaty interpretation according to the VCLT in its decision. In *European Food*, the CJEU opined that "with the effect from Romania's accession to the European Union, the system of judicial remedies provided for by the [TEU and TFEU] replaced that arbitration procedure, the consent given

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[136] *Id.* For instance, by referencing the principles of treaty interpretation under the VCLT, which the court has done numerous times in the past, or discussing how *Komstroy* would or may impact EU Member States' unconditional consent to arbitration under the ECT according to Article 25(1) of the ICSID Convention.

[137] *Id.* ¶¶ 49-50.

[138] *Id.* ¶ 52.

[139] *Id.* ¶ 59.

[140] *Id.*

[141] Pol. v. PL Holdings, ¶¶ 54-56.

to that effect by Romania, from that time onwards, lacked any force.[142] This finding, again made without any discussion of the VCLT and its rules on conflict of treaties, contravenes Article 25(1) of the ICSID Convention, which prohibits a Contracting State from unilaterally withdrawing its consent (for any reason, including EU accession) once it has been given. [143]

It is curious and perhaps troubling that the CJEU instructed the investors in the *PL Holdings* and *European Food* cases that the proper place for them to seek redress for their grievances against Poland and Romania, respectively, was in the national courts of those Member States. As mentioned above, the Commission and the CJEU have sought infringement proceedings against Poland for violations of Article 19(1) TEU and failing to ensure the "full effectiveness" of EU law and the independence of its judiciary since 2017.[144] Indeed, *the very day after* that the CJEU told PL Holdings it was obliged to go to the Polish courts to resolve its dispute against the State in accordance with Articles 19(1) TEU and Articles 267 and 344 TFEU, the court nevertheless held Poland to be in breach of Article 19(1) and approved the Commission's request to fine Poland EUR 1 million a day for this breach.[145] Romania is also not immune to the EU's concerns with its respect for the "rule of law" and fundamental values under the EU Treaties. The Cooperation and Verification Mechanism, which was established at the time of Romania's accession to the EU in 2007 and under which the Commission engages in frequent fact-finding missions and dialogue with political leaders, judicial, and civil society organizations in Romania to ensure compliance with the EU Treaties, remains in force as of the spring of 2022.[146] Though the Commission has not launched any infringement proceedings for violation of Articles 2 or 19(1) TEU against Romania, widespread corruption and lack of judicial independence continue to provoke anxiety in Brussels and Luxembourg.[147] As recently as May 2021, the CJEU issued a press release reminding Romania, *inter alia*, of the "principle of primacy of EU law" under *Costa v. ENEL* and Romania courts' obligations

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[142] Commission v. European Food, 2022 ECLI. 50, para. ¶145.

[143] *See* Paschalis Paschalidis, *Op-Ed: 'Micula: European Food for Thought'*, EU L. LIVE, https://eulawlive.com/op-ed-micula-european-food-for-thought-by-paschalis-paschalidis/ (last updated Feb. 17, 2022).

[144] *See* David R. Cameron, *EU-Poland dispute over courts deepens and the EU brings new infringement cases vs. Poland and Hungary*, YALE UNIV. MACMILLAN CTR., https://macmillan.yale.edu/news/eu-poland-dispute-over-courts-deepens-and-eu-brings-new-infringement-cases-vs-poland-and#:~:text=While%20the%20rule%20of%20law%20dialogue%20was%2C%20at,those%20provisions%20on%20the%20independence%20of%20the%20judiciary (last updated Jul. 21, 2021); *see also* Case C-619/18, Comm'n v. Pol., 2019 ECLI 531 (in which the CJEU decided upon the Commission's claim against Poland and ruled in favor of the Commission). The CJEU deemed that Poland's law imposing new mandatory retirement rules for judges and granting exclusive powers to the Polish president to appoint and/or remove judges was in violation of Article 19(1) TEU and Article 344 TFEU. *See id*.

[145] *See supra* p. 15; *EU court fines Poland 1 mln euros per day in rule of law row*, REUTERS, (Oct. 27, 2021, 9:28 AM), https://www.reuters.com/world/europe/eu-top-court-orders-poland-pay-1-million-euros-day-rule-law-row-2021-10-27/. The *Pol. v. PL Holdings* decision was released on 26 October 2021, one day before the CJEU approved the EUR 1 million per day fine against Poland for its violation of Article 19(1) TEU.

[146] *Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism*, at 1, COM (2021) 379 final (Aug. 6, 2021).

[147] Jan Strupczewski, *EU threatens legal steps against Romania over rule of law*, REUTERS, (May 13, 2019, 5:37 PM), https://www.reuters.com/article/us-eu-romania-idUSKCN1SJ1DL.

under that doctrine to "disapply" any provisions of national law contrary to the EU Treaties.[148] It is also worth noting that Slovakia, the EU Member State against which the Dutch investor brought its investment arbitration that became the subject of the CJEU's *Achmea* ruling in 2018, has also come under fire from the Commission and the CJEU for "rule of law" issues, including corruption, lack of judicial independence, and inadequate protection of the free press.[149]

Even in the wake of CJEU decisions such as *Achmea* and *Komstroy* that purport to have binding, *ab initio* and retroactive validity, no investment arbitration tribunal has ever declined jurisdiction on grounds of the *intra*-EU objection. As has been noted by other scholars and practitioners, however, the prospect for successful enforcement of *intra*-EU investment awards, in EU Member State courts as well as abroad, has perhaps become significantly bleaker.[150] Especially in the EU's newest Member States in Eastern and Central Europe, which the CJEU and the Commission have critiqued for years now as having actively biased and unreliable judiciaries, foreign investors can no longer avow themselves of any certain means of judicial redress and reparation for expropriation, unfair and inequitable treatment, and other violations of the general principles of international investment law and EU law. As a consequence of the Commission and CJEU's quest to put an end to *intra*-EU investment arbitration in the last fifteen years, there is perhaps no longer any neutral and widely respected forum—either domestic EU courts or investment treaty tribunals—to adjudicate these disputes. So continues the fragmentation of EU law from international investment law and public international law more generally, arguably to the detriment of foreign investors, individual human rights, and the rule of law even beyond the Union's own borders.[151]

IV. CONCLUSION

Insecurities resulting from the EU "rule of law" crisis and the backlash against the CJEU's doctrine of supremacy seem to have in part propelled the Commission and the CJEU's opposition to *intra*-EU investment arbitration and public international law more

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[148] Press Release No. 82/21, Court of Justice of the European Union, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 on *Romanian reforms in the areas of judicial organization, the disciplinary regime applicable to judges, and the financial liability of the State and the personal liability of judges as a result of judicial error* (May 18, 2021), at 2.

[149] *See Rule of Law in Slovakia*: *MEPs carried out a monitoring visit*, EUROPEAN INTEREST, (Sept. 22, 2021, 2:00 PM), https://www.europeaninterest.eu/article/rule-of-law-in-slovakia-meps-carried-out-a-monitoring-visit/; *Slovak Government's Sinking Fortunes Could Yield the EU's Latest Rule of Law Problem*, EU POLICIES, http://eu-policies.com/news/slovak-governments-sinking-fortunes-yield-european-union-latest-rule-law-problem/ (last updated Feb. 4, 2022).

[150] NURLANA DUNYAMALIYEVA, ENFORCEMENT OF INTRA-EU INVESTMENT ARBITRATION AWARDS IN THE UK: ACHMEA, MICULA AND BEYOND, COMMENT ON 'MICULA AND OTHERS V. ROMANIA UKSC JUDGMENT, 19 FEBRUARY 2020' (2021), https://ssrn.com/abstract=3833339; Seung-Woon Lee, *Enforcing Intra-EU Dispute Awards in the United States after Achmea*, KLUWER ARB. BLOG, http://arbitrationblog.kluwerarbitration.com/2020/05/26/enforcing-intra-eu-dispute-awards-in-the-united-states-after-achmea/ (last updated May 26, 2020).

[151] Int'l Law Comm'n., Rep. on the Study Group of the International Law Commission in its Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), ¶¶ 157, 218.

generally in the past decade and a half. As the EU has seen its own institutions come under threat internally from backsliding democracies and frustrated national courts and electorates, the Commission and CJEU have fixed their fire on an external "threat" more easily neutralized than the wayward executives of Central and Eastern European Member States: the system of *intra*-EU ISDS. In this fight, the CJEU has deemphasized principles of public international law and treaty interpretation that it once embraced and jealously guarded and sought to expand its jurisdictional authority over disputes touching upon EU law. Through *Achmea*, *Komstroy*, *PL Holdings*, and *European Food*, the Commission and CJEU have encouraged and ordered Member States to disavow their binding treaty obligations under international law—including the principles of *pacta sunt servanda* and non-retroactivity under the VCLT—and void consent to arbitration under any *intra*-EU BIT and the ECT.

On one hand, the defensive reaction of the CJEU to the rising *courant* of Euroscepticism within Member State courts and executive branches is understandable: the court has long considered itself the supreme and "constitutional" court of a federal-type union in the original vision of Jean Monnet, Robert Schuman and the other EU founders. But, on the other hand, as the ambition and will of the Member States to construct a "United States of Europe" has receded, so the CJEU has clutched more fervently at its messianic vision of a federal Europe, to the point of engaging in questionable jurisdictional "land grabs" (*e.g.*, finding itself competent in *Komstroy*, a dispute between a non-EU investor and a non-EU Member State, to hold that the tribunal's award constituted a threat to the supremacy and autonomy of EU law) and lashing out against ISDS and public international law itself. That the seemingly ideologically friendly regimes of EU law and international investment arbitration—both grounded in the rule of law, democracy, and individual human rights—have come to perhaps fatal blows inside the EU is not an encouraging development for the legitimacy of international law.

Although the Commission, the European Parliament and the CJEU have lately taken unprecedented measures to curb the slipping respect for Article 2 TEU values and judicial independence in Hungary, Poland, and elsewhere, it is intriguing that the CJEU's message to EU investors through decisions such as *Achmea*, *Komstroy*, *PL Holdings*, and *European Food* is that, regardless of what the Court has said to the contrary in its "rule of law" decisions, the courts of these backsliding Member States are the only place where the "full effectiveness" of EU law and the protection of investments in accordance with Article 2 TEU values and other individual property rights may be guaranteed. Such discordance in the CJEU's jurisprudence perhaps jeopardizes the attractiveness of the EU's Central and Eastern European Member States as destinations for "foreign" investment, even from within the Union itself. Why should investors of other EU Member States, or third-party States, trust Polish or Hungarian courts when the CJEU and Commission itself have themselves admitted they are not independent?

Furthermore, and as noted by Professor Gary Born,[152] the damage that decisions such as *Kadi*, *Achmea*, *Komstroy*, *PL Holdings* and other CJEU decisions has dealt to the

[152] Gary Born, '*Court-Packing' and Proposals for an EU Multilateral Investment Court*, KLUWER ARB. BLOG, http://arbitrationblog.kluwerarbitration.com/2021/10/25/court-packing-and-proposals-for-an-eu-multilateral-investment-court/ (last updated Oct. 25, 2021).

legitimacy of public international law may not be contained to the interior of the Union. The very nature of the *Komstroy* decision—which nominally did not even involve issues of EU law apart from the seat of the arbitration being Paris, France—presaged the Commission and the CJEU's willingness to seek the unraveling of the ISDS even in an *extra*-EU context. Indeed, Spain in the *European Food* case argued to the CJEU that the court might consider voiding even *extra*-EU BITs on grounds that such agreements would permit or require investment tribunals to interpret EU law in contravention of Articles 344 and 267 TFEU.[153] Moreover, in the United States, the United Kingdom, and elsewhere, the Commission has pursued an aggressive intervention strategy to try to persuade courts outside the EU not to enforce *intra*-EU investment arbitration awards:[154] in doing so, it has encouraged such courts to also disavow the principle of *pacta sunt servanda* and Contracting States' obligation under the ICSID Convention to treat awards issued under the treaty as having the same force as domestic judgments.

The reverberating effects of the EU's undermining of ISDS and certain principles of public international law more generally should not be underestimated. These developments not only put into serious question whether foreign investors will still regard EU Member States as promising and safe jurisdictions for investment but also may compromise the legitimacy of public international law and its core values in areas beyond ISDS and international human rights law specifically. It is one thing for the CJEU to hold that *pacta sunt servanda*—literally the premise of "*Agreements must be kept*"— means nothing with regard to approximately one hundred and fifty *intra*-EU BITs and MIAs; but, stretching this principle just a bit further, is it not perhaps problematic that one of the world's most admired champions of international law and human rights, the EU, is sending the message that it is OK, at times, for States to disregard or declare null and void their treaty commitments under international law? Does *pacta sunt servanda* still apply fully to Article 5 of the NATO Treaty? To Article 2(4) of the UN Charter?

The founders of the European Union, whose foremost wish was to make war on the Continent physically and politically "impossible" through the tools of international law and diplomacy, would likely be uncomfortable with these very questions. But in light of the Commission and the CJEU's recent treatment of ISDS and public international law in the last decade and a half, such questions should be asked. Can the world and the international bar afford to let the EU and its institutions—in perhaps what is a well-meaning response to the Union's own "rule of law" crisis—deal such potential damage to

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[153] *See* Paschalis Paschalidis, *Op-Ed: 'Micula: European Food for Thought*,' EU LAW LIVE, https://eulawlive.com/op-ed-micula-european-food-for-thought-by-paschalis-paschalidis/ (last updated Feb. 17, 2022).

[154] *See, e.g.*, Sherina Petit & Charlotte Hornby, *Investment protection post-Achmea*, NORTON ROSE FULBRIGHT, https://www.nortonrosefulbright.com/en/knowledge/publications/949b462f/investment-protection-post-achmea#:~:text=The%20Commission%20recently%20intervened%20in%20a%20review%20by,policy%20implications%E2%80%9D%20of%20allowing%20enforcement%20of%20intra-EU%20awards (last visited July 13, 2023); Mark W. Freidman, et al., *Achmea Reaches the ECT: CJEU Rules That Intra-EU Arbitration under the ECT is Also Incompatible with EU Law*, DEBEVOISE & PLIMPTON, https://www.debevoise.com/insights/publications/2021/09/achmea-reaches-the-ect (last updated Sept. 8, 2021).

the legitimacy of public international law? The answer to that question goes far beyond ISDS itself and to the very cornerstones of our post-World War II international legal order.


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VEILING LAWS THROUGHOUT IRANIAN HISTORY: THE RELATIONSHIP TO RELIGION, BEFORE AND DURING ISLAMIC LAW

*Nicolas Garon**

ABSTRACT

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I. INTRODUCTION: VEILING LAWS OF IRAN AND ITS LATEST CRACKDOWN (AUGUST 2022)

On August 15, 2022, Iranian President Ebrahim Raisi implemented additional rounds of restrictions toward women regarding the enforced obligation of wearing hijabs/headscarves.[1] The day before, Iranian state-run media announced that women who do not comply with the Islamic principle of covering their hair will "be fined, while female government employees will be fired if their social media profile pictures do not conform to Islamic laws."[2] The country's officials have also gone as far as extending this mandate beyond its borders; Iranian women, over the age of nine, if vacationing abroad, who are found to have posted photos without wearing a hijab, shall be "deprived of some social rights for six months to one year."[3] This highlights one of the many blatant constitutional violations imposed in modern Iranian society. The aforementioned extrajudicial intrusion of privacy from the Iranian Government infringes on the Constitution of Iran, Article 22, which states, "The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law."[4] Despite the Iranian Government's effort to constitutionally strengthen its grasp on citizens, it is still violative as it attempts to limit the rights of citizens on foreign soil. The government's illegitimate expansion of their jurisdiction to legal issues committed on foreign soil, runs afoul of the territorial principle of international law.

Before the 1979 revolution, which introduced a new constitution based on Islamic principles and departed from secularism, Iran was seen as a Western society especially regarding women's freedom.[4] This was understandably so, as its 1953 coup d'état was supported in great force by the United States' Central Intelligence Agency (C.I.A.) and the United Kingdom.[5] The West's motivation for supporting Mohammad Reza Pahlavi, Iran's last Shah, was precisely reflexive of strategic westernization. By placing a Westernized and progressive ally in power, relative to America's liking, regional cooperation and a new alliance can be seen as fruits ripe for the taking.

A spotlighted issue of post-revolution Iran is religious dress obligations for women, specifically the headscarf. Often adorned with a colorful scarf, or sometimes a hijab or chador, Iran's entire female population is required to conceal their hair beneath fabric.

In post-revolution Iran, the legal punishment of being unveiled as a woman is specified in the Islamic Penal Code of the Islamic Republic of Iran – Book Five, Chapter Eighteen (Crimes against public prudency and morality), Article 638. When translated to English, it reads "Note- Women, who appear in public places and roads without wearing an Islamic

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[1] RFE/RL's Radio Farda, *Iranian President Signs Decree Further Restricting How Women Can Dress*, https://www.rferl.org/a/iran-women-dress-restrictions-raisi/31989759.html (last visited Aug. 15, 2022).

[2] *Id.*

[3] *Id.*

[4] Jeremy Bender & Melia Robinson, *25 photos show what Iran looked like before the 1979 revolution turned the nation into an Islamic republic*, BUSINESS INSIDER (Sept. 9, 2022, 3:08 PM), https://www.businessinsider.com/iran-before-the-revolution-in-photos-2015-4.

[5] Lawrence Wu & Michelle Lanz, *How The CIA Overthrew Iran's Democracy In 4 Days,* NPR (Feb. 7, 2019, 12:00 AM), https://www.npr.org/2019/01/31/690363402/how-the-cia-overthrew-irans-democracy-in-four-days.

hijab shall be sentenced from ten days to two months' imprisonment or a fine of fifty thousand to five hundred Rials."[6]

II. SHIFTING REGIONAL INCONSISTENCY ON THE VEILING REQUIREMENTS, IRAN'S PERTINACIOUS POSTURE, AND A COMPARISON OF REGIONAL NEIGHBOR'S STANCES

Iran's upholding of the hijab law is becoming a regional anomaly. Compared to neighboring Islamic governments, Iran's stance on the issue is singular relative to its size and influence. In the Muslim World, the two other largest countries in the Middle East by land mass greatly differ from Iran on this policy. One of these nations is Turkey, which is secular and, accordingly, has no hijab mandate. Like Iran, the other largest nation, Saudi Arabia is a nation with state religion and religious law.[7] Though rivaled on sectarian lines,[8] Iran and Saudi Arabia are considered the Middle East's two powerhouses.[9] Despite their firm adherence to religious law, the nations are not congruent on the issue in contemporary times.

Iran houses the highest percentage and population of Shia Muslims and is home to the holy city of Mashhad.[10] Saudi Arabia, home to Mecca and Medina, is the birthplace of the Sunni majority of Islam and Wahhabism. The two countries are rivals engaged in proxy fighting for regional influence.[11] Saudi Arabia, though evolving under recently crowned Prince Mohammed Bin Salman, is known for enforcing the strictest Islamic punitive and legal system in the Ummah (Muslim World).[12] Despite this, the country's monarchy has recently lifted the requirement for women to cover their hair and wear the black abaya dress to reform previous customs.[13]

Through examining the 1992 Constitution of Saudi Arabia, it is evident that Sharia is the basis from which the laws of the nation are formulated, although Sharia has not been

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[6] Islamic Penal Code of the Islamic Republic of Iran – Book Five, IRAN HUMAN RIGHTS DOCUMENTATION CENTER, https://web.archive.org/web/20180310195447/http:/iranhrdc.org/english/human-rights-documents/iranian-codes/1000000351-islamic-penal-code-of-the-islamic-republic-of-iran-book-five.html#18 (last visited Aug 24, 2022).

[7] Robert J. Barro & Rachel M. McCleary, *Which Countries Have State Religions?*, 120 Q. J. OF ECON. 1331 (2005), available at: https://dash.harvard.edu/bitstream/handle/1/3710663/Barro_WhichCountries.pdf?sequence=2 (last visited Aug 24, 2022).

[8] Najat AlSaied, *Sectarianism and ideology: The cases of Iran and Saudi Arabia*, MIDDLE EAST INSTITUTE, https://www.mei.edu/publications/sectarianism-and-ideology-cases-iran-and-saudi-arabia (last visited Aug 24, 2022).

[9] *Iran and Saudi Arabia Battle for Supremacy in the Middle East*, WORLD POL. REV., https://www.worldpoliticsreview.com/israel-iran-saudi-arabia-battle-for-supremacy-in-the-middle-east/ (last updated May 15, 2023).

[10] *Mapping the Global Muslim Population*, PEW RSCH. CTR., https://www.pewresearch.org/religion/2009/10/07/mapping-the-global-muslim-population/ (last updated Oct. 7, 2009).

[11] Jonathan Marcus, *Why Saudi Arabia and Iran are bitter rivals,* BBC NEWS, https://www.bbc.com/news/world-middle-east-42008809 (last updated Sept. 16, 2019).

[12] Galina Yemelianova, *Explainer: what is Wahhabism in Saudi Arabia*, THE CONVERSATION (Jan. 30, 2015, 1:25 AM), https://theconversation.com/explainer-what-is-wahhabism-in-saudi-arabia-36693.

[13] *Saudi crown prince says abaya not necessary*, GULF NEWS (Mar. 19, 2018, 5:11 PM), https://gulfnews.com/world/gulf/saudi/saudi-crown-prince-says-abaya-not-necessary-1.2190993.

codified within the law.[14] Saudi judges often formulate their conclusions and rulings from legal sources such as the Hanbali code[15] and the book of 'Kasshaf al-Qina'.[16] These books provide a framework for clarity on repercussions and punishment.

The issue of the hijab and its enforcement through Saudi Arabian law lacks clarity. Unlike Iran, there is no written law stating the hijab is mandatory, yet there are streamlined consequences for offenses. Rather, judges in Saudi Arabia have the authority to implement "Ta'azir (deterrence)", meaning punishment can be issued for something that violates no established Quranic law, but is determined to be morally wrong.[17]

When issues arose regarding hijab violations in Saudi Arabia, judges procedurally consulted Fiqh (jurisprudence) to address Suffur issues, which translates to "lack of modesty". The punishment was fully decided by the judge as there is no prescribed punishment.

Suffur, before written or verbal accusation and judicial judgment, was enforced by the commissioned Committee for the Promotion of Virtue and the Prevention of Vice (Saudi Arabia), who are also known as the Mutawaeen. The Mutawaeen is a policing organization which addressed these issues of immorality. The group was commissioned by the King, in his capacity as Prime Minister. The Mutawaeen had the capacity to arrest, investigate, and pursue those whom they accused.[18] In 2016, the Monarchy of Saudi Arabia relinquished their investigative ability. Today, they have no ability to arrest and pursue any accused person(s).[19]

Whether the changes regarding the hijab and women's rights are caused by a true desire for gender equality in the nation, a readdressing of the criterion of Islamic Law (or simply, a more codified and progressive legal system to ameliorate foreign investment as the nation works towards their 2030 economic "Vision"), Saudi Arabia is willing to adapt to the modern issues of veiling and abaya requirements, despite their firm adherence to Islamic law and jurisprudence.[20] Iran's stubborn stance begs the question of its true intentions to maintain the veil mandate and determine whether religion is strictly the sole guiding factor.

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[14] Basic Law of Government [Constitution] Mar. 1, 1992, (Saudi Arabia), https://www.constituteproject.org/constitution/Saudi_Arabia_2013?lang=en (last visited Aug 24, 2022).

[15] *Islamic Jurisprudence & Law*, UNC CTR. FOR EUROPEAN STUDIES, https://veil.unc.edu/religions/islam/law/ (last visited Aug. 24, 2022).

[16] Muhammad Ibn Muhammad Ibn Al-'Aṭṭār, Kashf al-qinā' fī waḍ' al-arbā' min al-Jihat al-sitt fī 'ilm al-falak., (Apr. 5, 1737), The Library of Congress, https://www.loc.gov/item/2008401690/ (last visited Aug. 24, 2022).

[17] Susan C. Hascall, *Restorative justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?*, 4 BERKLEY J. OF MIDDLE EASTERN & ISLAMIC L. 35 (2011).

[18] Naif Al-Qahtani, *The Procedures of Committee for the Promotion of Virtue and the Prevention of Vice (CPVPV) with the New System in Saudi Araabia*, HG.ORG, https://www.hg.org/legal-articles/the-procedures-of-committee-for-the-promotion-of-virtue-and-the-prevention-of-vice-cpvpv-with-the-new-system-in-saudi-araabia-46681 (last visited Aug. 24, 2022).

[19] *Saudi cabinet decree prevents 'religious police' from pursuit, arrest*, AAL ARABIYA NEWS ENGLISH, (May 20, 2020, 1:05 PM), https://english.alarabiya.net/features/2016/04/13/Saudi-cabinet-decree-preventing-Religious-Police-from-pursual-and-arrest.

[20] *Id*.

III. DECREE OF KASHIF E HIJAB AND THE LEGAL HIJAB FREEDOM UNDER SECULAR IRAN 1936-1979

Refocusing on Iran, equal rights activists have often spotlighted the lack of enforcement of the hijab rule between 1963 and 1979.[21] The decree of Kashf e Hijab set into action by Reza Shah Pahlavi, former Shah of Iran, relinquished any legally-bound requirements for wearing a hijab.[22] Yet, after Islam was fused into Iran as its state religion and culture with legal authority, the hijab obligation was reinstated - a switch which still divides the nation of Iran.[23]

IV. IS THE HIJAB IN IRAN EXCLUSIVE TO ISLAM AND ISLAMIC LAW?

Apart from the post-revolutionary regime's intentions behind maintaining the veil, whether it is in good faith via a religiously persistent stance, or merely advantageous and authoritative, another question arises: During the Islamic Conquest, did Muslims introduce the veil to Zoroastrians in Iran? And was a veiling mandate unheard of in Zoroastrian law?

A well-informed accusation is that the veil in Iran, along with its mandate, are indicative only to Islam. This is because since before the Islamic conquests spawned the religion of Islam in Persia, documented accounts and paintings from the Sasanian period, (the period directly preceding the Islamic period) have shown Zoroastrian women without veils.[24]

Additionally and more recently, both Reza Shah Pahlavi and Mohammad Reza Pahlavi's reigns, were secular and thus not observant of hijab mandates.[25] After all, during the reign of the second Shah, "Mohammad Reza Pahlavi doubled down on his father's secular, pro-Western orientation, and in the 1970s, as anti-government activism gained momentum, many women consciously adopted headscarves or all-enveloping *chador*s as tangible rejections of the monarchy."[26] This furthers speculation that only during periods of Islamic Law in Iran were its citizens subject to these requirements.

Did the non-enforcement of the hijab in secular Iran prove the hijab is an issue of Islam for Iran? The link between the hijab and Islam in Iran appears mutually exclusive as those women in Zoroastrian Persia were accounted with unveiled heads.[27] Such pondering on

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[21] Ava Homa, *Why Iranian women are protesting now against the hijab,* AL ARABIYA NEWS ENGLISH, (May 20, 2020, 10:54 AM), https://english.alarabiya.net/features/2018/02/04/Why-Iranian-women-are-protesting-against-the-hijab.

[22] Ashraf Zahedi, *Concealing and Revealing Female Hair: Veiling Dynamics in Contemporary Iran*, *in* THE VEIL: WOMAN WRITERS ON ITS HISTORY, LORE, AND POLITICS 250, 260 (Jennifer Heath, ed., 2008).

[23] Maryam Sinaee, *Eighty Five Years On, The Shah's Ban On Hijab Still Divides*, IRAN INT'L, https://www.iranintl.com/en/202201070683 (last updated Jan. 7, 2022).

[24] MATHIAS WIRTH, ET AL., SEXUAL VIOLENCE IN THE CONTEXT OF THE CHURCH: NEW INTERDISCIPLINARY PERSPECTIVES (2021).

[25] Saeid Golkar & Asha Sawhney, *Dictators and civilizational thinking in Iran: From the Great Civilization to Islamic Civilization*, MIDDLE EAST INSTITUTE, https://www.mei.edu/publications/dictators-and-civilizational-thinking-iran-great-civilization-islamic-civilization (last updated Sept. 28, 2020).

[26] Suzanne Maloney & Eliora Katz, *Iran and the headscarf protests*, BROOKINGS (Jan. 24, 2019), https://www.brookings.edu/opinions/iran-and-the-headscarf-protests/.

[27] MUSEUM OF SASSANID IRAN, http://www.persiangulfstudies.com/en/index.asp?p=pages&id=234 (last visited Feb 20, 2023).

whether conducive links can be proven shall be understood with further exploration of facts and other periodical legal review. The Sasanian Empire, which produced depictions of unveiled women, and directly preceded the Islamic conquest of Iran, will be the empire of analysis for such review.

V. OBSERVING PERSIA'S ZOROASTRIAN LAWS AND PLURALISM BEFORE ISLAM, AND ANSWERING WHETHER ISLAM'S LINK TO VEILS IN IRAN WAS REFLECTIVE OF ITS PREVIOUS ZOROASTRIAN STATE RELIGION

Before the Islamic conquest of Persia in the mid-600s, Iran/Persia was a Zoroastrian nation in the Sasanian Empire.[28] Zoroastrianism was declared the official religion, and the Sasanian Empire used a legal system that was heavily based on Zoroastrian law and customs, though Sasanian and Zoroastrian law were not identical.[29] The Sasanian legal system was a six-layered system that provided: (1) Zoroastrian law as a personal law; (2) royal law as a territorial law; (3) laws of the members of the tolerated religions as personal laws; (4) *kardag* as the legal practice of the courts; (5) local variants of customs in particular regions and towns; (6) customs of nomadic peoples.[30] The Zoroastrian system applied only to followers of that religion, although tolerated religions such as Judaism and Christianity were allotted different personal laws. Local customs and nomadic principles as well as regionally specific laws were also integrated into its legal system where the system of *Kardag* acted as a procedural rulebook.[31]

There were no historical codes within the legal system of this empire, although the most influential legal book was the "Mādigān ī Hazār Dādestān (Book of a Thousand Judgements), a law book of compiled legal cases of private law matters, including topics of family, inheritance, obligations, and private procedural law."[32] If a legal issue was not covered in this de-facto guiding document, one could consult the Syriac Acts of Martyrs, religious works, scriptures of kings, and other historical writings for clarity.[33] Laws were enforced by the *kōy-bān* (street-keeper) who policed and arrested violators, and the *gizīr* (patrol) who acted as patrol officers with lesser authoritative power.[34]

An analysis of veiling requisites in Iranian history reveals that veiling requirements were not exclusive to Islamic Iran; however, religious justification and broad, gender-based requirements did not exist in pre-Islamic Iran. Veiling practices and stipulations did exist in the Zoroastrian period of Persia, but the first group to establish these customs were the

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[28] *History of Iran: Islamic conquest*, IRAN CHAMBER SOC'Y, https://www.iranchamber.com/history/islamic_conquest/islamic_conquest.php (last visited Aug 24, 2022).

[29] Jany Janos, *Sasanian Law*, https://bpb-us--e2.wpmucdn.com/sites.uci.edu/dist/c/347/files/2020/09/vdocuments.mx_sasanian-law-janos-2010.pdf (last visited Feb 20, 2023).

[30] Janos, *supra* note 29.

[31] Janos, *supra* note 29.

[32] Janos, *supra* note 29.

[33] Janos, *supra* note 29.

[34] *Judicial and Legal Systems ii. Parthian and Sasanian Judicial Systems*, ENCYCLOPEDIA IRANICA FOUNDATION, https://iranicaonline.org/articles/judicial-and-legal-systems-ii-parthian-and-sasanian-judicial-systems (last visited Aug. 24, 2022).

Assyrians.[35] The Assyrians allowed only privileged women to veil, thus forbidding veiling from other women deemed lesser in society, such as prostitutes and concubines.[36]

The adoption of the veil in Persia was introduced during the Achaemenid Empire, two empires prior to the Sasanian Empire, following observations of Babylonian society and customs.[37] In Zoroastrian Persia, like in Assyria, the veil was a status symbol, and it was reserved for women of high status.[38] Women of lower classes were ineligible to wear veils.[39] Due to this system, an absolute requirement of all women to veil never existed in Assyria[40] nor in Zoroastrian Persia, from its first to final empire.[41] Additionally, unlike post-Islamic Iran, veiling seemed to be more dependent on social status rather than religious adherence. Therefore, Islam was not the birthing of Iran's inception of veils; however, it seems to be the first religion in Iran that intertwined itself (as the majority state religion) within law as justification for legally enforcing the veil.

Forced veiling for all, based on gender or religion, did not exist prior to contemporary veiling mandates in Islamic Iran. It is unclear if women who were privileged to veil in Zoroastrian Persia were penalized for not veiling their hair and if such veiling was forced by law. It has been reported that during the early years of the Achaemenid Empire, noble families secluded the women within, and those women *had* to be covered when exiting such seclusion.[42] However, the Mādigān ī Hazār Dādestān is the only legal work from the Zoroastrian period of Persia that has survived,[43] and it does not specify any enforcement in veiling violations.[44]

VI. CONCLUSION

The issue of veiling as a legal requirement in Iran has ebbed and flowed through its long and ongoing history. One can extract legal, social, religious, and secularist contingencies on why it was enforced, depending on the period. When observing both Zoroastrian and Islamic Iran, we understand that the introduction of Islamic law to Iran did not bring with it a new concept of veiling; rather, what *is* unique, in post-Islamic Conquest Iran, is its scope and that its enforcement is strictly religious in its cause and justification, as well as not based on social

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[35] *History of Veil*, https://rootshunt.com/aryans/historyofveil/historyofveil.htm (last visited Mar 6, 2023).

[36] ENCYCLOPEDIA IRANICA FOUNDATION, *supra* note 36.

[37] Janos, *supra* note 29.

[38] LEILA AHMED & KECIA ALI, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE (1993).

[39] Massoume Price, *Women's lives in ancient Persia*, https://www.parstimes.com/women/women_ancient_persia.html (last visited Feb 22, 2023).

[40] KNUT L. TALLQVIST, OLD ASSYRIAN LAWS (2012).

[41] JENNIFER HEATH, THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE, AND POLITICS (2008).

[42] Alexandra Kinias, *History of the Veil. Part One: Veil in the Ancient World*, ALEXANDRA KINIAS, https://alexandrakinias.wordpress.com/2010/06/27/history-of-the-veil-part-one-veil-in-the-ancient-world/ (last updated June 27, 2010).

[43] Maria Macuch, *MĀDAYĀN Ī HAZĀR DĀDESTĀN*, ENCYCLOPÆDIA IRANICA, http://www.iranicaonline.org/articles/madayan-i-hazar-dadestan (last visited Feb 22, 2023).

[44] *Judicial and Legal Systems ii. Partian and Sasanian Judicial* Systems, ENCYCLOPAEDIA IRANICA FOUNDATION, https://iranicaonline.org/articles/judicial-and-legal-systems-ii-parthian-and-sasanian-judicial-systems (last visited Feb 22, 2023).

status like under the legal systems of Zoroastrian Persia. Punishment and enforcement are clearly laid out in today's post- revolution Iran, whereas this was not symmetric in the Zoroastrian-Sasanian Persia. Additionally, when compared to Iran's Muslim neighbors who have implemented reform on veiling requisites, Iran has yet to mirror their actions.

Of course, freedom to veil can extrapolate and provide religiosity toward those who desire to wear it but at the same time, the legal requisite of veils blockades women who wish to have a choice.[45] Possibly more importantly, veiling laws subject violators to hazards visible in Iran's current justice system, specifically regarding their constitutional protections, due process, and carceral system.

The enforcement of hijabs, when prosecuted, will add to Iran's constitutionally non-abiding penal system. Regarding the increased hijab protests in recent months, over 500 women have been incarcerated in the country.[46] In addition to those carceral overcrowding and/or false imprisonment claims, let us examine the constitutional breaches relative to those protesting the hijab.

Incarceration of women who either purposefully or intentionally break the hijab mandate are subject to Iran's unscrupulous criminal justice system which has encountered constitutional infringement issues. Women's rights activists in the country have been subject to "arbitrary prison sentences, torture in detention, banishment to harsher prisons far from their families, and added sentences on the verge of release."[47]

These 500+ detained women are under clear due process violations of Iranian Constitution Article 23, which reads:[48]

> No one may be arrested except by the order and in accordance with the procedure laid down by law. In case of arrest, charges with the reasons for accusation must, without delay, be communicated and explained to the accused in writing, and a provisional dossier must be forwarded to the competent judicial authorities within a maximum of twenty-four hours so that the preliminaries to the trial can be completed as swiftly as possible. The violation of this article will be liable to punishment in accordance with the law. [49]

Article 38 of the Constitution was also violated, with its first sentence reading "All forms of torture for the purpose of extracting confession or acquiring information are forbidden." Not only does incarceration for women mean violations of due process, but also coerced confessions.[50]

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[45] Kalpana Jain, *Why some Muslim women feel empowered wearing hijab, a headscarf*, RELIGION NEWS SERV., https://religionnews.com/2021/09/06/why-some-muslim-women-feel-empowered-wearing-hijab-a-headscarf/ (last updated Sept. 6, 2021).

[46] Dr. Ewelina U. Ochab, *More Than 500 Women Human Rights Defenders Unjustly Imprisoned in Iran*, FORBES (Aug. 13, 2021, 02:45 AM EDT), https://www.forbes.com/sites/ewelinaochab/2021/08/13/more-than-500-women-human-rights-defenders-unjustly-imprisoned-in-iran/?sh=1654fcd321c9.

[47] *Id.*

[48] *Id.*

[49] ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 32.

[50] *Id.* art. 38.

In the latter months of 2022, an Iranian woman by the name of Sepideh Rashno was seen arguing with a woman over the laws regarding the hijab/headscarf requirements.[51] She then publicly disappeared and after a social media frenzy demanding her whereabouts, a video confession was released of a "pale-faced Rashno… shown for a few seconds in what looked like a studio setting saying lines that appeared to have been written by authorities."[52] Rashno's non-violent actions of speech were enough for authorities to violate her liberties and the very principles of Iran's legal instruments.

The forced confession, which blasphemed the authority and diligence of prudent-law and constitutional protection, proved to be a violation of Iranian Constitution article 38's second sentence, which reads, "Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence."[53] In the 21st century, the unsettling divide on the issue of morality behind legally enforcing the veil in Iran still pulsates as the world watches demonstrations demanding gender equality from male and female protesters in Iran.[54]

While the authenticity of religious intentions cannot be empirically verified, and the intent is never to accuse any government of falsely banistering religion for something other than authentic and good intent, there is data that the hijab mandate in Iran does discriminate against its citizens, while providing a position of power to the government, whether convenient to the regime or not.

Iran's history of enforcing a veil mandate for women has always been, before and during Islamic rule, a means of placing authority over groups on which it wishes to exert power. While other strictly Islamic countries in the region address the legality of hijab issues with flexibility, Iran maintains its stubborn posture. The mandate adds to Iran's current structural bias against women, which the Human Rights Watch has listed as hindrances on, 'their ability to travel, prohibitions on entering certain jobs, and an absence of basic legal protections.'[55] It has also been suggested that the hijab mandate allocates control over Iran's female population by being used to "exclude women from various areas of public life, either by explicitly banning women from certain public spaces such as some sports stadiums, or by adding restrictions on their education and workplace etiquette."[56]

That said, the mandate either directly or indirectly provides structural inequity to its female population and its own government has reported 49% of its citizens are against veiling

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[51] RFE/RL's Radio Farda, *Hijab Protester Beaten Before 'Confession' Aired On TV, Says Rights Group*, RADIOFREEEUROPE/RADIOLIBERTY, https://www.rferl.org/a/iran-hijab-protestr-rashno-beaten-tv-confession/31975727.html (last updated Aug. 5, 2022).

[52] RFE/RL's Radio Farda, *Iranian Broadcast of Woman's 'Confession' Sparks Outrage on Social Media,* RADIOFREEEUROPE/RADIOLIBERTY, https://www.rferl.org/a/iranian-broadcast-womans-forced-confession-sparks-outrage/31969195.html (last updated Aug. 1, 2022).

[53] I ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] (Iran), art. 38.

[54] Jessie Van Amburg, *Men in Iran Are Wearing Hijabs in ISolidarity With Women*, TIME (Jul. 29, 2016, 3:21 PM EDT), https://time.com/4430645/iran-hijab-morality-police/.

[55] Sarah Leah Whitson, *Iran: Women Face Bias in the Workplac*e, HUMAN RIGHTS WATCH (May 25, 2017, 12:00 AM), https://www.hrw.org/news/2017/05/25/iran-women-face-bias-workplace.

[56] Moujan Mirdamadi, *How Iran uses a compulsory hijab law to control its citizens – and why they are protesting*, THE CONVERSATION, https://theconversation.com/how-iran-uses-a-compulsory-hijab-law-to-control-its-citizens-and-why-they-are-protesting-91439 (last updated Feb. 8, 2018).

by law.[57] Wearing the hijab is linked to support of the regime during its pre-revolutionary era when the hijab was not obligatory. Therefore, refusal to wear one is known as having a "bad-hijab" and puts those into the crosshairs for structural disenfranchisement as they are profiled as being against the regime.[58] This has led to refusal of service in banking institutions,[59] to measures as extreme as immediate arrests after subsequent police raids on social gatherings, merely for not veiling.[60]

The grounds behind the Iranian veil mandates, from Zoroastrian Persia to today's Iran, have never been uniform. The reasoning ranges from religious to classist and/or sexist justifications. The only comparable observations regarding veiling requirements in Zoroastrian Persia and today's Iran include the requisite base for profiling, which leads to reflective controlling over the "have-nots" in these discriminatory systems.

[57] Eliza Mackintosh, *Iran publishes report saying 49% of Iranians against compulsory veil*, CNN (Feb. 6, 2018, 3:15 AM), https://edition.cnn.com/2018/02/05/middleeast/iran-hijab-law-report-intl/index.html.

[58] Maya Oppenheim, *Iranian women removing headscarves to protest mandatory hijab laws*, THE INDEPENDENT, https://www.independent.co.uk/news/world/asia/iran-women-headscarves-remove-hijab-chastity-day-b2121243.html (last updated Jul. 12, 2022).

[59] *Id*.

[60] Mirdamadi, *supra* note 45.


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THE EXCLUSIONARY EFFECT OF MULTILATERAL GLOBAL TAX REFORMS AND THE PLIGHT OF DEVELOPING STATES

*Alexander Ezenagu and Ilias Bantekas**

ABSTRACT

Countries have come to accept the wide application of international tax rules in both their domestic and international tax affairs. However, where international tax rules fall short of the legitimate expectations of states and fail to provide necessary guidance, impacted states may be compelled to seek other sources of guidance. In this paper, we argue that in the absence and failure of international tax rules to provide adequate guidance and encourage a fair tax system, states should not be prevented from exercising their fiscal sovereignty and submit themselves to new rules and a new sovereign. These observations come in the wake of recent initiatives by the OECD and the G7 which aim to reform global taxation by preventing base erosion and profit shifting in a manner that allows developed states to collect more taxes to the detriment of developing states.

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I. INTRODUCTION

On July 1, 2021, the Organization for Economic Cooperation and Development (OECD) secured the votes of 130 members out of 139 members of the Inclusive Framework on a two-pillar plan to reform the global tax rules.[1] On October 8, 2021 OECD announced that 136 members of the Inclusive Framework had agreed to a two-pillar solution to address the tax challenges arising from the digitalization of the economy.[2] The OECD also stated that a small number of the Inclusive Frameworks have not yet joined the two-pillar solution.[3] Notably, two African countries—Kenya and Nigeria—, active members of the Inclusive Framework, withheld their support for this plan, which has been described by many as "historic".[4]

Nigeria is a major economic force in West Africa and the largest economy by GDP on the African continent. Kenya is East Africa's gateway and the region's largest economy. What must have influenced their decisions not to support a historic global tax reform, and what are the consequences of such action?

A bit of history. The current rules that govern international taxation were designed a century ago, under the auspices of the League of Nations, and subsequently deposited within the OECD.[5] The OECD is a 38-member country club that has no African country members, just as the League of Nations had no African members. Through the OECD Model Tax Convention, commentary, guidelines, and other relevant documents, this 38-member club legislates on the tax practices of countries across the globe, both domestically and internationally.[6] Agitation of the power, non-inclusivity and bias of the OECD led to the introduction of the United Nations Model Tax Convention, commentary, and guidelines in

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[1] *130 countries and jurisdictions join bold new framework for international tax reform*, OCED, https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm (last updated Jan. 7, 2021).

[2] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (last updated June 9, 2023).

[3] *OECD/G20 Base Erosion and Profit Shifting Project: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD (2021), https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.

[4] Holly Ellyatt, '*The beginning of a long road': Global tax reform will take sweat and tears to implement, experts say*, CNBC (June 7, 2021, 9:46 AM), https://www.cnbc.com/2021/06/07/global-tax-reform-deal-will-take-time-negotiation-and-cooperation.html.

[5] *See Double Taxation and Evasion: Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion„* League of Nations Doc. C.562M.178.1928.II (Geneva, Oct. 31, 1928) for a history of tax treaties; J. David B. Oliver, *The Relevance of Tax Treaty History*, 33 INTERTAX 484 (2005); Lara Friedlander & Scott Wilkie, *Policy Forum: The History of Tax Provisions—and Why It Is Important to Know About It*, 54 CAN. TAX J. 907 (2006); Reuven S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313 (2005).

[6] Attiya Waris, *How Kenya Has Implemented and Adjusted to the Changes in International Transfer Pricing Regulations: 1920-2016*, INT'L CTR. FOR TAX & DEV., Working Paper 69, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13401/ICTD_WP69.pdf.

the 1970s, though some may argue that the difference between these treaties is not significant.[7]

While there are other model tax conventions, especially at the national level, the OECD and the UN model tax conventions have become law in the tax space (the question of whether they are hard or soft law, in many respects, is academic).[8] States negotiate bilateral tax treaties on the basis of these tax conventions and by virtue of Article 26 of the Vienna Convention on the Law of the Treaties. Additionally, states are bound by tax treaties entered and are expected to perform them in good faith. However, due to its history and wide acceptance, the OECD's Model Tax Convention is the most used treaty among the two.[9] Some may argue that it has elevated itself to become hard law and is no longer in the realm of persuasive soft law.[10] Such an argument will not be misplaced when one considers the recent use of multilateral instruments in reforming domestic tax laws of countries. As argued, these soft laws have had tangible impacts on countries, and countries have been known to change their tax regimes to align with the transactional legal order of international taxation established by these bodies.[11]

Let us return to the model treaties and their purpose. At the end of the First World War and with the resumption of international trade, firms trading abroad feared that their income and capital would be taxed more than once—by the country where they reside (home country) and the country where they trade or invest (host country). To avert this double taxation and encourage foreign direct investment and international trade, these firms lobbied their countries to sign bilateral tax treaties with other countries for the sole purpose of preventing double taxation of taxpayers, as seen in model tax conventions and tax treaties entered into by countries in the 20th century.[12] For example, Article 1 of both the London and Mexico Model Tax Conventions drafts of the League of Nations expressly state that the

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[7] Reuven S. Avi-Yonah, *International Tax as International Law*, 57 N.Y.U. TAX. L. REV. 483, 497 (2007).

[8] Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned?*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: INSIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP (Cambridge University Press, 2012); also available as Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned*, Minn. Legal Stud., Research Paper No. 12-17, https://ssrn.com/abstract=2044800.

[9] Alberto Vega, *International Governance Through Soft Law: The Case of the OECD Transfer Pricing Guidelines*, MAX PLANCK INST. FOR TAX L. & PUB. FIN., Working Paper No. 2012-05 (2012), https://ssrn.com/abstract=2100341.

[10] Thomas Dubut, *The Court of Justice and the OECD Model Tax Conventions or the Uncertainties of the Distinction between Hard Law, and Soft Law, and No Law in the European Case Law*, 40 INTER TAX 2, 2 (2012).

[11] Frederik Heitmüller & Irma Mosquera, *Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future*, 24 J. INT'L ECON. L. 473 (2021).

[12] During that time, individuals possessed no international legal personality and hence double tax disputes were scarce as they would have required the rather expensive mechanism of diplomatic representation. One of the few cases known to this author that found its way to an international tribunal, in this instance the PCA, is the *Japanese House Tax* case, for which an award was rendered in 1905. *See* Ger. v. Japan (*Japanese House Tax* case), Award ICGJ 407 (Perm. Ct. Arb. 1905). It should, of course, be noted that the PCIJ in the Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser A/B) No. 46 (June 7), was asked to decide whether art. 435 of the Versailles Peace Treaty had abrogated prior customs agreements between the two nations. *See also* Ilias Bantekas, *Inter-State Arbitration in International Tax Disputes*, 8 J. INT'L DISP. SETTLEMENT 507 (2017).

"present convention is designed to prevent double taxation in the case of taxpayers of the contracting States. . . ".[13]

Not long after countries agreed on a model tax treaty for the prevention of double taxation, they realized that they may have empowered firms to create "homeless income", leading to the non-taxation of firms, in addition to the prevention of double taxation. This is when the problems began. Early debates recognized that the flaw in the foundational premise was that multinational entities (MNEs) could create holding companies in tax favorable jurisdictions that could produce income not materially taxed in any country.[14] The creation of "homeless income" by tax treaties caused countries to introduce domestic tax base safeguarding measures, such as Controlled Foreign Corporation (CFC) rules,[15] foreign tax credit (FTC) limitation,[16] earnings stripping prevention rules,[17] thin capitalization rules and other general anti-avoidance rules (GAAR).[18] In the absence of uniform tax reform at the global level, tax competition and tax spillover could lead to conflict among countries, despite the fact that it is a strong tenet of sovereignty that states possess an entitlement to tax as a matter of regulatory power,[19] despite a few exceptional judgments to the contrary.[20] It is here that the OECD comes in.

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[13] *Annex Text of the Model Bilateral Tax Convention,* THE UNIV. OF SYDNEY AUSTRALIAN DIGITAL COLLECTIONS, https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-15.xml;chunk.id=d2395e1647;toc.depth=1;toc.id=d2395e1647;database=;collection=;brand=default (last visited Mar. 5, 2023).

[14] Bret Wells & Cym H. Lowell, *Income Tax Treaty Policy in the 21st Century: Residence vs. Source* 5 COLUM. J. TAX L. 1 (2014).

[15] Reuven S. Avi-Yonah & Oz Halabi, *US Subpart F Legislative Proposals: A Comparative Perspective*, LAW & ECON. Working Paper 69 (2012), https://repository.law.umich.edu/law_econ_current/69.

[16] Michael Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1043 (1997).

[17] Craig Elliffe, *Interest Deductibility: Evaluating the Advantage of Earnings Stripping Regimes in Preventing Thin Capitalisation,* 2 N.Z. L. REV. 257, 257 (2017).

[18] *See* Reuven S. Avi-Yonah, *Bridging the North/South Divide: International Redistribution and Tax Competition*, 26 MICH. J. INT'L L. 371 (2004).

[19] Mobile v. Kimball, 102 U.S. 691, 703 (1880); *see also* Houck v. Little River Drainage Dist., 239 U.S. 254, 265 (1915), Mr. Justice Hughes expressly stated that a state's power to tax is ultra vires if it is abusive and "as a result of its arbitrary character is mere confiscation of particular property". Equally confirmed in A. Magnano Co. v. Hamilton*,* 292 U.S. 40, 44 (1934).

Most international investment treaties (IITs) whether bilateral or multilateral subject their expropriation provisions to the host state's regulatory measures in the field of tax. *See* The United Nations Conference on Trade and Development, *INVESTOR-STATE DISPUTE SETTLEMENT UNCTAD Series on Issues in International Investment Agreements II,* 133*,* UNCTAD/DIAE/IA/2013/2 (2014). Of course, tax-related regulatory measures are lawful when they are legitimate and applied without discrimination and in good faith. *See* Yukos Universal Ltd. (Isle of Man) v. Russia, Hague Ct. Rep. (Scott) 227 (Perm. Ct. Arb. 2014).

In this case, however, the tribunal found that Russia's tax measures against Yukos were expropriatory; *see also* Les Laboratoires Servier SAS Arts et Techniques du Progres SAS v. Poland*,* (Fr. v. Pol.), Hague Ct. Rep. (Scott) 569 (Perm. Ct. Arb. 1989), which reiterated that a state was validly exercising its regulatory (police) powers where it was acting: in good faith; reasonably; without discrimination; and in proportion to the public aim pursued. This applies mutatis mutandis to taxation measures.

[20] For example, Kügele v. Polish State, Case No 34, Annual Digest 24, 69 (1932), rejected the argument that an increase in taxes (a license fee in the case at hand) may be confiscatory, although the tribunal did not necessarily reach the conclusion that this was generally impossible under all circumstances. *See* Ali Lazem & Ilias

This brief article is organized as follows: Section Two explores the impact of tax practices on the enjoyment of fundamental rights, highlighting the need for a mutually acceptable multilateral approach. Section Three then attempts an analysis of the 2020 OECD/G7 initiative to create an inclusive framework and how this has fared in relation to past initiatives by the world's superpowers.

II. A BRIEF ACCOUNT ON THE IMPACT OF HARMFUL TAX PRACTICES ON HUMAN RIGHTS

Not surprisingly, domestic general anti-avoidance measures (GAAR) by states acting individually did not holistically address problems associated with base erosion and profit shifting, or the harmful tax practices of corporations, aided in some instances by jurisdictions through tax laws and policies. Base erosion is the tax planning arrangement of companies geared at reducing a company's taxable profit in a jurisdiction.[21] A common arrangement is the use of loan agreements at high interest rates to lower the taxable profits by deducting large interest payments from the profits of the company.[22] Profit shifting, on the other hand, is the practice by which MNEs shift profits from high-tax jurisdictions to low-tax or secrecy jurisdictions to avoid paying taxes or to pay low, significantly reduced taxes in the low tax jurisdictions, or to not disclose tax information in secrecy jurisdictions.[23] This has had a detrimental effect on the ability of persons in developing countries to enjoy not only socio-economic, but also civil and political rights. It has also allowed governments in fragile, impoverished states to rely on their regulatory power to tax by regressing on their duty to collect taxes from MNEs at the appropriate rate in respect of profits generated on their territory.[24] Such tax practices violate states' obligation to make the maximum use of their resources.[25] In most cases states fail to make the best use of their resources, something that is often pointed out by judicial institutions and intergovernmental entities.[26] One poignant

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Bantekas, *The Treatment of Tax as Expropriation in International Investor-State Arbitration*, 8 ARB. INT'L 85, 91 n.35 (2015).

[21] Annet Wanyana Oguttu, *Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan*, INT'L CTR. FOR TAX AND DEV. 54 (2016), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf.

[22] Sebastion Beer et al., *International Corporate Tax Avoidance: A Review of the Channels, Effect Sizes, and Blind Spots*, INT'L MONETARY FUND 2018/168 (2018), https://www.imf.org/en/Publications/WP/Issues/2018/07/23/International-Corporate-Tax-Avoidance-A-Review-of-the-Channels-Effect-Size-and-Blind-Spots-45999.

[23] Clemens Fuest & Nadine Riedel, *Tax Evasion and Tax Avoidance in Developing Countries: The Role of International Profit Shifting*, OXFORD UNIV. CENTRE FOR BUS. TAX'N 10/12 (2010), https://oxfordtax.sbs.ox.ac.uk/sitefiles/wp1012.pdf.

[24] *See* Magdalena Sepúlveda-Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. on Extreme Poverty and Human* Rights, U.N. Doc. A/HR C/26/28 (May 22, 2014), noting that fiscal policies and unfair tax systems are among the major determinants in the enjoyment of human rights.

[25] *See* Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights*, 16 HUM. RTS. Q., 693 (1994).

[26] In *Settlement Agreement between AJIC and the City of Buenos Aires* (Arg.) 23.360/0 (2008), (2 September 2011), decided by the Superior Tribunal of Justice, the local government had under-utilised its financial resources by 32 per cent in respect of financing early childhood education. Ultimately, the parties reached a settlement, following findings of violations by lower courts regarding the right to education. The settlement contained an

concern with tax base erosion is the distributive failures of so-called regressive tax regimes, although this is largely an indirect outcome of tax base erosion and profit shifting. Its effect is felt in both developed and developing countries, albeit at different ends. These regimes generally rely on the assumption that the rich will invest money in the economy if their personal and property taxes are reduced, taking into account that they already pay some corporate tax and provide significant employment. As a result, regressive regimes balance their shortfall by imposing higher taxes on goods and services, which are, however, consumed by low and middle-income households. Thus, they generate inequitable outcomes and fail to distribute wealth across the population because the poor end up paying more of their income as taxes than the rich.[27] Countries adhering to regressive regimes are not making the maximum use of their resources and should consider reverting to progressive taxation where the wealthy are taxed according to their real income. Such a system, however, cannot work if the global financial system allows the wealthy to emigrate to a handful of tax havens, an issue addressed in a following section of this article and the subject matter of recent OECD and G7 initiatives. In many cases states simply fail in their task to use maximum available resources on account of limited administrative capacity, excessive bureaucracy,[28] or through their inability simply to collect taxes.

There are several indexes by which to measure economic inequality, which itself may explain structural problems with a state's economy, such as tax policies that effectively discriminate against the poor and low-income classes. An index/coefficient regularly employed by the UN Committee on Economic, Social and Cultural Rights (CESCR) is the Gini index, which measures economic inequality in a given population. The Gini index ranges from 0 (or 0 per cent) to 1 (or 100 per cent), with 0 representing perfect equality and 1 representing perfect inequality. In its assessment of the South African report, the country's Gini coefficient of 0.63 was found by the CESCR to be one of the worst globally. The CESCR explained that this score was partially due to South Africa's tax policies, which do not allow the mobilization of the resources required to reduce such inequalities. In addition, it found that value added tax, as well as other taxes on household items, had a serious impact on low-income households, for which there had not been no human rights impact assessments.[29] Section Four goes on to deal with the purported multilateral framework propagated by the OECD, but which ultimately only succeeded in a considerable degree of alienation and the culmination of unilateral goals and outcomes. Three distinct sub-sections examine the three pillars of this framework, namely: alternative corporate minimum tax; digital tax services; and formulary appointment of MNC profits. The final section of the

agreement whereby a permanent auditor was appointed to monitor the progress of relevant works, as well as a bimonthly work group to monitor implementation of the agreement, comprised of representatives from both camps.

[27] The German Federal Constitutional Court has held that the state's power of direct taxation – as opposed to indirect taxation – cannot be used to deprive people of the means for their 'existential minimum'. *See* Bundesverfassungsgericht [Federal Constitutional Court] Sep. 25, 1992, 82 Entscheidungen der amtlichen Sammlung [BVERFGE] 60, 85 (Ger.), Bundesverfassungsgericht [Federal Constitutional Court] Sep. 25, 1992, 87 [BVERFGE] 153,169 (Ger.).

[28] *See* Comm. on Econ., Soc. and Cultural Rts. [hereinafter CESCR] *Concluding Observations on the Combined Third to Fifth Periodic Reports of Romania*, ¶ 7, U.N. Doc. E/C.12/ROU/CO/3-5 (Dec. 9, 2014).

[29] CESCR, *Concluding Observations on the Initial Report of South Africa*, ¶ 21, U.N. Doc. E/C.12/ZAF/CO/1 (Nov. 29, 2018).

paper seeks to ascertain whether these initiatives are in fact self-serving and ultimately force developing states in Africa to pursue unilateral avenues that best benefit their people.

III. THE 2020 OECD/G7 GLOBAL TAX INITIATIVE

In June 2020, under the leadership of the UK, the G7 agreed to push forward a multilateral agreement purportedly aimed at curtailing the capacity of large MNEs to achieve tax base erosion and profit shifting.[30] This was hailed as a seismic initiative, but it is not at all certain, just like several other past G7 initiatives, that it will culminate into a viable and globally accepted agreement. In any event, the 2020 G7 initiative is based on two pillars. Under the first pillar, MNEs will be expected to pay tax in the countries where they operate, as opposed to the countries where they are headquartered. This applies to MNEs with at least a 10 per cent profit margin, in which case 20 per cent of any profit above this 10 per cent profit margin will be taxed in the countries of operation. What is meant here by 'operation' is the accumulation of actual profits as these are reflected in the sale or distribution of an MNEs output. Surprisingly, the multifaceted complexities arising from "value creation" and the distributional conflicts created therefrom are given no attention whatsoever in this consideration.[31] The key beneficiaries of this first pillar tax are developed states with wealthy consumer markets. The countries where MNEs outsource their operations are outliers to this taxation initiative. Given that the introduction of taxation in the country of 'operation' will increase the cost of production, MNEs will now have a greater incentive to race to the bottom in the countries of production,[32] such as by decreasing labor cost, health and safety standards. In this vein, MNEs will no doubt seek to mitigate their increased tax bill by creative accounting through transfer pricing mechanisms.[33] In the absence of legislation and procedures to curtail transfer pricing in developing countries, MNEs are likely to spread profits and losses across their affiliates around the world in order to pay less taxes in the countries of production, the developing states. Even if developing states desired and possessed the mechanisms to deter and punish transfer mispricing, the race to attract foreign investment will halt any attempts to do so. As a result, the actions described in the first pillar

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[30] HM Treasury, *G7 Finance Ministers Agree Historic Global Tax Agreement,* GOV.UK, https://www.gov.uk/government/news/g7-finance-ministers-agree-historic-global-tax-agreement, (last updated June 5, 2021).

[31] *See* Johanna Hey, "*Taxation Where Value is Created" and the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 BULL. FOR INT'L TAX'N 203 (2018).

[32] *See, e.g.*, CESCR, *General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities*, U.N. Doc. E/C.12/GC/24 (Aug.10, 2017), where it was stressed that tax competition and bank secrecy, as well as an absence of global tax cooperation, drives developing states racing to the bottom and erodes fundamental human rights; *see also* Ilias Bantekas, *The Linkages Between Business and Human Rights and Their Underlying Root Causes* 43 HUM. RTS. Q. 117 (2021) (who argues that it is not the case that MNEs are inherently anti-human rights or willingly operate on the edges of the law, but rather that the international financial architecture is structured in a way that pushes developing countries to race to the bottom and which MNEs simply exploit).

[33] *See* Monica Iyer, *Transferring Away Human Rights: Using Human Rights to Address Corporate Transfer Mispricing,*15 NW. J HUM RTS 1 (2017) (who argues in favor of a human rights approach in the design of domestic and international tax policies). *See also* Allison Christians, *Fair Taxation as a Basic Human Right*, 9 INT'L REV. CONST. 211 (2009).

of the G7 initiative smacks of the type of multilateralism imposed by industrialized states out of self-interest with few, if any, tangible benefits for countries in the developing world.[34]

Under the second pillar, G7 states agreed to the principle of a levy of at least 15 per cent global minimum corporation tax on a country-by-country basis. There are several problems with this approach. Firstly, it does not in any way by itself curb harmful transfer pricing. Developing states may well levy 15 per cent corporate tax yet agree to sever or significantly decrease all other taxes that MNEs would otherwise be subject to. MNEs would then be seen in their mother/HQ state as having satisfied the 15 per cent corporate tax requirement, when in fact the overall tax they pay is lower. Secondly, in an ideal scenario, it is not unlikely that a corporate tax below 15 per cent is commingled with a range of levies or other obligations in order to create meaningful employment, contribute to the SDGs, or mitigate the effects of climate change. If this low corporate tax rate is viewed by industrialized states as tax avoidance – and accordingly the imposing state as a tax haven – none of the benevolent effects of the corporate tax decrease would materialize.

In this sense, it is abundantly clear that any efforts towards global tax multilateralism do not (and should not) begin (or end) with the self-interests of the industrialized North and its loss of tax revenues. Rather, any global tax reform, especially if engineered by the G7 should aim at strengthening global tax collection and curtailing profit shifting practices that prevent developing states from collecting due taxes.[35] Nothing in the 2020 G7 Initiative even hints at a tax governance that promotes the SDGs; instead, the wording emphasizes that need for greater tax collection for the benefit of the national economies of G7 states. Of course, there is at least one potentially useful outcome from the G7 initiative, if in fact it culminates into a treaty. Economies operating as mere postal boxes with no oversight or interest in the operations of foreign corporate entities, particularly those offering flags of convenience to shipping/freight companies, will be particularly impacted and rightly so. Companies operating under flags of convenience have not only evaded taxes globally, but moreover contribute nothing to the economies of host states and because of the absence of oversight mechanisms, they have been allowed to operate in gross violation of seaworthiness, labor and health and safety standards.[36]

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[34] *See* Reuven S. Avi-Yonah, *Globalization, Tax Competition and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1650 (2000) (who argues that "[i]n the absence of a world taxing authority that can redistribute tax revenues directly and given the paucity of foreign aid from developed to developing countries, [a progressive division of an international tax base between rich and poor] has the best chance of achieving meaningful distributive goals").

[35] *See* Johanna Stark, *Tax Justice Beyond National Borders--International or Interpersonal?*, 41 OXFORD J. LEGAL STUD. 133 (2021) (who argues in favor of an international tax regime delivering distributive tax justice). *See also* Ivan Ozai, *Two Accounts of International Tax Justice*, 3 CANADIAN J.L. & JUR. 317, (2020) (who traces the distributive consequences of a possible global tax reform).

[36] *See* L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience: Does the Present Law Pose Special Liability Issues?*, 3 PACE Y.B. INT'L L. 63, (1991); Eric Powell, *Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience*, 19 ANN. SURV. INT'L & COMPAR. L. 263 (2013).

IV. THE EMERGENCE OF MULTILATERALISM THROUGH THE OECD AND ITS EXCLUSIONARY OUTCOMES

Although the human right dimension of base erosion was an insignificant factor in multilateral efforts to curtail such practice of tax base erosion and profit shifting, the significant loss of tax revenues of developed states was reason enough. It is thus unsurprising that a multilateral approach to address issues of base erosion and profit shifting had become desirable and was under discussion since the early 2010s. Under pressure by the G7 and G20 countries, the OECD in 2013 launched the Base Erosion and Profit Shifting (BEPS) initiative, to close gaps for companies that allegedly avoid taxation or reduce tax burden in their home country by engaging in tax inversions (moving operations) or by migrating intangibles to lower tax jurisdictions. 15 Action Items were issued by the OECD, which formed the BEPS Action Plans. They were to address tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax. In 2015, the BEPS package of 15 measures were delivered. It is important to note that this package of 15 measures was developed by 44 jurisdictions including all OECD and G20 members participating on an equal footing, as well as through widespread consultations with more than 80 other jurisdictions.[37] The OECD's desire was to introduce "soft law", which will be adopted by most countries both in their domestic and international tax dealings. To achieve this and to obtain legitimacy, in 2016 the OECD established the Inclusive Framework.[38] The Inclusive Framework came as a result of the call by G20 Finance Ministers to the OECD to build a framework by early 2016 with the involvement of interested non-G20 countries and jurisdictions, particularly developing economies, on an equal footing.[39] The mandate of this Inclusive Framework is to implement the BEPS package and finalize the remaining technical work to address BEPS challenges. For context, the delineation of the global tax issues, decision on priorities and solutions to these tax issues, were decided by 44 countries between 2012 and 2015.[40] In 2016, other countries, mostly developing countries, were invited to participate in the implementation of these global tax reforms, "on an equal footing". This act by the developed countries led to the metaphor, if you are not on the table, you are on the menu, among civil societies and campaigners. Nevertheless, African countries joined the Inclusive Framework and actively participated in

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[37] *Inclusive Framework on BEPS: Progress Report July 2016-June 2017* OECD Report (2017), https://www.oecd.org/tax/BEPS/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf. [hereinafter *Inclusive Framework*] BEPS was introduced in the EU as EU Council Directive EU/2016/1164 of 12 July 2016 (ATAD. For the purposes of this discussion, ATAD requires EU member states to adopt CFC rules (e.g., tax is based on residence if the effective tax rate of the source jurisdiction is below 50 per cent of the tax rate in the residence jurisdiction). This makes it much more difficult to shift profits artificially outside the EU. *See* Reuven S. Avi-Yonah & Orli K. Avi-Yonah, *Be Careful What You Wish For?: Reducing Inequality in the Twenty-FirstCentury*, 116 MICH. L. REV. 1001 (2018).

[38] Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 2 ERASMUS L. REV. 76, (2017).

[39] *Inclusive Framework*, *supra* note 37.

[40] It is noteworthy that following the ratification of more than one-hundred bilateral tax agreements by the USA to curtail tax base erosion, which ultimately led to a Common Reporting Standard (CRS) for the automatic exchange of financial information, the OECD came up with a Multilateral Agreement on Administrative Cooperation in Tax Matters (MAATM). The aim of this was to concretize the CRS model and eliminate bank secrecy from the process. *See* Reuven Avi-Yonah & Gianluca Mazzoni, *BEPS, ATAP and the New Tax Dialogue: "A Transatlantic Competition?"*, 46 INTERTAX 885 (2018).

its deliberations. After all, you cannot complain of non-inclusion when you are not part of the decision-making process.

At the conclusion of the first BEPS Initiative, the OECD initiated BEPS 2.0, essentially blueprints on two pillars on finding solutions to the tax challenges arising from the digitalization of the economy. The 2013 BEPS Action Plan 1 focused on addressing the tax challenges of the digital economy and failure to reach a multilateral consensus on it. In addition to its heralded importance for all countries, the 2013 BEPS Action Plan 1 led to its elevation into BEPS 2.0. The Inclusive Framework is saddled with the responsibility of achieving multilateral consensus on this very important issue.

Pillar One of the blueprints sets out to develop a new right to tax highly digitalized companies but also consumer-facing companies who reach consumers in a jurisdiction through digital means.[41] Important here is the agreement on the nexus for establishing presence in a jurisdiction, given the limitations of permanent establishment nexus contained in tax treaties. Pillar Two focuses on ensuring that large internationally operating businesses pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate in.[42] These two pillars have pre-occupied the focus of the international tax community for the last five years, with countries and experts heavily investing in the process. For instance, Nigeria's active involvement saw the then head of the international tax department and now head of the tax policy department of the Federal Inland Revenue Service, become the Vice-Chairman of the Inclusive Framework. Thus, it is safe to claim that Nigeria, as many other African countries, sought a multilateral solution to the global tax issues and actively participated in the negotiation. However, Nigeria, in addition to Kenya, Sri Lanka and Pakistan, withheld its vote on the global solution, whose process it actively participated in.

The issues plaguing global corporate tax rules can be summarized thus: conflict of allocation of taxing rights between residence (mostly developed countries) and source states (mostly developing countries);[43] treatment of subsidiaries of MNEs as separate entities,[44] base erosion and profits shifting activities of MNEs through transfer mispricing and earnings stripping activities; and finally, tax competition through low or no tax rates.[45] Note that countries can address these issues through their domestic laws, however, as feared in the 1920s, it is the conviction that unilateral actions of countries will lead to double taxation of firms and adversely affect foreign investments, making it important to adopt a global

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[41] Org. for Econ. Coop. & Dev. [hereinafter OECD], *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris (2020), https://doi.org/10.1787/abb4c3d1-en.

[42] *Id.*

[43] European Commission, *Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century*, COM(2021) 251 final (2021), https://taxation-customs.ec.europa.eu/system/files/2021-05/communication_on_business_taxation_for_the_21st_century.pdf.

[44] Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development: New Thinking on SDGs and International Law, Policy Brief No. 4* (2019), https://www.cigionline.org/static/documents/documents/SDG%20PB%20no.4_0.pdf.

[45] Aqib Aslam & Maria Coelho, *A Firm Lower Bound: Characteristics and Impact of Corporate Minimum Taxation*, INT'L MONETARY FUND 2021/161 (2021), https://www.imf.org/en/Publications/WP/Issues/2021/06/08/A-Firm-Lower-Bound-Characteristics-and-Impact-of-Corporate-Minimum-Taxation-49886.

consensus on addressing these tax challenges.[46] Hence, the BEPS process and the establishment of the Inclusive Framework. What is clear from the reactions of the African and other developing nations is that while the OECD may have achieved something historic by getting 136 jurisdictions to "agree" on a global approach to tax MNEs, the global solution has failed to meet its demands. One such demand is that the global minimum tax must be at least 20%[47] (25% for civil societies), however, the OECD has opted for a global minimum tax of 15%.[48] Note that, the African country of Mauritius, notorious for its use by firms for base erosion and profit shifting, has a corporate income tax of 15%, effectively, 3% after foreign tax credit, while Nigeria has a corporate income tax of 30%. The two-pillar solution excludes extractive industries and financial services from its scope, two important economic sectors to Nigeria in terms of employment and GDP contribution.[49] It is arguable that the Inclusive Framework achieves little or nothing for Nigeria, which may explain the country's withdrawal of support for the "historic" global tax plan.

A. ALTERNATIVE CORPORATE MINIMUM TAX

What becomes of Nigeria and other African countries? First, it must be stated that tax is a sovereignty issue, and the sovereignty of national taxation should be protected.[50] This is beyond doubt part of customary international law, even if tax regulation in one state produces an impact on other states and its institutions, whether public or private. Where soft law fails to achieve fair and equitable treatment of all countries, countries will assert their sovereignty on tax matters,[51] which must be respected.[52] As Benjamin Franklin echoed, "we must, indeed, all hang together, or most assuredly we shall all hang separately."[53] For Nigeria, this necessarily means the imposition of taxes on the profits of any company, which accrue in, are derived from, brought into, or received in Nigeria, as provided for in section 9 of the

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[46] Wole Obayomi & Victor Adegite, *INSIGHT: Taxation of Digital Economy in Nigeria—Significant Economic Presence*, BLOOMBERG TAX (Aug. 24, 2020, 3:00 AM), https://news.bloombergtax.com/daily-tax-report-international/insight-taxation-of-digital-economy-in-nigeria-significant-economic-presence.

[47] *130 Inclusive Framework Countries and Jurisdictions Join a New Two-Pillar Plan to Reform International Taxation Rules—What Does this Mean for Africa?* ATAF, https://www.ataftax.org/130-inclusive-framework-countries-and-jurisdictions-join-a-new-two-pillar-plan-to-reform-international-taxation-rules-what-does-this-mean-for-africa (last updated Jul. 1, 2021) [hereinafter *130*].

[48] Lamia Oualalou, *ICRICT Report: The Global Pandemic, Sustainable Economic Recovery, and International Taxation*, https://www.icrict.com/press-release/2020/6/14/icrict-report-the-global-pandemic-sustainable-economic-recovery-and-international-taxation (last updated June 15, 2020).

[49] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm (last updated June 9, 2023).

[50] Julien Chaisse & Xueliang Ji, *'Soft Law' in International Law-Making — How Soft International Taxation Law is Reshaping International Economic Governance,* 13 ASIAN J. WTO & INT'L HEALTH L. AND POL'Y 463 (2018).

[51] Will Moreland, *The Purpose of Multilateralism: A Framework for Democracies in a Geopolitically Competitive World*, BROOKINGS (2019), https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190923_purpose_of_multilateralism_moreland.pdf.

[52] *130*, *supra* note 47.

[53] Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 137 (2016).

Corporate Income Tax of Nigeria.[54] Options such as alternative corporate minimum tax (ACMT),[55] formulary apportionment of profits of MNEs[56] and digital services tax (DST)[57] should be adopted by the country in the exercise of its sovereign power to tax income and profits with significant economic presence within its territory.[58] These reform options are further discussed below.

Alternative corporate minimum tax (ACMT) is the imposition of a small percentage tax rate, for example, 1 percent, on the taxpayer's total revenue (turnover) before any deductions.[59] Where the alternative tax is higher than the taxpayer's regular tax liability (tax on the taxable profits of the taxpayer), the minimum tax is payable. The ACMT imposes a minimum tax rate on the turnover of companies, geared towards preventing base erosion and profit shifting, since no deductions are allowed before imposing the tax. For opponents of the ACMT, they argue that taxes on gross revenue subject investors to risk taxation even in the absence of economic profit. Therefore, the ACMT may be deemed to be economically inefficient for that purpose. Proponents of the ACMT argue that the ACMT is immune to avoidance of taxes through the overstatement of deductions since no deductions are allowed. They also argue that the ACMT is relatively easier to administer when compared to the existing tax system, which is fraught with the challenges of determining the arm's length and applying complex and difficult transfer pricing methodologies.

B. DIGITAL SERVICES TAX

The digital services tax (DST) is similar to the imposition of withholding taxes on payments made by a taxpayer to a recipient.[60] The DST is paid on the gross transaction value of the digital service and the aggregate of DSTs paid on behalf of a taxpayer, for example, Netflix, will be deemed the final tax for that taxpayer, except where the foreign taxpayer has a permanent establishment in the taxing jurisdiction. Of importance is the definition of what constitutes digital services. For example, Kenya's Income Tax (Digital Service) Tax Regulations, 2020, defines digital services to include, "over-the-top services, downloadable digital content, provision of digital marketplace, sale of, licensing of, or any other form of monetizing data collected about users, generated from the user's activities on a digital

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[54] *See* Companies Income Tax Act (1977), § 9 (Nigeria).

[55] Aslam & Coelho, *supra* note 45.

[56] *Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Centur*y COM (2021) 251 final (May 18, 2021).

[57] Christophe Waerzeggers, et al., *The Evolution of Tax Law Design within an Increasingly Destabilized International Tax Law Framework*, *in* CORPORATE INCOME TAXES UNDER PRESSURE 341-357 (Ruud De Mooij, et al., eds., 2021).

[58] *See* Finance Act (2019) 107:6 O.G., A1-24 (Nigeria).

[59] MICHAEL C. DURST, TAXING MULTINATIONAL BUSINESS IN LOWER-INCOME COUNTRIES: ECONOMICS, POLITICS AND SOCIAL RESPONSIBILITY (2019).

[60] Ana Cebreiro-Gómez et al., *Digital Services Tax: Country Practice and Technical Challenges*, INT'L BANK FOR RECONSTRUCTION AND DEV./THE WORLD BANK (2021), https://documents1.worldbank.org/curated/en/099725001112228984/pdf/P169976002e89a07209ae40d48d6ebb7154.pdf.

marketplace…".[61] The Regulations further defines a digital platform to mean "any electronic application that allows digital service providers to be connected to users of the services, directly or indirectly, and includes a website and mobile application".[62] Scholars have expressed the view that the introduction of a DST by a jurisdiction will see companies pass the additional burden to consumers in increased prices of the product.[63] This is commonly found in contracts where gross-up provisions are inserted to pass any burden imposed by the domestic law on the service recipient and not the provider. However, the same argument can be made for all types of taxes on companies since companies will always seek to maximize profits. Also, in a competitive market, increased prices of products by companies may result in boycott of the products for other products. Thus, companies have the incentive not to increase their prices, especially in a competitive market.[64]

C. FORMULARY APPOINTMENT OF PROFITS

The formulary appointment of the profits of multinational group, in most cases, emanates from the treatment of the multinational group as a single firm (also known as unitary firm). This approach considers the multinational group as a single business, which for convenience is divided into purely formal separately incorporated subsidiaries.[65] After the global income of the multinational group is computed, the group income is apportioned between the various component parts of the group by a formula that reflects the economic contribution of each component part to the derivation of the global profit.[66] This approach of income allocation recognizes that the relationships between members of the multinational group are governed predominantly by control, and not legal contracts. It accepts the economic reality that multinational entities of a group share ownership, management and control, and this shared relationship should define their tax treatment as unitary firms contributing to a group profit.

To apply the formulary apportionment, establishing the unitary business and applying the formula are essential. Which parts of the business of the group are deemed unitary for the purpose of unitary taxation? Should all subsidiaries of the group be covered or are some to be excluded? What factors should be applied in profit apportionment and how should those be factors be weighed? It must be stated here that different businesses or industries will require different factors and weights. The factors and weight for the extractive industries differ from those for the digital economy.[67]

Opponents of the formulary apportionment of profits of group companies have argued that a move from the arm's length principle would abandon the sound theoretical basis on

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[61] *See* The Income Tax (Digital Service Tax) Regulations (2020) KENYA GAZETTE SUPPLEMENT NO. 214 § 3, pursuant to the Finance Act 2020.

[62] *Id.* § 2.

[63] Wei Cui, *The Digital Services Tax: A Conceptual Defense,* 73 TAX L. REV. 69 (2019).

[64] Andrew Appleby, *Subnational Digital Services Taxation,* 81 MD. L. REV. 1 (2022).

[65] Kimberly A. Clausing, *The U.S. State Experience Under Formulary Apportionment: Are There Lessons for International Reform*?, 69 NAT'L TAX J. 353 (2016).

[66] Sol Picciotto, *Taxing Multinational Enterprises as Unitary Firms*, INT'L CTR. FOR TAX & DEV. 53 (2016), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12773/ICTD_WP53.pdf.

[67] Johannes Becker et al., *How Data Should (Not) Be Taxed*, (2018).

which the arm's length principle is founded. They have also argued that such a move, especially by individual countries or a small group of countries, will threaten the existing international consensus on taxation of MNEs, thereby substantially increasing the risk of double taxation. Also, a move to the formulary apportionment would require substantial international coordination, consensus on the pre-determined formula and composition of the group, which would be difficult to achieve. The use of pre-determined formula for all similar transactions or industries as against a case-by-case formula determination, is seen as arbitrary and not appreciative of the unique attributes of each transaction or each company within the same industry.[68] Proponents of formulary apportionment, emphasize that this approach guarantees that profit is taxed where the economic activities occur and eliminates the appeal of tax havens or low-tax jurisdictions, since substantial economic activities must occur in those jurisdictions for any profit to be allocated to them.[69] They also argue that the formulary apportionment greatly reduces profit shifting and base erosion by excluding intra-firm transactions and expenditure in the calculation of the group profit.[70]

V. MULTILATERALISM AT WHAT COST AND FOR WHOSE BENEFIT?

No reform option provides a one-size-fits-all solution or will be 100 percent fool-proof, however, tax regimes should be at the determination of the country, without fear of being black-listed or punished by the developed countries. It is therefore puzzling that the OECD in the October 2021 agreement has asked countries to remove all digital services taxes and other similar measures with respect to all companies, and to commit not to introduce such measures in the future. Note that Pillar I of the two-pillar solutions only applies to in-scope companies (about 100 global MNEs), leaving out the thousands of MNEs operating in developing countries. What rules apply to them? The existing arm's length principle, judged to be flawed, which led to the current BEPS process? In the absence of guidance or any acceptable guiding international law, countries should not be berated for introducing and implementing domestic measures. After all, nature abhors a vacuum.

Second, a new international tax soft law regime and a global tax sovereign should be created by Nigeria and other African countries to replace the OECD and its hold on the international tax regime. For decades, scholars and stakeholders have called for the establishment of a UN tax body, with obvious merits for developing countries. Recent updates to the UN Model Convention further justify this call. For instance, the recently agreed Article 12B of the UN Model Convention empowers source States to tax income paid by the resident of its State or a permanent establishment of a non-resident of its State to a third party of the other contracting State.[71] The new Article 12B allows source States to tax

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[68] Altshuler, Rosanne & Harry Grubert, *Formula Apportionment? Is it Better Than the Current System and are There Better Alternatives?* 63 NAT. TAX. J. 1145 (2009).

[69] *See* Michael Durst, *The Tax Policy Outlook for Developing Countries: Reflections on International Formulary Apportionment*, INT'L CTR. FOR TAX AND DEV. 32 (2015), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/11181/ICTD_WP32.pdf.

[70] *See* KIMBERLY A. CLAUSING & REUVEN S. AVI-YONAH, REFORMING CORPORATE TAXATION IN A GLOBAL ECONOMY: A PROPOSAL TO ADOPT FORMULARY APPORTIONMENT (2008).

[71] *See* Andrés Báez Moreno, *Because not always B comes after A: Critical Reflections on the*

the gross income paid by resident of its State to the other State, while permitting the taxpayer of the other State to elect to pay taxes on its net profit for the financial year, where the taxpayer chooses and provides documents to that effect.[72] In any case, the source State has the right to tax the gross income of the taxpayer of the other contracting State. Article 12B does not incorporate a de minimis thresholds at present in the OECD BEPS Pillar I outcome, thus, giving states the right to tax any taxpayer, regardless of size. States may unilaterally decide to introduce de minimis threshold, for administrative efficiency.

While the call for a UN body may still be desirable, it is high time the African Union (AU) played an important role in tax matters. There are reasons for this. An AU tax body and regime will provide African countries with stronger bargaining power, akin to the roles of the US congress and the European Union parliament on tax matters. Decisions reached at the OECD and other global platforms are subject to approval at the legislative houses of these unions, offering further protection and influence. An AU tax body negotiating on behalf of all African countries will better represent the continent and influence decisions at the global level. The other reason is that, since the coming into effect of the African Continental Free Trade Area (AfCFTA) agreement, tax issues pose non-tariff barriers to the successful implementation of the free trade area, especially corporate income tax.[73] Hence, an AU tax regime on corporate income taxation of firms trading within the free trade area will avert tax avoidance, tax evasion and tax competition, which may act as barriers to the success of the AfCFTA.

Finally, corporate income tax is of great economic relevance to Nigeria, the largest contributor of non-oil tax to the country's revenue, and other African countries.[74] According to ATAF, large taxpayers, usually MNEs, account for 78% of total tax revenue collected by African countries, and corporate income tax is a significant part of the total tax revenue.[75] Thus, preserving the corporate income tax is of great relevance to Nigeria and other African countries. The failure of multilateralism in achieving a fair and equitable global tax solution leaves countries with no choice but to seek unilateral measures and new alliances. Such actions are justifiable, and Nigeria, just like Kenya, is right to have taken the first step in not supporting the global tax plan. It must now be bold in its next steps, by (1) protecting its fiscal sovereignty and exercising it without fear in accordance with laws of the state; and (2) by rallying other African countries under the auspices of the African Union to develop a tax regime that will work for the continent and ensure the successful implementation of the AfCFTA.

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new Article 12B of the UN Model Tax Convention on Automated Digital Services (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923508.

[72] Okanga Okanga &Lyla Latif, *Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance,* 2 AFR. J. of INT'L ECON. L. 100, 119 (2021).

[73] *See* Alexander Ezenagu, *Transfer Mispricing as a Non-Tariff Barrier to the African Continental Free Trade Agreement*, AFRONOMICS LAW (2019), https://www.afronomicslaw.org/2019/01/24/transfer-mispricing-as-a-non-tariff-barrier-to-the-african-continental-free-trade-agreement.

[74] *See* Tax/Statistics Report (2021) (Nigeria), https://www.firs.gov.ng/tax-statistics-report/.

[75] *See* African Tax Administration Forum, *African Tax Outlook 2019* (2019) (S. Afr.), https://events.ataftax.org/index.php?page=documents&func=view&document_id=49&token=cf479f8927dec3b8fc4f3c027c42aa9d&thankyou.

VI. CONCLUSION

Global tax initiatives have been manifold in the recent past, going far beyond the less complicated issue of double taxation. One would have expected that in the era of the SDGs and the challenges posed by climate change, multilateral tax initiatives, especially when intended to serve as potential global agreements, would focus on fair and equitable tax distribution, which in turn would help reshape the current international financial architecture. Neither the OECD nor the recent G7 initiatives support or lend hand to such an approach.[76] For one thing, the type of tax multilateralism envisaged and engineered by these entities is exclusive of the developing world. It is solely driven by the top to the bottom.[77] In fact, this type of multilateralism is of such a nature that does not require the active consent and participation of all states, even though its potential impact is global and severe. In the past it was rather simple to distinguish between contracting and non-contracting parties to a treaty regime, even if the treaty did produce some mild outcomes on third parties. The economic prowess of developed states (effectively controlling capital, currency, foreign investment, as well as political and military power) dictates that any agreement between them is necessarily 'forced' on third states and their populations. What might offset this state of affairs is a competing - regional or like-minded – tax regime that relies less on foreign capital and investment and whose participants are able to mitigate the effects of hard currency fluctuations as these impact imports and exports. This is a tall order, which does not seem likely, even if there are voices to this direction in Africa by countries such as Nigeria and Kenya. Although it is beyond the scope of this short paper, a potential alliance with China and Russia is a dimension whose impact has not been fully explored. It is hoped that any current or future global tax initiatives are not devoid of a human rights approach and are consistent with the UN Sustainable Development Goals. In the opinion of these authors such an approach is the only form of multilateralism that can achieve global inclusivity, and which can be labelled legitimate.

While the OECD and G7 leaders have every interest to pursue a global tax agenda that serves the backbones to their economies, namely the prerogative to tax MNCs at a level that does not allow host states to reap tangible tax benefits, it is unlikely that such a system can persist for much longer. Developing host states are weary of the international financial legal

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[76] BCB Holdings Ltd. and Belize Bank Ltd. v. Att'y Gen. of Belize, [2013] Caribbean Court of Justice [CCJ] 5 (AJ) is emblematic of this approach. There, a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor because it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The Caribbean Court of Justice argued that whether or not the concession violated public policy should be assessed by reference to 'the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize' as well as international public policy. The tax concession could only be considered illegal if it was found to breach 'fundamental principles of justice or the rule of law and represented an unacceptable violation of those principles.' It should be noted that BCB and the Bank of Belize bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded. BCB Holdings Ltd. and Belize Bank Ltd. v. Government of Belize, Fed. Appx. 17 (D.C. Cir. 2016), *cert. denied,* 137 S. Ct. 619 (2017). The courts of developed states were happy to approach the validity of the award legalistically and not through the lens of tax justice or public policy.

[77] *See* Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation* 19 INT'L J. CONST. L. 798 (2021) (arguing that when capitalism was left to its own devices it bred injustice and inequality. The focus of the article is on Chinese capitalism and hence Alter takes the view that multilateralism led by liberal states is beneficial).

regime under which they have become highly indebted and there is some discussion in the horizon for alternative international finance regimes.[78] It is not a far leap for developing states to push towards modified unilateral or regional multilateral foreign investment normative frameworks that avoid a race to the bottom, which effectively allows MNCs to achieve maximum benefits in their search for host states. If alternative investment and finance frameworks are ultimately set up, even if rudimentary, taxation will become the next battleground. Control of investment, finance and international trade and commerce is the bedrock for the reform of the international tax regime.

[78] *See* Ilias Bantekas, *Addressing Unsustainable Sovereign Debt through Parallel System(s) of Transnational Finance*, 37 CONN. J. INT'L L. 72 (2021).