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Investment Arbitration involving the Renewable Energy Industry under the Energy Charter Treaty:

Recent Developments within the European Union

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A thesis submitted for the degree of
LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation

January 2022
Thessaloniki – Greece

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January 2022
Thessaloniki - Greece

Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

With renewable energy being an overly important sector of today's economy, disputes arising out of it are inevitable. During the past few years a substantial body of case law has been formed from arbitral tribunals applying the Energy Charter Treaty on such investment disputes within the territory of the European Union.

A review of this case law showcases important aspects of international investment law and its arbitrability within the European Union. Firstly, the most contemporary issue of international investment law arises, namely the conflict between legitimate expectations of investors with regards to the treatment of their investments by host States and the right of States to regulate without being bound by their previous behavior towards investors. Consequently, an extremely significant issue in the context of the European Union also derives from arbitrating such investment disputes, that is the ability of an arbitral tribunal to interpret and apply European law and ultimately the tribunal’s jurisdiction for resolving investment disputes between Member States; the Achmea Judgment of the CJEU had already provided some insight on this matter and was recently followed by the Komstroy Judgment that provided more answers from an EU Law perspective.

The effect both above decisions of the CJEU may have on the applicability of the Energy Charter Treaty in intra-EU Investment Arbitration in practice remains to be seen. This dissertation thus aims to the extensive review of the aforementioned case law and the respective analysis of the relevant, mainly EU-related, issues it has created.

Keywords: Energy Charter Treaty, Renewable Energy, Intra-EU Investment Arbitration

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31/01/2022

Preface

As already briefly mentioned, the subject of this dissertation revolves around the Energy Charter Treaty, renewable energy and Investment Arbitration in an intra-EU context. So, these main pillars need to be briefly explained before attempting to analyze in more detail the relevant case law *(Chapter 1 - Introduction)*.

The following structure will then be followed for the comprehensive analysis of this subject, that is the arbitrability of intra-EU investment disputes arising out of the Energy Charter Treaty, with regards to its development through renewable energy case law in the past years and its status in the present day.

To begin with, the views of arbitral tribunals that first came across renewable energy disputes under the Energy Charter Treaty between a European investor and an EU Member State, shortly after regulatory reforms had taken place in this sector, and had to decide upon the so-called "intra-EU objection" will be reviewed *(Chapter 2)*. It will become evident that arbitral tribunals, not being bound by European Law and not finding any reason to apply it when applying an international treaty, constantly rejected such objections to their jurisdiction.

Following, the Achmea Judgment of the Court of Justice of the European Union at its basic arguments will be examined *(Chapter 3)*. This judgment refers to a specific Bilateral Investment Treaty, but its effects on Intra-EU Investment Arbitration in general came to be far more reaching.

Consequently, a review of subsequent case law from arbitral tribunals will follow showcasing the potential jurisdictional effects of the Achmea Judgment on Intra-EU Investment Arbitration under the Energy Charter Treaty *(Chapter 4)*. It should be noted up front that the views of arbitral tribunals on their jurisdiction were not substantially modified due to the Achmea Judgment.

The very recent Komstroy Judgment of the Court of Justice of the European Union examines the herein subject at its core and its views will be analyzed as broadly as possible *(Chapter 5)*. The implications of the aforementioned judgment for Investment Arbitration under the Energy Charter Treaty inside the EU *(Chapter 6)*, along with its possible consequences on the post-award phase, meaning on set-aside proceedings and recognition and enforcement proceedings *(Chapter 7)* will occupy the last and most important part of this dissertation, before reaching its conclusions *(Chapter 8)*.

In a few words, this dissertation aims at looking into the interrelation between European Law and International Law, taking the application of the Energy Charter Treaty in renewable energy disputes between EU investors and EU Member States by arbitral tribunals as a starting point.

Engaging with this subject would not have been possible without the guidance of my supervisor Prof. Komninos Komnios. His support and encouragement during the past few months, along with his positive attitude, have been of the utmost importance in my effort to compose this dissertation.

Contents

1. Introduction

Before delving into the views of arbitral tribunals and the relevant case law regarding the Renewable Energy Industry, some preliminary remarks giving context to the subject are deemed necessary. More specifically, a few words on the ECT, renewable energy and the relevant regulatory reforms that arose out of the economic crisis of 2008 in the EU will follow.

1.1. The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a unique multilateral international treaty in the energy sector. Although it contains provisions in various areas (such as energy trade, transit, competition and environmental protection), *its provisions regarding the protection and promotion of energy investments are its cornerstone*[1].

Prior to the ECT, the European Energy Charter was signed in December 1991 by over fifty states, including the European Union (EU) and EURATOM. Its signature set the ground for the negotiation of the ECT and highlighted the key areas where the future Contracting Parties should act. The ECT was eventually signed in December 1994 and *entered into force on 16 April 1998*. The ECT is unique not only because of its objectives, but also because of the speed of its negotiation; less than three years to reach an agreement on such controversial issues. The purpose of the ECT[2] is not to regulate in detail, but to provide for a legal framework based on which the Contracting Parties can further negotiate and agree on specific rules applicable in the energy field[3].

The *settlement of disputes* between investors and the Contracting Parties to the ECT is regulated in Article 26 ECT. The dispute resolution mechanism under Article 26 is unconditional and does not require the prior exhaustion of local remedies. Furthermore, the provision does not concern the resolution of disputes between a Contracting Party and its own investors[4]. In accordance with Article 26, the disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former, which concern an alleged breach of an obligation of the Contracting Party under Part III of the ECT (Investment Promotion and Protection), shall first be settled amicably. If such a dispute cannot be settled amicably within a period of three (3) months, the *investor may choose* to submit the dispute for resolution (a) to the courts or administrative tribunals of the Contracting Party party to the dispute; or (b) in accordance with a previously agreed

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[1] *Baltag C.*, Arbitrating Investments Disputes under the Energy Charter Treaty, Romanian Arbitration Journal, Vol. 7, No. 3, July-September 2013, p. 31.

[2] As set out in Article 2, the purpose of the ECT is to create "*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*".

[3] *Baltag C.*, op. cit., pp. 31-32.

[4] In these cases, the investors must resort to the national laws and seek remedies in the courts of the Contracting Party.

dispute settlement procedure; or (c) to international arbitration or conciliation. If the investor chooses to resort to arbitration, the following options are available: (i) in front of the ICSID, under the ICSID Convention or the ICSID Additional Facility Rules; (ii) by an arbitral tribunal under the UNCITRAL Rules; (iii) by an arbitral tribunal in front of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)[5]. *The choice belongs to the investor and the Contracting Parties give their unconditional consent to the submission of a dispute to international arbitration or conciliation. Consequently, a Contracting Party may not withdraw its consent upon the receipt of a request for arbitration or conciliation from the investor*[6].

More recently, in 2015, the International Energy Charter was signed, as a step towards strengthening energy cooperation and facing current energy challenges that originated after the signature of the European Charter and the ECT, such as the interrelationship between energy security, economic development and environmental protection, the role of energy trade for sustainable development and the need for diversification of energy sources and routes, among others[7].

In November 2017, the discussions on the modernisation of the ECT were initiated. The list of topics to be considered in this process was put together and approved on 27 November 2018. The EU authorised the European Commission to join the negotiations for the modernisation of the ECT and approved the list of items to be addressed. In one of these documents, the EU clarified that "*since the 1990s (most of) the ECT provisions have not been revised. This became particularly problematic in the context of the ECT provisions on the protection of investment, which do not correspond to modern standards as reflected in the EU's reformed approach on investment protection. Those outdated provisions are no longer sustainable or adequate for the current challenges; yet it is today the most litigated investment agreement in the world*"[8].

On 2 March 2020, the EU presented a draft proposal on the modernisation of the ECT, which did not address Investor-State Dispute Settlement (ISDS). Consequently, on 20 April 2020, the EU released a revised draft proposal that also included several changes and reforms to ISDS. By this proposal, the EU reaffirmed its commitment to set up a Multilateral Investment Court (MIC) meant to entirely replace the investor-State arbitration system[9].

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[5] A commentary on which set of rules is best suited for energy disputes can be found in *Abbas B.*, International Arbitration Rules and Their Effect on Energy Sector Disputes, International Trade and Business Law Review 21, 2018, pp. 63-124.
[6] *Baltag C.*, supra note 1, pp. 40-42.
[7] *Baltag C. and Dudas S.*, Achmea, Arbitral Tribunals and the ECT: Modernisation or Regression?, Chapter 3 in Ana Stanič and Crina Baltag (eds), The Future of Investment Treaty Arbitration in the EU, 2020, p. 26.
[8] Ibid., pp. 26-27.
[9] Ibid., p. 27.

1.2. Renewable Energy in the EU

The EU and its Member States have been aiming for a greener energy mix that involves a significantly increased share for renewable energy. The EU actually took measures to promote renewable energy with various forms; it required, for example, that Member States provide priority access to electricity networks with regards to electricity produced from renewable sources and set mandatory targets for the share of renewable energy for all Member States. Furthermore, the EU allowed and encouraged Member States to set up support mechanisms for electricity generation from renewable sources. It was, at first, left to individual Member States to decide on the content of these support mechanisms. In the beginning, the EU measures in this area were provided by the 20-20-20 by 2020 objectives set in 2007; the 2009 Directive[10] made these objectives binding on Member States. This binding nature of the renewable energy targets meant a substantial increase in investment in this method of producing electricity in the EU. However, the scale of investment in this field and the increased regulation and push towards this type of electricity generation was unprecedented. *Thus, given the increase in activity in renewable energy production, it was no surprise that disputes in this sector started to arise*[11].

1.3. Regulatory reforms in the EU

The past few years brought new developments for the ECT, the most important being the unprecedented number of disputes arising out of alleged breaches of the investment protection standards provided under it[12]. Most of these disputes have

[10] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

[11] More on the matter of renewable energy in the EU in *Talus K.*, Renewable energy disputes in the European Union: An Overview of current cases, in EU Renewable Energy Law: Legal Challenges and New Perspectives, Scandinavian Institute of Maritime Law Yearbook, 2014, pp. 140-141.

[12] The analysis of case law in the following chapters focuses on procedural aspects and mainly *on the jurisdiction of an arbitral tribunal to decide on investment disputes between EU investors and EU Member States*. For a more *substantive analysis* regarding investment protection standards and potential conflict between legitimate expectations of investors and the right of States to regulate see also *Gadiyev K.*, Arbitration of Energy-Related Disputes under the Energy Charter Treaty, Global Jurist, Vol. 8, No. 2, 2008, pp. [i]-18, *Lavranos N. and Verburg C.*, Renewable Energy Investment Disputes, 12 European Energy Law Report, 2018, pp. 65-94, *Levashova Y.*, The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment, Chapter 6: The State's Right to Regulate and the Legitimate Expectations of the Investor, International Arbitration Law Library, Volume 50, 2019, pp. 113-172, *Restrepo T.*, Modification of Renewable Energy Support Schemes under the Energy Charter Treaty: Eiser and Charanne in the Context of Climate Change, Goettingen Journal of International Law, Vol. 8, No. 1, 2017, pp. 101-138, *Selivanova Y.*, Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases, in Meg Kinnear and Campbell

been initiated by EU investors against EU Member States. This development comes at a time when the EU is focused on putting an end to intra-EU disputes being resolved by arbitration[13].

The ECT has become the most often invoked international investment agreement. For the most part, *the recent arbitration proceedings stem from measures and reforms in the field of renewable energy*. Many countries, in particular EU Member States, considered the development of the renewable energy sector as a priority due to its numerous benefits, economic growth, protection of the environment and increase of energy efficiency among them. In the past decade, a wide range of measures and incentives were implemented, increasing investments in the renewable energy sector. *The 2008 global economic crisis, however, caused several countries to amend their regulatory framework and eliminate or reduce the incentives provided*. Criticised for undermining foreign investors' expectations, these changes have been perceived as breaching the protection standards provided under the ECT and gave rise to multiple disputes. The most characteristic example is that of cutbacks on subsidies for renewable energy and an additional tax on revenues in Spain, that led to numerous investors commencing arbitration proceedings under the ECT[14].

McLachlan (eds), ICSID Review – Foreign Investment Law Journal, Oxford University Press 2018, Volume 33 Issue 2, pp. 433-455, *Simoes F.*, When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking, Denver Journal of International Law and Policy, Vol. 45, No. 2, 2017, pp. 251 et. seq., *Walde T.*, Energy Charter Treaty-Based Investment Arbitration: Controversial Issues, Journal of World Investment & Trade, Vol. 5, No. 3, June 2004, pp. 373-412.

[13] *Iacob I. and Cirlig R.*, The Energy Charter Treaty and Settlement of Disputes - Current Challenges, Juridical Tribune, Vol. 6, No. 1, June 2016, p. 72.

[14] Regulatory changes in Italy regarding the elimination of incentives for photovoltaic generators had a comparable effect. Similarly, the Czech Republic is currently fighting claims from investors in connection with a state levy on solar energy. After several reforms of green certificates support schemes, Romania also risks dealing with new investment claims. Ibid., pp. 74-75.

2. Intra-EU Investment Arbitration under the ECT: Case Law before Achmea

Arbitral tribunals presiding over ECT claims of European investors against EU Member States were confronted with jurisdictional objections long before the Achmea Judgment of the CJEU. Almost all tribunals rejected those objections. More specifically, prior to Achmea, a great number of cases dealt with a jurisdictional objection called the "*Intra-EU Objection*" brought forward by respondent EU Member States and supported by amicus curiae briefs of the European Commission (EC). One of the central arguments developed at that stage, was that, in the context of Article 26 ECT, an implied disconnection clause must be read into the text of the treaty requiring that, in the case of conflict, EU law prevails[15].

In more detail, in the context of the ECT, the EC acting as amicus curiae and the respondent EU Member States have challenged the compatibility of the ECT dispute settlement mechanism with Articles 267 and 344 TFEU. This has led to challenging the jurisdiction of arbitral tribunals for resolving disputes between an EU investor against another EU Member State in an intra-EU arbitration. The argument is based on the alleged conflict between ISDS provisions of international investment agreements and *Article 267 TFEU, which allows Member States' courts or tribunals to refer questions regarding the interpretation of EU law to the Court of Justice*. Since arbitral tribunals are not national courts or tribunals, they are not able to request such a preliminary ruling, but would proceed to interpreting issues of EU law without the assistance of the CJEU. Additionally, *Article 344 TFEU prevents Member States from resolving disputes related to EU law through international arbitration*. Hence, it was suggested that investment disputes would affect the interpretation of EU legislation and should thus remain within the jurisdiction of European institutions. Therefore, according to this argument, Articles 267 and 344 TFEU should prevail over the engagement of Member States under any intra-EU investment agreements[16].

In a number of pre-Achmea intra-EU disputes under the ECT, the EC intervened as amicus curiae in support of the respondent Member States' intra-EU jurisdictional objection. The EC also argued that, in the absence of an explicit disconnection clause, an implicit disconnection clause for intra-EU relations must be read into the ECT. *The implicit disconnection, it was argued, is proven by the existence of a dispute settlement mechanism in Articles 26 and 27 ECT, providing for the ISDS mechanism and the possibility of submitting a dispute between Contracting Parties to ad hoc arbitration, which is incompatible with Article 267 TFEU*. Related to this is also the EC's argument that Article 344 TFEU prevents Member States from resolving disputes related to EU

[15] *Wychera B.*, Investment Arbitration, Arbitrating under the Energy Charter Treaty – a Fight against Windmills?, Chapter V in Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration, Volume 2020, p. 600.

[16] *Damjanovic I. and Quirico O.*, Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of Achmea and Vattenfall: A Matter of Priority, Columbia Journal of European Law, Vol. 26, No. 1, Fall 2019, p. 119.

law through international arbitration. Implicit disconnection in the relations between Member States could thus be inferred from the contrary to EU law provisions, establishing the primacy of EU law over the ECT in such intra-EU relations[17].

At this point, it should be noted that, indeed, the EU initially pushed for a disconnection clause in order to prevent the application of the ECT in intra-EU relations, but eventually dropped this pursuit during negotiations. At least from a historical perspective then, *the EC's claim that the ECT is not meant to apply in intra-EU relations is inaccurate in that the EU consciously accepted this possibility*[18].

Proceeding to the review of the relevant case law, the arbitral tribunal in Charanne[19], whose decision was followed by other tribunals, dismissed all the above arguments, finding that "*although the EU is a Contracting Party of the ECT, the States that compose it have not ceased to be Contracting Parties as well*" and therefore, both the EU and its Member States "*may have legal standing as Respondent in action based on the ECT*". It also held that the terms of the ECT do not contain any disconnection clause and *no inconsistency arises between the ECT and the EU founding treaties*. The tribunal thought that Article 344 TFEU applies to agreements relating to State-to-State disputes between EU Member States, and not to international arbitration between private investors and EU Member States[20].

Moreover, the tribunal in RREEF[21] also rejected the argument that an implied disconnection clause is embodied in the ECT *relying on the fundamental pacta sunt servanda principle of customary international law*, under which a party wishing to exclude the application of the ECT would have to make a reservation or would have to include an explicit disconnection clause. The tribunal further reasoned that construing an implicit disconnection clause into the ECT is particularly indefensible, given that the ECT already contains other express exceptions to the submission of disputes to arbitration[22] and would also be contrary to the purpose of the treaty. In fact, Article 46 does not allow reservations and Article 26 mandates ECT Member States to give unconditional consent to ISDS, thus confirming that the ECT was intended to apply unconditionally and integrally[23].

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[17] *Damjanovic I. and Quirico O.*, supra note 16, pp. 119-120.
[18] *Basedow R.*, The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration, Journal of International Economic Law, 2019, p. 1.
[19] Charanne BV and Construction Investment S.à.r.l. v. Kingdom of Spain, SCC Case No. V 062/2012.
[20] *Damjanovic I. and Quirico O.*, supra note 16, p. 120.
[21] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30.
[22] *Wychera B.*, supra note 15, p. 600.
[23] *Damjanovic I. and Quirico O.*, supra note 16, p. 120.

The tribunal in Isolux[24] ruled in a very similar manner adding that "*the fact that the territory of the EU, according to Article 1.10 of the ECT, covers the territories of the Netherlands and the Kingdom of Spain does not prevent each of them also maintaining a territory in the sense of the ECT*".

In Blusun[25] the tribunal sided with the aforementioned decisions all dismissing Spain's jurisdictional objections[26]. Namely, it rejected the EC's assertion that the arbitral tribunal does not have jurisdiction under the ECT because "*Member States have only created obligations regarding investment promotion and protection with respect to third countries*" stating that there is nothing in the text of the ECT which could carve out issues arising between Member States, mainly relying on the *shared competence of both the EU and its Member States to sign the ECT* at the time of its signature and the lack of incompatibility between the ECT and EU Law.

Finally, the tribunal in Eiser[27] first mentioned that "*there is no transnational body of European law regulating the organization of business units, a matter that remains subject to member countries' domestic law. Thus, within the framework of the definition, there can be no EU Investors*". It took a particularly firm stance in its argumentation against an implied disconnection clause stating that "*the Tribunal concludes that Respondent's arguments do not justify disregarding the ECT's ordinary meaning in order to exclude a potentially significant body of claims. It is a fundamental rule of international law that treaties are to be interpreted in good faith. As a corollary, treaty makers should be understood to carry out their function in good faith and not to lay traps for the unwary with hidden meanings and sweeping implied exclusions*".

By contrast, the tribunal in Electrabel[28] thought that EU law prevails over the ECT in intra-EU disputes. It held that this is implicit in the nature of EU law itself, as clarified in Article 351 TFEU. This approach is considered critical, given that a non-EU jurisdiction stated the primacy of EU law over international investment law[29].

Nevertheless, the vast majority of investment arbitral tribunals confirmed the application of the ECT to intra-EU investment disputes and upheld their jurisdiction. Apparently, the jurisprudence formed at first was rather uniform in upholding the intra-EU application of the ECT.

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[24] Isolux Infrastructure Netherlands BV v. Kingdom of Spain, SCC Case No. V 2013/153.

[25] Blusun S.A, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3. A comprehensive review of this case can be found in *Baltag C.*, The Energy Charter Treaty and the Intra-EU Treaty Objection Post Charanne and Reef Cases: The Latest Developments in Blusun v. Italy, Romanian Arbitration Journal, Vol. 13, No. 1, January-March 2019, pp. 106-111.

[26] *Wychera B.*, supra note 15, p. 601.

[27] Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36.

[28] Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.

[29] *Damjanovic I. and Quirico O.*, supra note 16, pp. 120-121.

3. The Achmea Judgment of the CJEU

The CJEU, on 6 March 2018, issued its decision on a request for a preliminary ruling in the case of Slovak Republic v. Achmea BV, known as the Achmea Judgment[30], which turned out to be highly controversial in the field of investment arbitration within the EU. In this section, the basic aspects of this decision will be shortly analyzed and the actions of EU Member States that followed will be mentioned in brief.

3.1. The decision

In a few words, the CJEU ruled that the Bilateral Investment Treaty (BIT) between the Netherlands and Slovakia, more precisely the ISDS provision of the BIT, was incompatible with EU law. The judgment was based on a preliminary ruling request made by the German Federal Court of Justice, in which it sought clarification on whether the BIT was compatible with the Articles 344, 267 and 18 TFEU[31].

The reasoning of the CJEU was mostly based on Article 267 TFEU, which frames the preliminary ruling procedure when a question of interpretation of EU law is raised in the national courts of an EU Member State. The main issue with the preliminary ruling procedure in this case was whether arbitral tribunals deciding disputes under the BIT might interpret and apply EU law. The CJEU thought that as EU law should be considered as "*law in force in every Member State and as deriving from an international agreement between the Member States*" and as the relevant provision of the BIT requires tribunals to take both of these types of legislation into account, there is a "*twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law*"[32].

Thus, the CJEU proceeded with assessing whether such interpretation and application would be compatible with EU law. It noted that an arbitral tribunal established under the BIT is not part of the judicial system of any Member State and that "*it cannot in any event be classified as a court or tribunal of a Member State within the meaning of Article 267 TFEU*". Therefore, such an arbitral tribunal would not be able to request a preliminary ruling from the CJEU on the interpretation of EU law, and the *full effectiveness* of EU law could not be secured. Furthermore, the CJEU noted that as arbitral awards are binding and can be subject to only limited review by national courts, the obligation of the EU Member States set in Article 19 TEU to secure effective legal protection within the scope of EU law is breached when the Member States have agreed to enable ISDS within the EU by arbitral tribunals[33].

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[30] Slovak Republic v. Achmea BV, Judgement of the Court of Justice of the European Union (Grand Chamber) Case No. C-284/16, 6 March 2018.
[31] *Talus K. and Särkänne K.*, Achmea, the ECT and the Impact on Energy Investments in the EU, Chapter 2 in Ana Stanič and Crina Baltag (eds), The Future of Investment Treaty Arbitration in the EU, 2020, p. 10.
[32] Ibid.
[33] Ibid.

The CJEU concluded that the ISDS provision in the BIT is incompatible with Articles 267 and 344 TFEU. It summarised its reasoning with stating that "*by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law*". Arguably, the issue was ultimately the preservation of the system ensuring that the CJEU may have the last word on the interpretation of EU law, thus securing the uniformity of the interpretation as well as the autonomy of the EU legal order[34,35].

From the outset, it should be emphasized that the CJEU in Achmea only declared the specific ISDS provision contained in that intra-EU BIT to be incompatible with EU law. The CJEU did not go on to declare the whole BIT incompatible. Nor did the CJEU refer to the ISDS provisions contained in other intra-EU BITs or the ECT. Thus, prima facie, one could argue that the consequences of the Achmea Judgment are limited to that case and to the specific BIT involved[36,37].

As already mentioned, this judgment -as well as the request for the preliminary ruling- *did not address the question of whether the ECT is as well incompatible with EU law*. Similarly to intra-EU BITs, the ECT enables intra-EU investment arbitration, as most of the EU Member States are parties to it, alongside with the EU itself. Although the preliminary ruling request concerned merely a BIT between two EU Member States, Advocate General Wathelet assessed also the compatibility of the ECT with EU law. He stated that there had, up to that date, been no requests for the CJEU's opinion on the issue, and that neither the EU Member States nor the EU institutions had the slightest doubt that it might be incompatible. *This is arguably a rather strong assertion bearing in mind that simultaneously several EU Member States had already relied on the very same issue when objecting the jurisdiction of arbitral tribunals in intra-EU ECT arbitrations*; meaning that, even though there were no requests made to the CJEU to rule on the issue at the time Advocate General Wathelet delivered his opinion, several Member States did already consider the possibility of the ECT and EU law being incompatible[38].

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[34] *Talus K. and Särkänne K.*, supra note 31, pp. 10-11.

[35] More on the Achmea Judgment in *Thieffry V.*, The Achmea Judgment: An Additional Stage in the Construction of a Group of International litigation Resolution Mechanisms - An Analysis in the Light of French Arbitration Law, International Business Law Journal, Vol. 2018, No. 3, 2018, pp. 201-216.

[36] *Lavranos N. and Singla T.*, Achmea: Groundbreaking or Overrated?, in Jörg Risse, Guenter Pickrahn, et al. (eds), SchiedsVZ | German Arbitration Journal 2018, Volume 16 Issue 6, p. 350.

[37] More on the implications of Achmea and the interaction between intra-EU BITs and EU law in *Kulaga L.*, Implementing Achmea: The Quest for Fundamental Change in International Investment Law, Polish Yearbook of International Law 39, pp. 227-250. For the effect of the Achmea Judgment on the European energy market see also *Liebig J.*, The Influence of the Energy Charter Treaty on the European Energy Market, International Comparative Jurisprudence, Vol. 4, No. 2, 2018, pp. 77-89.

[38] *Talus K. and Särkänne K.*, supra note 31, pp. 11-12.

As arbitral tribunals continued to reject the intra-EU objection and the prevailing view in academic literature was that the reasoning of Achmea cannot be extended to the ECT[39], this issue caused legal uncertainty and remained unclear up until the issuance of its quite similar Komstroy Judgment on September 2021, that clarified the position of the CJEU on the relationship of the ECT and EU law.

3.2. Communication of the European Commission

Shortly after the issuance of the Achmea Judgment, on 19 July 2018, the EC issued a communication to the European Parliament and the Council[40] in which it stated that investors were not allowed to invoke the ECT for intra-EU disputes. It was summarised that EU investors cannot rely on intra-EU BITs, which are incompatible with EU law and no longer necessary in the single market and that they cannot have recourse to arbitral tribunals established by such intra-EU BITs, or similarly, to arbitral tribunals established under the ECT. As a result, virtually all intra-EU investor-State proceedings see the respondent State try to fend off claims from investors on the basis of the incompatibility between ISDS provisions and EU law by either submitting jurisdictional objections during the proceedings or challenging the rendered arbitral awards[41].

All the above lead to the conclusion that the EC considers the legal protection offered by EU law to European investors to be as good as that offered by intra-EU BITs[42] and views the domestic courts of the Member States in conjunction with the CJEU to be the only appropriate dispute settlement fora[43].

3.3. Political Declarations of EU Member States

The Achmea Judgment also had concrete political consequences. On 15 January 2019, 22 EU Member States issued the Declaration on the Legal Consequences of the

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[39] *Coop G.*, Energy Charter Treaty and the European Union: Is Conflict Inevitable, Journal of Energy and Natural Resources Law, Vol. 27, No. 3, August 2009, pp. 415-419, where further references are included. Opposite view in *Scheu J. and Nikolov P.*, The setting aside and enforcement of intra-EU investment arbitration awards after Achmea, in William W. Park (ed), Arbitration International, Oxford University Press 2020, Volume 36 Issue 2, pp. 256-258.

[40] European Commission, Communication from the Commission to the European Parliament and the European Council regarding the Protection of Intra-EU investment, 19 July 2018.

[41] *Baltag C. and Dudas S.*, supra note 7, p. 28.

[42] However, as the European Commission itself regularly acknowledges in its annual Judicial Monitor, the judicial systems in many Member States are malfunctioning, corrupted and not independent. This has recently also been confirmed by the European Parliament, which adopted a resolution triggering the Article 7 procedure against Hungary. Poland is similarly facing an Article 7 procedure because of the Government's direct interference with the functioning of the Polish Supreme Court and the judicial system generally. Moreover, Bulgaria and Romania have been under special strict supervision by the European Commission for several years already due to the persisting and widespread corruption problems.

[43] *Lavranos N. and Singla T.*, supra note 36, pp. 350-351.

Achmea Judgment and on Investment Protection in the European Union, whereby they undertook to effectively enforce the consequences of Achmea. In that declaration they expressed their position that not only investor-state arbitration clauses contained in BITs concluded between EU Member States are contrary to EU law and thus inapplicable, but also that the investor-state arbitration clause in Article 26 ECT is not compatible with EU law. These 22 Member States, inter alia, also declared that "*in cooperation with a defending Member State, the Member State, in which an investor that has brought such an action is established, will take the necessary measures to inform the investment arbitration tribunals concerned of those consequences. Similarly, defending member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent*". In light of these -anything but ambiguous- political statements and declared intentions of most of the EU Member States, that are also members of the ECT (which apparently include interference with independent state court proceedings), not to uphold their consent to arbitrate, it appeared to be only a matter of time until intra-EU disputes under the ECT would be stopped by whatever means[44]. The very recent Komstroy Judgment of the CJEU is proof of the aforementioned.

Hungary, on the one hand, and Finland, Sweden, Luxembourg, Malta and Slovenia, on the other, *submitted separate Declarations* undertaking to do the same. The separate Declaration of Hungary took a stance against the point on the ECT and specifically emphasised that the "*Achmea judgment is silent on the investor-state arbitration clause in the ECT […] and it does not concern any pending or prospective arbitration proceedings initiated under the ECT*". Similarly, the separate Declaration of Finland, Luxembourg, Malta, Slovenia and Sweden simply reminded in passing that Achmea is silent on ECT jurisdiction but took no stand on the matter[45].

While it was evident from these Declarations that EU Member States were firm in accepting the formal termination of intra-EU BITs, at that point in time a consensus still needed to be reached on the issue of the ECT, in light of the participation of both the EU and its Member States in this treaty.

3.4. Termination Agreement

Following the CJEU's Achmea Judgment, the EC requested EU Member States to terminate Intra-EU BITs, then commenced infringement proceedings against a number of them, and finally proposed a draft termination treaty in October 2019[46].

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[44] *Wychera B.*, supra note 15, p. 607.
[45] *Baltag C. and Dudas S.*, supra note 7, p. 29.
[46] More details on the Termination Agreement and its legal effects in *Moise D.*, The Future of Investment Arbitration in the European Union, Romanian Arbitration Journal, Vol. 14, No. 3, July-September 2020, pp. 52-55, *Triantafilou E. and Pusztai D.*, Achmea, Investment Treaty Arbitration, Public International Law and EU Law: The Way Forward, Chapter 4 in Ana Stanič and Crina Baltag (eds), The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court, Kluwer Law International 2020, pp. 52-58.

Consequently, on 5 May 2020, the EU Member States, except for Austria, Finland, Ireland and Sweden, signed the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (the Termination Treaty), an agreement for the termination of roughly 130 intra-EU BITs. This Agreement is subject to ratification and expected to enter into force for each of the signatory EU Member States thirty days after providing a ratification instrument to the Council of the European Union[47,48].

3.5. Poland v. PL Holdings

The CJEU, in its recent preliminary ruling issued in Poland v. PL Holdings[49,50], also declared that EU law *prohibits the conclusion by a Member State of an ad hoc arbitration agreement with identical content to an invalid arbitration clause in a BIT between Member States*. In order to reach this conclusion, the Court relied mainly on the reasoning in Achmea, confirming that an arbitration clause in a BIT, according to which an investor from one Member State may, in the event of an investment dispute with the Member State that concluded the BIT, bring arbitration proceedings against the latter State before an arbitral tribunal whose jurisdiction that State has accepted, is contrary to EU law. Consequently, the Court found that, to allow a Member State to submit a dispute which may concern the application or interpretation of EU law to an arbitral tribunal with the same features as the tribunal referred to in such a BIT arbitration clause that is invalid because it is contrary to EU law, by concluding an ad hoc arbitration agreement with the same content as that clause, *would in fact entail a circumvention of the obligations* arising for that Member State under the Treaties, taking into account that both arbitration clauses produce exactly the same effects. So, any attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would be contrary to the provisions and fundamental principles regulating the EU legal order.

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[47] *Baltag C. and Dudas S.*, supra note 7, p. 30.

[48] Greece issued Law 4827/2021, published on 8 September 2021, that ratified the Termination Agreement.

[49] Republic of Poland v. PL Holdings Sàrl, Judgment of the Court of Justice of the European Union (Grand Chamber) Case No. C-109/20, 26 October 2021.

[50] PL Holdings, relying on the BIT between Belgium and Luxembourg, on the one hand, and Poland, on the other, submitted a request for arbitration to the arbitral tribunal stipulated in an arbitration clause in that treaty. By two arbitral awards of 28 June and 28 September 2017, the arbitral tribunal affirming that it had jurisdiction to settle the dispute at hand, decided that Poland had failed to conform with its obligations under the BIT and ordered it to pay damages to PL Holdings. The action before the Svea Court of Appeal in Sweden, in which Poland sought to have the arbitral awards set aside was dismissed. The Svea Court held that, even though the arbitration clause in the BIT is invalid, *that invalidity does not prevent a Member State and an investor from another Member State from entering into an ad hoc arbitration agreement at a later stage in order to settle that dispute*. An appeal was brought against that decision before the Supreme Court in Sweden, which decided to seek clarification from the CJEU as to whether Articles 267 and 344 TFEU exclude the conclusion of an ad hoc arbitration agreement between a Member State and an investor where the content of that agreement is identical to an arbitration clause that is set out in a BIT and is contrary to EU law.

4. Intra-EU Investment Arbitration under the ECT: Case Law after Achmea

The implications of the Achmea Judgment surpassed the framework of intra-EU BITs and went on to affect the entire ISDS system involving the EU and EU Member States. This became apparent especially in the context of the ECT, with arbitral tribunals being constantly invited to assess the impact of Achmea.

In more detail, following the issuance of Achmea, arbitral tribunals continued to face in subsequent proceedings the intra-EU objection, that transformed into the Achmea objection. At this point, EU Member States supported their case on the tribunals' lack of jurisdiction invoking the Achmea Judgment, irrespective of whether the proceedings were initiated under an intra-EU BIT or under the ECT. Not surprisingly, in both cases, arbitral tribunals continued to reject such objections. With regards to intra-EU proceedings under the ECT, arbitral tribunals viewed the matter as follows.

The first post-Achmea decision of a tribunal resolving an intra-EU ECT dispute was the Masdar award[51]. During the proceedings, Spain no longer relied on the implied disconnection clause argument heavily discussed in previous cases. In a few paragraphs, *the tribunal declared that the Achmea Judgment had no bearing upon the present case*. In essence, it stated that Achmea dealt with a specific BIT and maybe related to other BITs between Member States. It continued that "*the ECT is not such a treaty. Thus, the Achmea Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party*". The tribunal further referred to the Opinion of Advocate General Wathelet in the Achmea case and the fact that his statement regarding the ECT was not addressed by the CJEU and that the Achmea Judgment is simply silent on the subject of the ECT[52].

In the arbitration of Antin[53], Spain filed an application requesting that the proceeding be reopened, so that the Achmea Judgment could be submitted. The tribunal, however, denied this request and rejected all of Spain's jurisdictional objections on the basis of case law previously discussed. Notably, it repeats the ruling in Eiser that "*treaty makers should be understood to carry out their function in good faith, and not to lay traps for the unwary with hidden meanings and sweeping implied exclusions*"[54].

The Vattenfall tribunal issued a separate 73-page long "Decision on the Achmea Issue"[55]. Taking Article 26 ECT as a starting point and interpreting it in accordance with

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[51] Masdar Solar & Wind Cooperatief U.A v. Kingdom of Spain, ICSID Case No. ARB/14/1.
[52] *Wychera B.*, supra note 15, p. 604.
[53] Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar BV v. Kingdom of Spain, ICSID Case No. ARB/13/31.
[54] *Wychera B.*, supra note 15, p. 605.
[55] Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co. oHG, Kernkraftwerk Brunsbüttel GmbH & Co.

international law principles, the tribunal analyzed whether EU law can influence the meaning of that provision or whether the ordinary meaning in the sense of Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) must prevail. While acknowledging that EU law, to the extent of the TEU and TFEU, including their interpretation by the CJEU, constitutes a part of international law, it concluded that "regardless *of whether EU law is understood to be international law, EU law does not constitute principles of international law which may be used to derive meaning from Article 26 ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT*". For the tribunal "*it would have been a simple matter to draft the ECT so that Article 26 does not apply to disputes between an Investor of one EU Member State and another EU Member State as respondent. That was not done; and the Tribunal has been shown no indication in the language of the ECT that any such exclusion was intended*". The tribunal's decision also considers Article 16 ECT, according to which "*where two or more Contracting Parties have entered into a prior or subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of the ECT, nothing in Part III or V of the ECT shall be construed to derogate from*" Article 26 ECT, where the provision in the ECT is more favourable to the investor or investment. *The tribunal considered that Article 26 ECT, granting the possibility of arbitration, would be understood as more favourable to the Investor, insofar as the EU Treaties are interpreted to prohibit that avenue of dispute resolution*. The tribunal further stated that "*Article 16 confirms beyond doubt that Respondent's proposed reading of the provisions of the ECT is untenable. In light of this provision it is not possible to read into Article 26 an interpretation whereby certain investors would be deprived of their right to dispute resolution, whether against an EU Member State or otherwise*"[56]. Finally, the tribunal acknowledged that it is under a "*duty to render an enforceable decision and ultimately an enforceable award*" and yet concluded that the "*enforceability of this decision is a separate matter that does not impinge upon the Tribunal's jurisdiction*"[57].

The Vattenfall tribunal in issuing its decision was obviously aware of its competencies and the political dilemma it was part of when it stated: "*To the extent that the EC or EU Member States saw an incompatibility between EU law and the dispute resolution provisions of the ECT at the time of negotiation of the treaty, or to the extent that they now see such an incompatibility, it was and is incumbent upon them to take the necessary action to remedy that situation. It is not for this Tribunal to redraft the treaty which has been agreed by the Contracting Parties to the ECT*"[58].

In Foresight[59] the tribunal saw no reason to depart from previous case law when it rejected Spain's jurisdictional objection[60].

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oHG v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018.

[56] *Wychera B.*, supra note 15, pp. 605-606.

[57] *Baltag C. and Dudas S.*, supra note 7, p. 32.

[58] *Wychera B.*, supra note 15, pp. 605-606.

[59] Foresight Luxembourg Solar 1 S.à.r.l., et al. v. Kingdom of Spain, SCC Case No. 2015/150.

[60] *Wychera B.*, supra note 15, p. 607.

The Greentech tribunal[61] confirmed that Achmea is of limited application and cannot, therefore, apply to cases brought under multilateral treaties such as the ECT. In dismissing Spain's jurisdictional objections based on Achmea, the tribunal also examined the plain language of Article 26 ECT and concluded on the basis of the ordinary meaning of the text, as required under Article 31 VCLT, that there was no carve-out of intra-EU disputes from the protections of the ECT[62].

The CEF Energia tribunal[63] dismissed the arguments made by both Italy and the EC that the ECT did not cover intra-EU disputes. The tribunal's analysis of jurisdiction included the following important takeaways. First, there was no basis for the argument that the ECT was never meant to apply to intra-EU disputes. To this end, the tribunal relied largely on the fact that the ECT did not contain a disconnection clause regarding intra-EU disputes, as well as on the finding that EU Treaties concluded after the entry into force of the ECT did not supersede it. Second, the findings of the CJEU in Achmea were strictly related to that specific BIT and could not be extended to disputes under the ECT. In reaching this conclusion, the tribunal stressed the crucial role of the BIT's provision on applicable law in the CJEU judgment, which, unlike the ECT, required tribunals to interpret and apply EU law; it considered this feature -not present in the ECT- responsible for the outcome reached by the CJEU in Achmea. Third, the tribunal held that the communication of the EC is "*not an authoritative statement of EU law*" and therefore is not enough to make it change its interpretation of Achmea. Fourth, the tribunal rejected that EU rules on state aid preventing intra-EU awards from being enforced within the EU, could therefore deprive it of jurisdiction over the dispute. The tribunal concluded that "*If the Tribunal were to accede to such a proposition then it would give support to a sovereign state being able to avoid an international promise to arbitrate disputes with a two-fold argument which relies on rules which such sovereign itself created and simply foreshadows putative future issues with enforcement. The Tribunal cannot give succour to this position, and it is dismissed*"[64].

The Cube Infrastructure Fund tribunal[65] stated that "*when scrutinized closely, Achmea reveals specificities that make it inapposite as precedent for the present proceedings*".

In Landesbank Baden-Württemberg[66] the tribunal rejected both parties' respective arguments that the issue was already settled law.

The NextEra Energy tribunal[67] ruled that it "*is not empowered to decide whether a dispute submitted by a European investor against a European State under the ECT falls*

[61] Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095.
[62] *Baltag C. and Dudas S.*, supra note 7, p. 31.
[63] CEF Energia BV v. Italian Republic, SCC Case No. 2015/158.
[64] *Baltag C. and Dudas S.*, supra note 7, pp. 32-33.
[65] Cube Infrastructure Fund SICAV, Cube Energy S.C.A, Demeter Partners S.A, Demeter 2 FPCI and Cube Infrastructure Managers S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/20.
[66] Landesbank Baden-Württemberg and others v. Kingdom of Spain, ICSID Case No. ARB/15/45.

under Article 344 or is in breach of Article 267 of the TFEU. The task of this Tribunal is to determine whether such dispute falls under the provisions of the ECT. Likewise, it is not the task of this Tribunal to determine whether the scope of this dispute concerns the application of the TFEU, but rather whether such dispute concerns the application of the substantive provisions of the ECT".

The 9REN Holding tribunal[68] "*attempted to understand the reasoning in the ECJ's decision in Achmea. There is much to understand. However, for this case, this Tribunal's perspective as an international tribunal applying international law, together with the terms and membership of the ECT, make it possible to address Spain's arguments within a relatively narrow compass*". In addition, "*there is nothing in the Achmea decision that suggests the ECJ contemplated ECT claims against the EU itself while at the same time (as Spain argues) immunizing from such claims EU Member States. Spain is as firmly bound by the ECT dispute resolution mechanism as is the EU itself*".

The Rockhopper tribunal[69] concluded that "*drawing upon the foregoing conclusions from Achmea for the purposes of this case, the Tribunal agrees with the tribunal in Vattenfall (amongst others, including, for example, Masdar) that the judgment is, in of itself, of limited application (only, insofar as EU law is concerned, to the Achmea BIT) and, further, of no application as such to the ECT. The Tribunal considers that a proper reading of the Achmea does not lead to the conclusion that it is in any way a relevant consideration for the investor-State arbitration mechanism established in Article 26 of the ECT as regards intra-EU relations*".

The SolEs Badajoz tribunal[70] invoked Article 16 ECT, as the Vattenfall tribunal did, and stated that "*bearing in mind that the task of this Tribunal is to determine its own jurisdiction, pursuant to the ICSID Convention and the ECT, and that the Tribunal is not an institution of the EU, the Tribunal concludes that, if the ECT and the TFEU address the same subject matter, Article 16 of the ECT means that the TFEU may not derogate from the dispute settlement provisions of the ECT and thus that the TFEU does not detract from the Tribunal's jurisdiction*".

In Opera Fund[71] the tribunal dismissed the respondent's intra-EU jurisdictional objection without *reinventing the wheel*.

A very comprehensive ruling on the relationship between EU law and the ECT, along with the implications of Achmea on ISDS under the ECT is the one by the tribunal in Eskosol[72]. Adopting the doctrine of ordinary meaning of the language used in Article 26

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[67] NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v. Kingdom of Spain, ICSID Case No. ARB/14/11.
[68] 9REN Holding S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/15/15.
[69] Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14.
[70] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38.
[71] Opera Fund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36.
[72] Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50.

ECT, the tribunal held that the argument made by the EC and Italy that the ECT was never meant to cover intra-EU ISDS could not efficiently be supported. After determining that intra-EU ISDS could not be excluded on that basis, the tribunal analysed whether the EU treaties required intra-EU disputes to be excluded from the scope of the ECT. The tribunal decided negatively for several reasons, the most important being that *the applicable law provision contained in Article 26 ECT did not require the tribunal to apply EU law*; that Article 16 ECT requires the tribunal to apply the treaty which is more favorable to the investor and that the Lisbon Treaty and the ECT *do not cover the same subject matter*. On the consequences of Achmea to its jurisdiction, the tribunal concluded that any potential invalidation of Article 26 ECT pursuant to Achmea *could not be applied retroactively to annul a consent to arbitration given by Member States before Achmea was issued*, but could potentially only do so for investors who have not yet initiated proceedings. The last important point to be highlighted relates to the enforcement of the award. The tribunal expressly accepted that the enforceability of an award disregarding Achmea could be problematic, given the fact that Achmea is binding on EU Members States. And yet, despite acknowledging that such difficulties could arise, it concluded that its jurisdiction could not be limited by national rules on the enforceability of an award[73].

More recently, the tribunal in Watkins[74] also dismissed the intra-EU objection confirming the findings of the above consistent case law formed. In doing so, the tribunal reviewed the approach adopted by previous tribunals and reached the conclusion that *tribunals have generally rejected the idea that Achmea could have an effect on their jurisdiction* on the basis of three different lines of arguments. The first group of decisions held that there is no incompatibility between EU law and intra-EU ISDS. The second group discarded Achmea and its implications on intra-EU ISDS by holding that it was of limited application since it focused on the incompatibility of BITs in an intra-EU context, rather than multilateral treaties, such as the ECT. Finally, a third approach was that Achmea could not have a bearing outside of the EU legal order. The Watkins tribunal held that Achmea could not affect its jurisdiction based firstly on the fact that the judgment does not mention the ECT, as well as on the fact that the tribunal should determine its jurisdiction on the basis of international law, including the ECT, rather than EU law, which Achmea is part of[75].

All the previously discussed case law makes evident that, during the past few years, the ISDS mechanism of the ECT has been a highly controversial issue in the context of intra-EU proceedings and has created legal uncertainty for European investors. This uncertainty has even been described as "*ironic*" taking into account that the ECT was "*the brainchild of the European Union*"[76].

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[73] A more detailed analysis of the Eskosol award can be found in *Baltag C. and Dudas S.*, supra note 7, pp. 33-37.

[74] Watkins Holdings S.à.r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44.

[75] *Baltag C. and Dudas S.*, supra note 7, pp. 38-39.

[76] *Lacson A.*, What Happens Now: The Future of Intra-EU Investor-State Dispute Settlement under the Energy Charter Treaty, New York University Journal of International Law and Politics, Vol. 51, No. 4, Summer 2019, p. 1329.

5. The Komstroy Judgment of the CJEU

On 2 September 2021, the CJEU, following closely the conclusions reached in Advocate General Szpunar's Opinion[77], issued a preliminary ruling under Article 267 TFEU relating to the proceedings of the Republic of Moldova and Komstroy LLC[78] and concerning the interpretation of Article 1(6) and Article 26(1) of the ECT[79].

The questions referred to the Court of Justice for a preliminary ruling were the following:
(1) Must [Article 1(6) ECT] be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any economic contribution on the part of the investor in the host State can constitute an "investment" within the meaning of that article?
(2) Must [Article 26(1) ECT] be interpreted as meaning that the acquisition, by an investor of a Contracting Party, of a claim established by an economic operator which is not from one of the States that are Contracting Parties to that treaty constitutes an investment?
(3) Must [Article 26(1) ECT] be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the area of another Contracting Party, in the case where the investor does not carry out any economic activity in the territory of that latter Contracting Party?

The Court, after briefly analyzing some essential provisions of the ECT, the relevant French law provision and the facts of the present case that led the Court of Appeal in France to request a preliminary ruling, first commented on its jurisdiction. The CJEU came to the conclusion that it has jurisdiction to interpret the ECT, in particular, in the context of a reference for a preliminary ruling, relying on the fact that the establishment of the seat of arbitration on the territory of a Member State, in this case France, entails, for the purposes of the proceedings brought in that Member State, the application of EU law, compliance with which the court hearing the case is obliged to ensure in accordance with Article 19 TEU.

It is evident that the aforementioned questions do not directly relate to the applicability of the ECT in disputes between investors of EU Member States and Contracting EU Member States (intra-EU disputes). Nevertheless, the CJEU in its

[77] A brief comment on Advocate General Szpunar's Opinion regarding the case at issue can be found in *Scheu J. and Nikolov P.*, AG Szpunar's Opinion in Case C-741/19: Preparing the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty?, Kluwer Arbitration Blog, 2021.
[78] Republic of Moldova v. Komstroy LLC, Judgment of the Court of Justice of the European Union (Grand Chamber) Case No. C-741/19, 2 September 2021.
[79] For a brief on this judgment see also *Suatean I.*, CJEU: Intra-EU Arbitration under the ECT Is Incompatible with EU Law. Brief on CJEU's Judgment in the Case of Republic of Moldova v Komstroy, Romanian Arbitration Journal, Vol. 15, No. 3, July-September 2021, pp. 133-[ii].

attempt to answer the first question referred to it found *"necessary, first of all, as several Member States which have participated in the proceedings have observed, to specify which disputes between one Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former may be brought before an arbitral tribunal pursuant to Article 26 ECT"*.

In that regard, it stated that *"although the fact that the dispute at issue in the main proceedings, based on Article 26(2)(c) ECT, is between an operator from one third State and another third State does not preclude, for the reasons stated in paragraphs 22 to 38 of the present judgment, the Court's jurisdiction to answer those questions, it cannot be inferred that that provision of the ECT also applies to a dispute between an operator from one Member State and another Member State"*.

The Court continued its analysis on this latter argument by holding that *"an international agreement cannot affect the allocation of powers laid down by the Treaties and, hence, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties"* and directly referred to the Achmea Judgment.

Finally, in paragraph 47 of its decision, after having made reference to the autonomy of EU law, the division of powers and the preliminary ruling procedure provided for in Article 267 TFEU, it concluded that *"it is in the light of the foregoing considerations that the question whether a dispute between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State may be subject to arbitration proceedings under Article 26(2)(c) ECT must be examined"*.

Using the same arguments it presented when issuing the -previously analyzed- Achmea Judgment, that are firstly, the application and interpretation of EU Law by arbitral tribunals established under the ECT (para. 48-50); secondly, the designation of such an arbitral tribunal as not constituting a component of the judicial system of an EU Member State, meaning that it is not entitled to make a reference to the Court for a preliminary ruling (para. 51-53); and thirdly, the lack of sufficient judicial review of the arbitral award by a court of a Member State capable of ensuring full compliance with EU law (para. 54-59), it finally concluded that Article 26(2)(c) of the ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.

In more detail, the Court considered that *"in the present case, the parties to the dispute at issue in the main proceedings chose, in accordance with Article 26(4)(b) ECT, to submit that dispute to an ad hoc arbitration tribunal, established on the basis of the UNCITRAL arbitration rules, and thus accepted, in accordance with those arbitration rules, that the seat of the arbitration tribunal should be established in Paris, which made French law applicable to the proceedings before the referring court, whose*

purpose was the judicial review of the arbitration award made by that tribunal. However, such judicial review can be carried out by the referring court only in so far as the domestic law of its Member State so permits". In the view of the CJEU, such judicial review in investment arbitration (in comparison to commercial arbitration) is not sufficient.

Before shortly commenting that in principle the EU is competent to conclude international agreements providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the EU institutions, it noted that *"it must be considered that, if the provisions of Article 26 ECT allowing such a tribunal to be entrusted with the resolution of a dispute were to apply as between an investor of one Member State and another Member State, it would mean that, by concluding the ECT, the European Union and the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law"*.

In its final remarks on the issue at hand, the Court held that *"it follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves. In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State"*.

Summing up the aforementioned remarks, the CJEU had to, at first, justify ruling on the question of validity of the ECT arbitration clause in intra-EU disputes. It noted that answering the question referred to it required clarifying which disputes may be brought to arbitration pursuant to Article 26 ECT. Then, while admitting that the dispute at hand was an extra-EU dispute, the CJEU simply stated that this does not preclude its jurisdiction and that it cannot be inferred that Article 26 ECT also applies to intra-EU disputes. Thereafter, the CJEU followed dutifully its reasoning in Achmea, recalling the autonomy of the EU legal order and the necessity to preserve it, by putting in place a judicial system to safeguard consistency and uniformity in the interpretation of EU law. Then, it examined whether the requirements set in Achmea for arbitration to be valid are met. In the case of Article 26 ECT, the CJEU noted that arbitral tribunals established under Article 26 ECT are required to interpret, and even apply, EU law; that such tribunals are not established within the judicial system of the EU and cannot be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU and that awards rendered pursuant to Article 26 ECT are not subject to review by a court of a Member State capable of ensuring full compliance

with EU law and guaranteeing that matters of EU law can, if necessary, be submitted to the CJEU for a preliminary ruling[80].

The case at hand was arguably not the best to extend the Achmea Judgment to ECT arbitration for the following reasons. To begin with, this was not the question referred to the CJEU; the dispute was not intra-EU and EU law was not directly applicable and lastly, no EU public policy concerns were flagged. Nevertheless, such a ruling was anticipated. The entire EU and EU Member States' agenda (the termination treaty, the EU's proposal in the ECT modernisation process, advocating for a future multilateral investment court applicable to disputes under the ECT) announced it[81].

By issuing this decision, in essence precluding once and for all intra-EU investment arbitration under the ECT, the CJEU proved -as many had anticipated- that the Achmea Judgment was not meant to affect only BITs, but its reasoning was to be -and indeed it did- extended on Investment Arbitration under the ECT. As with Achmea, the Komstroy Judgment was issued taking into consideration mostly EU Law, while arbitral tribunals faced with investment disputes arising out of the ECT, that is an international agreement, apply the latter bearing in mind the principles of international law, not EU Law. That is the main reason why it will be very interesting to see how arbitral tribunals will receive and interpret this judgment in future disputes, especially considering that even after the Achmea decision, most -if not all- arbitral tribunals refused to decline jurisdiction irrespective of whether the claims were based on intra-EU BITs or the ECT, because Achmea merely reflects the EU point of view and does not solve the problem of treaty conflict in the international law sphere. Given the similarities in the CJEU's reasoning, one could expect tribunals constituted to resolve intra-EU ECT disputes to react in the same way with regards to the Komstroy Judgment. In other words, having analyzed the arbitral tribunals' views after the issuance of the Achmea Judgment, it could, therefore, be anticipated that their reasoning on jurisdiction will not be very much affected by the Komstroy Judgment, as it was previously not affected by the very similar Achmea Judgment.

[80] *Fouchard C. and Thieffry V.*, CJEU Ruling in Moldova v. Komstroy: the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty (and a Restrictive Interpretation of the Notion of Protected Investment), Kluwer Arbitration Blog, 2021.
[81] Ibid.

6. Intra-EU Investment Arbitration under the ECT in the present day

The CJEU has declared that ISDS provisions relating to the settlement of disputes in an intra-EU context are incompatible with EU Law and thus, inapplicable to the relations between Member States. This stance has created first and foremost legal uncertainty for European investors, but it has also created the need for an alternative method of dispute resolution. Those issues will be explored in the next few sections.

6.1. Concerns stemming from the CJEU's rulings

One of the main concerns that the CJEU's rulings created is discrimination based on nationality and destination of the investment. The insistence of the EC and the CJEU for removing intra-EU ISDS means that European investors choosing to invest inside the EU could possibly receive less protection than investors from third countries investing also in the EU[82]. It has been supported that, at present, there is no alternative system in place within the EU that can grant the same investment protection and, therefore, because of the CJEU's rulings, all European investors lost a significant benefit[83].

EU Member States are still accountable, though, to investors from third countries, which means that even though a European investor cannot raise a claim against an EU Member State under the ECT, a non-EU investor can nevertheless initiate such proceedings against the same Member State. This places European investors at a disadvantage in relation to non-EU investors and potentially, this could significantly affect the flow of capital into and within the EU[84]. Also, politically, it is difficult to explain why the EU places its own investors in a more disadvantageous position than foreign non-EU investors[85].

6.2. Interrelation between EU Law and International Law

Firstly, it has been claimed that, under the ECT, there is no doubt as to what the applicable law is. Article 26(6) ECT clearly states that "*A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*". Hence, it is not for an investment tribunal to engage in the substitution of EU law in place of the applicable law of the

[82] A diametrically opposite view can be found in Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49, Statement of dissent of Professor M. G. Kohen (3 February 2020), where it is stated "*that EU investors enjoy within the EU more substantial rights and privileges than non-EU investors, even with regard to those non-EU investors having the benefit of the protection of BITs*".
[83] *Lavranos N. and Singla T.*, supra note 36, p. 353, *Lacson A.*, supra note 76, p. 1343.
[84] Intra-EU investors could also restructure in response, which would create a sort of location arbitrage wherein investors go outside the European Union so they can arbitrate a claim against a Member State under the ECT. *Lacson A.*, supra note 76, p. 1343.
[85] *Lavranos N. and Singla T.*, supra note 36, p. 353.

ECT. That would not be loyal application of the applicable law of the tribunal, that is the international treaty[86].

Nevertheless, differences in interpretation have occurred and it is arguable that those differences between reasonings and conclusions of the CJEU and the ECT arbitral tribunals stem from a difference in perspective. The CJEU views the issue of the validity of intra-EU arbitration as an EU institution. As such, it gives more weight to the importance of EU law and its autonomy. Thus, the CJEU will likely decide any conflict between the TFEU and a BIT or the ECT in favour of the TFEU. In contrast, the ECT arbitral tribunals look at the dispute as institutions of consent under the ECT and international law. To those tribunals, a clash between the ECT and the TFEU is not one between a constitutive primary law and a subordinate or secondary law; rather, it is between two treaties of equal weight. Thus, the tribunals depend heavily on rules of interpretation under the VCLT and the conflict rule in the ECT[87].

In other words, the CJEU in Achmea did not engage in the assessment of the conflict between the Netherlands-Slovakia BIT and EU law in the light of customary international law of treaty conflicts but merely based on EU law. National courts of EU Member States, in turn, have emphasised the primacy of EU law and the duty to loyal cooperation, when being faced with the question of enforceability of intra-EU ISDS awards. On the other hand, arbitral tribunals have relied on the treaty conflict articles of the VCLT when deciding on whether the conflict between EU law and an intra-EU BIT or the ECT denied them a basis for having jurisdiction[88].

The tribunals' approach may be the most appealing from the perspective of international law, especially because the arguments for incompatibility of intra-EU ECT arbitration with EU law tend to put a meaning on treaty texts unsupported by their plain meaning or context. Moreover, the tribunals' approach promotes the object and purpose of the ECT to create a legal framework that encourages and protects investments while avoiding the categorization of ECT ISDS into extra-EU and intra-EU. In the absence of a worldwide appellate court or a system of precedent, the question of which approach is correct, however, will likely not be definitively resolved[89].

Furthermore, a potential solution to the problem being discussed could be the application of EU law in investment arbitration as being no more than facts. This approach has already been opted for in other international agreements, whereby EU law is conceived of as no more than relevant domestic law to be taken into consideration, as matter of fact[90].

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[86] *Bjorge E.*, EU Law Constraints on Intra-EU Investment Arbitration, Law & Practice of International Courts and Tribunals, Vol. 16, No. 1, 2017, p. 84.
[87] *Lacson A.*, supra note 76, p. 1340. See also *Alter C. and Leung Wing Cheung S.*, Post-Achmea Investment Treaty Arbitration: A Departure from the EU-centric Approach, in Dirk De Meulemeester, Maxime Berlingin, et al. (eds), Liber Amicorum CEPANI (1969- 2019): 50 Years of Solutions, 2019, pp. 349-350.
[88] *Talus K. and Särkänne K.*, supra note 31, p. 19.
[89] *Lacson A.*, supra note 76, p. 1340.
[90] *Bjorge E.*, op. cit., pp. 85-86.

One might also wonder whether the debate about the role of EU law in intra-EU investment disputes is no more than a comeback of the old debate of the alleged primacy of domestic law over international law in investment disputes. For a long time the idea that international law had a direct role to play in the settlement of investment disputes was opposed. For many years there was strong reluctance towards what has later come to be known as the internationalization of legal investment relations. International law, this argument ran, should not be allowed to govern what was argued to be matters of domestic law. Judged in that light, the views of the EC and the CJEU seem to some extent to be a comeback of old arguments; in their view, international law should not be allowed to govern matters which are for EU law[91].

The CJEU's reasoning in Komstroy, however, leaves no doubt that intra-EU arbitration under the ECT is incompatible with the European legal order. Undoubtedly though, the *EU has manifestly entered into a public international law commitment to that effect, making the situation certainly complex from a legal point of view*. From a political point of view, the situation seems somewhat clearer. A decision from the CJEU cannot be considered enough to stop the intra-EU applicability of the ECT, which means that the EU will need to take some sort of action towards that. To that end, the EU and its Member States could either terminate their ECT membership or they could seek the inclusion of a disconnection clause as part of ongoing ECT modernisation negotiations. The second option may seem more appealing. Though, firstly, third countries may not agree to such a disconnection clause and secondly, a reformed ECT with an arbitration provision will probably need to undergo mixed ratification. Many Member States and the European Parliament may not find appealing to ratify an agreement with conventional ISDS provisions and insist on replacing conventional ISDS with the EU's new Investment Court System. Yet, convincing all ECT parties of the Investment Court System may be a difficult task[92,93].

6.3. EU's efforts on a Multilateral Investment Court

The EC, in the context of negotiating the modernisation of the ECT on behalf of the EU, stated that "*ECT provisions on the protection of investment do not correspond to modern standards as reflected in the EU's reformed approach on investment protection*". It is, therefore, no wonder that the revised draft proposal for the modernisation of the ECT in*cludes an option under Article 26 ECT for disputes to be*

[91] *Bjorge E.*, supra note 86, p. 75.

[92] *Basedow R.*, Moldova v. Komstroy and the Future of Intra-EU Investment Arbitration under the Energy Charter Treaty: What Does the ECT's Negotiating History Tell Us?, Kluwer Arbitration Blog, 2021. See also *Pocania E.*, The Relationship between European Law and International Investment Law in Light of the CJEU's Achmea Decision, Romanian Arbitration Journal, Vol. 14, No. 4, October-December 2020, pp. 131-133.

[93] For the possibility and the advantages of recourse to commercial arbitration as an alternative to investment treaty arbitration see *Lavranos N.*, Is Commercial Arbitration an Alternative to Investment Treaty Arbitration in Lights of the Increasing Aversion against BITS and IDS, European Investment Law and Arbitration Review, Vol. 2, No. 1, January 2017, pp. 302-314.

resolved under the rules of a multilateral investment court to which the Contracting Party which is party to the dispute is a Party and explicitly clarifies that, if both the host State and the investor's home State have consented to the jurisdiction of the multilateral court, then the dispute shall be submitted to that court to the exclusion of the other mechanisms of dispute resolution, namely ICSID, UNCITRAL and SCC arbitration, referred to in Article 26 ECT. This approach must be understood in the context of the EU policy with respect to foreign investments[94].

The EC has been making concerted attempts in negotiations with third countries for the replacement of the arbitration model with a permanent Investment Court System (ICS)[95]. For starters, the ICS has already been incorporated within the Comprehensive Economic and Trade Agreement with Canada (CETA), the EU-Vietnam FTA, the EU-Singapore FTA (through an additional agreement) and the updated EU-Mexico FTA. However, the EC also harbours a broader vision. It envisages the permanent investment court as a multilateral institution, one that functions like an international court to decide investment disputes between private investors and all those States that accept its jurisdiction over their BITs. Admittedly, the proposal for the so-called "*Multilateral Investment Court*" (MIC) is emerging, while the structure of this institution remains largely under discussion. However, the decisions of the CJEU in Achmea and Komstroy could lead to significant changes in the future design of the ICS/MIC if the EC continues to pursue this initiative[96].

Notably, concerns regarding the compatibility of the MIC with the autonomy of the EU legal order surfaced even before the Achmea decision. The EC has emphasized that the ICS Tribunal would not interpret or apply EU law since it is only permitted to address EU law as a matter of fact, which preserves the autonomy of the EU legal order. In addition, it stressed that EU and the Member States would be bound only by the decision on liability and damages, and not by any meaning ascribed to domestic law by the ICS Tribunal[97].

6.3.1. Opinion 1/17[98]: CETA ISDS compatible with EU Law

It is clear that the EU envisaged the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada as a major reform of investment dispute resolution. Establishing the CETA dispute resolution system is the first step towards establishing the announced and previously discussed Multilateral Investment Court

[94] *Baltag C. and Dudas S.*, supra note 7, p. 39.
[95] A review of the EU's attempts for the past decade can be found in *Brown C.*, The EU's Approach to Multilateral Reform of Investment Dispute Settlement, Chapter 13 in Ana Stanič and Crina Baltag (eds), The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court, Kluwer Law International 2020, pp. 219-236.
[96] *Lavranos N. and Singla T.*, supra note 36, p. 354.
[97] Ibid.
[98] Opinion 1/17, Court of Justice of the European Union (Full Court), 30 April 2019.

system. Opinion 1/17 addresses some of the issues associated with this proposal from an EU law perspective[99].

In 2019, the CJEU clarified a reference from Belgium on whether the Investor-State Dispute Settlement (ISDS) mechanism in CETA was compatible with EU law and held that it was. This ruling could be construed as a departure from the Court's decision in Achmea, which held that the application of the ISDS provision in the Netherlands-Slovakia BIT was incompatible with EU law[100].

In issued Opinion 1/17, the Court stated that *EU law does not, in principle, preclude the creation of a court or tribunal responsible for the interpretation of its provisions and whose decisions are binding on the EU*. However, as such a court or tribunal would stand outside the EU judicial system, it cannot have the power to interpret or apply provisions of EU law which might have the effect of impeding the EU institutions from operating in the way that the EU constitutional framework requires. CETA was understood as having made sufficient concessions in this regard and was thus deemed compatible[101].

In many ways, both CETA and the Court's opinion can be seen as direct responses to the uncertainty generated by Achmea. In particular, CETA featured a clause "*that read as if the drafters took utmost care to give as little ammunition as possible to any concern about impinging on the Court's jurisdiction*". Indeed, Article 8.31[102] defines the jurisdiction as narrowly as possible, *explicitly stating that the Investment Court has no power of authoritative interpretation over EU law*. The Court relied heavily on the careful wording of this carve-out provision in finding the agreement compatible[103].

In more detail, the CJEU took this opportunity to clarify its position on the important and often invoked principle of autonomy. It found that EU law permits entering into an international agreement which creates a court to interpret that agreement and render decisions binding on the EU. This agreement may affect the powers of the EU

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[99] *Moise D.*, The Future of Investment Arbitration in the European Union, Romanian Arbitration Journal, Vol. 14, No. 3, July-September 2020, p. 55.
[100] *Williams B.*, Qualifying Achmea: Investor-State Arbitration, Jurisdictional Conflict and EU Decision-Making, in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Sweet & Maxwell 2021, Volume 87 Issue 1, p. 111.
[101] Ibid., p. 116.
[102] Under Article 8.31.1, the ISDS tribunal is called to determine whether the alleged measure is in accordance with the rules and principles of international law applicable between the parties, namely CETA. The domestic law of a Member State may be considered as a matter of fact, following the interpretation given by that Member State's courts and authorities. Furthermore, Article 8.21 of CETA gives the EU the power to determine whether the alleged measure pertains to the Member State or the EU itself. At the appeal stage, the tribunal's powers are also confined to interpretation of the applicable law, as described above, or in relation to domestic law in the context of manifest errors in the appreciation of the facts. *Moise D.*, op. cit., p. 60.
[103] *Williams B.*, op. cit., p. 116.

institutions as long as there is no adverse effect on the autonomy of the EU legal order. The aim of the principle of autonomy is to safeguard the essential characteristics of EU law, namely that it stems from an independent source of law (the EU treaties), it has primacy over the laws of the Member States, and has direct effect. The CJEU found that the fact that the ISDS mechanism stands outside the judicial system of either party does not necessarily affect the autonomy of the EU legal order. The ISDS mechanism interprets and applies CETA and CETA is not subject to the interpretation by the courts of Canada or the EU Member States. This is due to the reciprocal nature of international agreements and the need to maintain the powers of the EU in international relations. Although CETA becomes an integral part of EU law, the ISDS mechanism may not interpret or apply other provisions of EU law or make awards that affect the EU constitutional framework[104].

The CJEU distinguished the CETA mechanism from the BIT in the Achmea Judgment, concluding that the BIT in that case allowed the arbitral tribunal to interpret EU law. Moreover, the Achmea Judgment concerned an Intra-EU BIT. The CJEU ruled that such treaties are contrary to the principle of mutual trust by which Member States are to consider that the other Member States comply with EU law. This is not the case with a non-EU state[105].

The two rulings can be seen to work together[106] in setting out two broad ground rules. First, that the Court's view of the interpretation of EU law can expand in the interests of protecting the principle of mutual trust. In Achmea, the risk posed to Member States meant that interpretation was seen to include non-binding applications of the law as fact, while in Opinion 1/17 the Court extended interpretation to include a new element restricting the ability of EU third state agreements to consider public policy matters. Second, the two cases establish that in defining the scope of its autonomy, the Court looks not to enforce absolute control, but rather to secure conditions in which mutual trust can flourish. To this end, its actions might best be seen not as political responses to controversial issues of the day, but part of a larger narrative that has been present since the EU's inception[107].

[104] *Moise D.*, supra note 99, p. 56.
[105] Ibid., p. 57.
[106] It has also been argued though that the difference between the Achmea reasoning and the Opinion 1/17 reasoning is based on an artificial distinction (as domestic law being regarded as fact does not prevent it from being de facto applied or interpreted by the CETA Tribunal). *Alter C. and Leung Wing Cheung S.*, supra note 87, pp. 351-352.
[107] *Williams B.*, supra note 100, p. 118.

7. Consequences of the incompatibility of the ECT ISDS with EU Law on the post-award phase

Issues with post-award proceedings intensified as the CJEU's Achmea Judgment led parties in intra-EU arbitrations to further post-award disputes and conflicting decisions. Investors attempted to enforce awards, while EU States challenged them. After the issuance of the Komstroy Judgment, the same battles will most definitely occur in relation to intra-EU ECT arbitrations, thus creating further legal uncertainty[108]. Therefore, the last step towards concluding the subject under consideration, that is the arbitrability of intra-EU investment disputes arising out of the ECT, is to evaluate how the established incompatibility of intra-EU investment arbitration with EU law affects the post-award phase, meaning setting aside and recognition and enforcement proceedings within and outside of the EU. To that end, multiple factors need to be taken into account, such as the applicability of the ICSID Convention, the seat of the arbitral tribunal or the jurisdiction in which enforcement is sought[109].

7.1. Setting aside proceedings

Setting aside proceedings can only be initiated at the place of arbitration and are governed by the national arbitration law of the place of the arbitration[110].

It should be noted that the possibility of setting aside an award *does not exist in case of ICSID awards*, because the ICSID regime is autonomous and detached from any national legal order and therefore does not allow for a review of awards before domestic courts. Thus, only non-ICSID investment awards are subject to setting aside proceedings by the courts of the place of arbitration[111].

For all other arbitral awards, that are rendered within the legal framework of the New York Convention (NYC), the question arises whether and to which extent the incompatibility of intra-EU investment arbitration with EU law may successfully be invoked before the national court at the place of arbitration. This question is related to whether the national court is bound by EU Law and, since the setting aside procedure is governed by the law of the place of arbitration, it must be distinguished whether the award was rendered by an arbitral tribunal placed within or outside of the EU[112].

If the award was rendered by a tribunal with a seat within the EU, the competent national court for setting it aside will apply EU law as forming part of the law in force in

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[108] *Fouchard C. and Thieffry V.*, supra note 80.
[109] *Scheu J. and Nikolov P.*, The setting aside and enforcement of intra-EU investment arbitration awards after Achmea, in William W. Park (ed), Arbitration International, Oxford University Press 2020, Volume 36, Issue 2, p. 254.
[110] While procedures for applications to set aside an award may differ substantially from jurisdiction to jurisdiction, a general framework for the recourse against arbitral awards is provided by the UNCITRAL Model Law on International Commercial Arbitration.
[111] *Scheu J. and Nikolov P.*, op.cit., p. 260.
[112] Ibid.

every Member State[113]. In contrast, where the award is rendered by a tribunal outside of the EU, the competent court will decide on the setting aside by applying its national law which is outside of the EU legal order. The inapplicability of EU law directly and adversely affects the success of any EU-related recourse against the award[114].

So, in cases where the award was rendered by a tribunal within the EU, an application for setting aside will be successful. In contrast, courts outside of the EU will most likely refrain from giving effects to the CJEU's judgments within their national legal order. Hence, the relevance of those judgments in the context of annulment proceedings largely depends on the location of the place of the arbitration[115].

7.2. Recognition and enforcement proceedings

In this context also, differences exist between arbitral awards whose recognition and enforcement is governed by the NYC and those for which the ICSID Convention is applicable. In both cases, the CJEU's judgments have wide-reaching consequences on the enforceability of intra-EU arbitral awards. In addition to the legal instruments governing the investor's enforcement action, it is crucial whether recognition and enforcement are sought inside or outside of the EU. The place of the arbitral tribunal will also have to be taken into account[116].

7.2.1. Within the European Union

a. ICSID Awards

According to Article 54(1) ICSID Convention, an arbitral award rendered within the framework of ICSID is not subject to judicial review by State Courts but enforceable within the territory of all Member States of the Convention *as if it were a final judgment of a court in that State*. Within the ICSID regime, the only recourse against an arbitral award is the limited grounds for annulment laid down in Article 52. Due to this self-contained enforcement mechanism, which operates independently from the NYC, arbitral awards rendered within the ICSID framework are considered to be directly enforceable in all its Contracting States[117].

As a matter of public international law and regardless of the CJEU's judgments, the obligation to automatically recognize ICSID awards as enforceable without judicial review by domestic courts is also applicable to intra-EU investment arbitration. However, it is necessary at this point to consider whether the hierarchy of norms

[113] In view of the incompatibility of ISDS clauses contained in intra-EU investment treaties -including the ECT- with EU law, a successful recourse against awards could be based on the invalidity of the arbitration agreement and a conflict of the award with the public policy of the concerned State.
[114] A detailed analysis of the matter can be found in *Scheu J. and Nikolov P.*, supra note 109, pp. 259-266.
[115] Ibid., p. 266.
[116] Ibid.
[117] *Lavranos N. and Singla T.*, supra note 36, p. 355.

within the EU legal order could hinder EU Courts from applying Article 54 ICSID Convention to the enforcement of intra-EU investment arbitration awards. In the Achmea Judgment, the CJEU made clear that the incompatibility of intra-EU investment arbitration with EU law is inter alia based on insufficient judicial review of investment awards. It is noteworthy that the enforceability of the award in that case was governed by the NYC, which allows for (limited) judicial review and includes the possibility for the competent Member State Court of requesting a preliminary ruling from the CJEU pursuant to Article 267 TFEU. Since this possibility does not even exist under the ICSID Convention, the CJEU's reasoning also extends to ICSID awards[118].

Furthermore, primary EU law prevails not only over national law, but also over international treaties. With respect to the conflict between Article 54 ICSID Convention and EU law, this means that the latter prevails within the EU legal order. Hence, EU Member State Courts are bound by the CJEU's jurisprudence when ruling on the enforcement of arbitral awards, including those issued under the ICSID Convention[119].

Even though the non-compliance with obligations under the ICSID Convention may lead to reputational cost for EU Member States, EU law and CJEU jurisprudence do not seem to leave any room for a different approach. As a consequence, there is no chance of success in enforcing an ICSID award within the EU, if the award is based on an intra-EU investment treaty[120].

b. Arbitral awards under the NYC

The incompatibility of intra-EU investment arbitration with EU law most likely also hinders the recognition and enforcement of awards governed by the NYC. Several grounds for non-recognition, such as non-validity of the agreement pursuant to Article V(1)(a), non-arbitrability pursuant to Article V(2)(a) and public policy pursuant to Article V(2)(b) NYC, seem to be fulfilled, that make intra-EU investment treaty awards not enforceable if the arbitration is placed within the EU[121].

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[118] *Scheu J. and Nikolov P.*, supra note 109, p. 268.

[119] This analysis is in principle confirmed by a number of court decisions that have been rendered in the course of the investment dispute between I. and V. Micula against Romania, in which the claimants tried to enforce an ICSID award against the State within and outside of the EU. In 2015, the EC directed Romania not to pay the award on the ground that such payment would constitute illegal state aid under EU law. Furthermore, in its annulment decision in the Achmea case, the BGH also reaffirmed *the position of EU law at the top of the hierarchy of norms*. The BGH pointed out that by joining the EU, *Member States have given up the capacity to apply international treaties which are incompatible with EU law*.

[120] *Scheu J. and Nikolov P.*, supra note 109, pp. 267-269. See also *Tietje C. and Wackernagel C.*, Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration, Journal of World Investment & Trade, Vol. 16, No. 2, 2015, pp. 205-247.

[121] A detailed analysis of the matter can be found in *Scheu J. and Nikolov P.*, supra note 109, pp. 269-271. See also *Stanič A.*, Enforcement of Awards and Other Implications of the Achmea, Chapter 9 in Ana Stanič and Crina Baltag (eds), The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court, Kluwer Law International 2020, pp. 147-151.

7.2.2. Outside of the European Union

In light of the foregoing, any investor seeking to enforce an intra-EU award would have to consider initiating proceedings before courts outside of the EU[122]. In order to evaluate the impact of the CJEU's judgments on such proceedings, a distinction on whether the award is governed by the ICSID Convention or the NYC has to be made[123].

First of all, since courts outside of the EU are not bound by EU law, the ICSID Convention cannot be precluded by the principle of supremacy of EU law[124].

On the other hand, if the investor seeks to enforce an award governed by the NYC outside of the EU, it can be assumed that State Courts would find the CJEU's judgments to be irrelevant. This does not mean, though, that such an award would be enforceable under any circumstances. In contrast, the prospects of success in enforcement proceedings depend on *whether the seat of arbitration is located within or outside of the EU*. If the award was rendered by a tribunal within the EU, EU law is a part of the applicable law and *the CJEU's judgments invalidate the arbitration agreement between the host State and the foreign investor*. Consequently, the competent court may refuse enforcement at the request of the defending State due to that reason pursuant to Article V(1)(a) NYC. In addition, there is a high probability that any EU Member State will request the court to refuse enforcement pursuant to Article V(1)(e) NYC, if the award has been set aside at the place of arbitration. If the award was rendered by a tribunal outside of the EU and enforcement is sought in a non-EU jurisdiction, none of the grounds for refusing recognition and enforcement under Article V NYC based on EU law are satisfied[125].

Summing all above remarks up, *the supremacy of EU law virtually eliminates the chances of investors to successfully enforce an award rendered on the basis of intra-EU investment arbitration within the EU*. Regardless of Article 54 ICSID Convention, this is applicable also to ICSID awards. Outside of the EU, ICSID awards will however remain enforceable. In case of non-ICSID awards, recognition and enforcement depend on whether the place of the arbitration is situated within or outside of the EU[126].

In light of the above and even though investment tribunals are not bound by the decisions of the CJEU, they would certainly have to factor in the enforceability of their awards. As things stand, proceeding with a finding of jurisdiction under the ECT, would most possibly render their awards unenforceable within the entire EU. Therefore, tribunals seated in the EU might feel compelled to factor in the jurisdictions where enforcement of the award may be sought and allow themselves to be guided by pragmatism rather than legal doctrine[127].

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[122] For the relevant matter of courts' approaches to date in which enforcement of intra-EU BIT arbitral awards has been sought see *Stanič A.*, supra note 121, pp. 155-162.
[123] *Scheu J. and Nikolov P.*, supra note 109, p. 271.
[124] *Lavranos N. and Singla T.*, supra note 36, p. 354. More details and jurisprudence in *Scheu J. and Nikolov P.*, supra note 109, pp. 271-271.
[125] *Scheu J. and Nikolov P.*, supra note 109, pp. 272-273.
[126] Ibid., p. 273.
[127] *Lavranos N. and Singla T.*, supra note 36, p. 353.

8. Conclusions

From a strictly legal point of view, the jurisdiction of an arbitral tribunal presiding over an ECT claim cannot be overturned merely because of the CJEU's findings that, according to its authoritative understanding of EU law, EU law would be breached. For such a tribunal the right choice would be to follow its treaty, the applicable law which is its vocation to apply -that is the ECT. EU law cannot be relied on to withhold rights expressly provided by the ECT, no more than, in the context of proceedings before the CJEU, the ECT could be relied on to withhold rights expressly provided by EU law[128].

Regardless of the CJEU's Komstroy Judgment with regards to the validity of intra-EU ECT arbitration, the need remains for an impartial, independent means of adjudicating investor-state disputes outside the host Member States[129].

As already discussed, due to the fact that the ISDS provisions contained in the ECT were declared incompatible with EU law by the Komstroy Judgment of the CJEU, European investors would have to resort to domestic courts of EU Member States in order to seek investment protection. However, given the inefficiency und unreliability of the judicial systems in many Member States, it is obvious that those judicial systems need to be improved. It is also obvious that the Member States concerned are either unable or unwilling to take the necessary steps. Consequently, it falls into the responsibility of the European institutions, in particular the European Commission as guardian of the EU Treaties, to make sure that the domestic judicial systems in all EU Member States are actually able to provide effective and efficient judicial protection to European investors[130].

The legal uncertainty created is wider than just the immediate result of the Komstroy Judgment, that is the rise of more jurisdictional objections in the course of arbitration proceedings between EU investors and EU Member States. It also relates to the legal certainty and rule of law in the EU more generally. The possible retroactive impact of the recent developments taking place in the EU undermines the necessary stability of the legal system and, ultimately, the rule of law in the EU. The decisions of the CJEU in Achmea and Komstroy and the EC's actions against intra-EU investment disputes raise the question of consistency. Can the EU demand stability, predictability and strict adherence to the rule of law from other countries around the world, when at the same time it appears to be changing the rules of the game very suddenly and retroactively?[131]

[128] *Bjorge E.*, supra note 86, p. 86.
[129] *Lacson A.*, supra note 76, p. 1345.
[130] *Lavranos N. and Singla T.*, supra note 36, p. 357.
[131] *Talus K. and Särkänne K.*, supra note 31, p. 22.

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