CONSEQUENCES OF THE ACHMEA JUDGEMENT
FOR INTRA-EU ARBITRATIONS BASED ON THE ENERGY CHARTER TREATY

On 6 March 2018, the Court of Justice of the European Union handed down its landmark ruling in the Achmea case. The court found that arbitration clauses included in intra-EU BITs are incompatible with EU law. As a result, a majority of EU Member States endorsed the political declarations of 15 and 16 January 2019 in which they expressed their willingness to terminate their intra-EU bilateral investment treaties (BITs) and to replace their investor protection mechanisms with equivalents under the acquis communautaire.

All of this shook the arbitration world to its core, leaving arbitrators and counsels with many outstanding issues and unanswered questions. One group of questions concerned (and, as practice shows, still concern) the scope of the Achmea decision, including in particular the question whether the Achmea Judgement should apply only to the BITs or also to multilateral agreements such as the Energy Charter Treaty (ECT) which constitutes the basis for a significant number of arbitration proceedings. This article aims to tackle this question by analysing relevant case law, statutory provisions, and studies of related literature.

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I. INTRODUCTION

On 6 March 2018, the Court of Justice of the European Union (the “CJEU”) rendered a highly anticipated judgement in Case C-284/16 (Slowakische Republik v. Achmea BV (the “Achmea Judgement” or “CJEU Judgement”), stating that the dispute resolution clause contained in Article 8 of the Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic (Slovak Republic)¹ is not compatible with EU law.

In doing so, the CJEU departed from the Advocate General Wathelet’s opinion of 19 September 2017², in which he concluded that neither intra-EU Bilateral Investment Treaties (“intra-EU BITs”) nor the investor-state dispute settlement clauses (the “ISDS”) contained in them³ breached

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¹ In 1993, as a result of the dissolution of the Czech and Slovak Federative Republic, by succession the Slovak Republic became a party to the said BIT (the “Netherlands-Slovakia BIT”).
³ An ISDS clause is an essential element of not only every BIT, but also of every international agreement, whether bilateral or multilateral, which provides for investment protection. Such clause acts as a special arbitration clause under which a state, which is a party to the agreement and which is in breach of its provisions, may be sued by private
EU law. The Advocate General additionally emphasised that the ISDS clause constituted a benefit that was an integral part of the BIT and the lack of this clause would undermine the purpose of the BIT because, without it, the BIT would not ensure adequate protection required to encourage and attract foreign investments⁴.

Although the Achmea Judgement has not automatically resulted in the annulment of the intra-EU BITs, it has far-reaching effects not only on their application but also their existence. On 5 May 2020, after a two-year negotiation process followed political declarations of 15 and 16 January 2019 on the legal consequences of the Achmea Judgment and investment protection (the “Declaration of January 2019”), a majority of EU Member States signed an agreement to terminate intra-EU BITs (the “Termination Agreement”)⁵.

Notably, a majority of EU Member States (22 out of 28 at that time, including Belgium, Cyprus, Denmark, France, Germany, the Netherlands, Poland, Spain, and Great Britain) also voiced the opinion that the Achmea Judgment applied equally to intra-EU investor-State arbitration under the Energy Charter Treaty (“ECT”)⁶. The remaining Member States (Finland, Luxembourg, Malta, Slovenia, Sweden, and Hungary) disagreed and refused to answer the question whether the Achmea Judgment would have implications on intra-EU investor-State arbitration under the ECT⁷.

entities (investors) from another state which is a party to that agreement and which may bring the matter to international arbitration. An example of such clause is Article 8 of the Netherlands-Slovakia BIT.

⁴ Opinion of A. G. Wathelet of 19 September 2017, par. 54 et seq.

⁵ Available at: https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en [accessed on 30 October 2020].

⁶ See Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, dated 15 January 2019, signed by Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Italy, Cyprus, Latvia, Lithuania, the Netherlands, Austria, Poland, Portugal, Romania, Slovakia, and Great Britain, pp. 1–2, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf [accessed on 30 October 2020].

As a result, intra-EU jurisdictional objections being raised with reference to the Achmea Judgment has become a common practice in intra-EU investment arbitrations brought under the ECT. This has caused an ongoing debate as to whether the effects of the decision in question should be considered as going beyond the limits of intra-EU BITs to multilateral investment agreements (treaties) to which the EU as a whole is a party, including especially the ECT as “the most frequently invoked” agreement of its type.

II. BACKGROUND OF THE ACHMEA CASE

In 2004, Slovakia opened its health insurance market to private investors. Dutch insurer Achmea B.V. (formerly known as Eureko B.V.) (“Achmea”) set up a subsidiary in Slovakia, intending to offer private health insurance services there. However, in 2006 Slovakia partly reversed the liberalisation of its health insurance market as a result of which, among other things, Achmea’s Slovak subsidiary was forbidden from making profits. In consequence, in 2008 Achmea brought arbitration proceedings against Slovakia under the Netherlands-Slovakia BIT, arguing that by changing the investment framework, Slovakia had breached its treaty obligations and had caused financial damage to its subsidiary.

In 2012, the ad-hoc arbitral tribunal found that Slovakia had indeed breached the Netherlands-Slovakia BIT and ordered it to pay Achmea damages of approximately EUR 22.1 million. As the seat of arbitration was Frankfurt am Main, Germany, Slovakia brought setting-aside proceedings before the Regional Court in Frankfurt am Main (Oberlandesgericht Frankfurt am Main), arguing that the arbitral tribunal had no jurisdiction to hear Achmea’s claim and that the arbitral award had been issued in breach of EU public policy. In Slovakia’s view, the ISDS clause included in Article 8 of the Netherlands-Slovakia BIT was incompatible with EU law; more specifically, with several provisions of the Treaty on the Functioning of the European Union (the “TFEU”)9, including Articles 18, 267, and 344.

The Regional Court in Frankfurt am Main rejected Slovakia’s arguments, finding that the BIT was not incompatible with the said provisions of the TFEU10. Slovakia filed an appeal, which led the Federal Court of Justice (Bundesgerichtshof) to request the CJEU to issue a preliminary ruling on whether the ISDS clause included in Article 8 of the Netherlands-Slovakia BIT is compatible with EU law or not.

In its decision of 3 March 2016, the Federal Court of Justice made it clear that it did not agree with Slovakia’s arguments in this matter and its view was that EU law did not preclude the application

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8 For more details, see: https://www.energycharter.org/media/news/article/updated-statistics-on-investment-arbitration-cases-under-the-energy-charter-treaty/ [accessed on 30 October 2020].

9 Consolidated texts of the EU treaties (the Treaty on European Union and of the Treaty on the Functioning of the European Union, together with the annexes and protocols) as they result from the amendments introduced by the Treaty of Lisbon, signed on 13 December 2007.

10 Decision of German Regional Court in Frankfurt am Main of 18 December 2014, Case No. 26 Sch 3/13.
of either the intra-EU BITs or the ISDS clauses contained in them\textsuperscript{11}. However, due to the intervention of the European Commission, which expressed the view that intra-EU BITs are incompatible with EU law, and the lack of CJEU jurisprudence regarding this issue, it decided to stay the proceedings and to refer the following preliminary questions to the CJEU:

“(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between EU Member States of the European Union (an intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

(2) Does Article 267 TFEU preclude the application of such provision?

If Questions 1 and 2 are answered in the negative:

(3) Does the first paragraph of Article 18 TFEU preclude the application of such provision under the circumstances described in Question 1?\textsuperscript{12}

The Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania, and the European Commission submitted observations in support of Slovakia’s arguments, while Germany, France, the Netherlands, Austria, and Finland contended that the clause at issue and, more generally, clauses of a similar kind commonly used in the 196 BITs currently in force between the EU Member States of the EU, were valid. A similar view, as already mentioned earlier, was expressed by the Advocate General of the CJEU, who in his opinion of 19 September 2017 argued that EU law, including the principle of non-discrimination contained in Article 18 of the TFEU, did not preclude the existence of either intra-UE BITs or the ISDS included in them.

Although the opinion of the Advocate General does not bind the CJEU, in most cases it allows a prediction of the direction in which the CJEU will go in its decision. However, as discussed below, this was not the case here.

III. ACHMEA JUDGMENT

3.1. EU law and Its Primacy

At the outset of the judgement in the Achmea case, the CJEU emphasised that according to its settled case law, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, the observance of which is ensured

\textsuperscript{11} Decision of German Federal Court of Justice of 3 March 2016, Case No. I ZB 2/15.

\textsuperscript{12} Opinion of AG Wathelet of 19 September 2017, par. 30; Achmea Judgement, par. 26.
by the CJEU itself. As the CJEU noted, this principle was specifically expressed in Article 344 of the TFEU, under which the EU Member States undertake not to submit disputes regarding the interpretation or application of Treaties to be resolved by any settlement method other than those provided for in the Treaties.

The CJEU recalled the principle of autonomy of the EU legal system, emphasising that EU law is characterised by its independence from national laws and international law, its primacy over national laws, and the direct effect of a whole series of its provisions for citizens of the EU Member States and the EU Member States themselves. According to the CJEU, based on these specific characteristics, the EU Member States are obliged to ensure, in their respective territories, the uniform and consistent application of EU law.

The CJEU added that to ensure that these specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. And the key element of this judicial system is the preliminary ruling procedure provided for in Article 267 of the TFEU, which, by setting up a dialogue between one court and another, in particular between the CJEU and the national courts and tribunals of the EU Member States, secures a uniform interpretation of EU law, thereby serving to ensure its consistency, full effect, and autonomy.

3.2. The Arbitral Tribunal May Be Asked to Interpret or Apply EU Law

Given the above and in contrast to what the Advocate General argued, the CJEU made the point that even if the arbitral tribunal is called on to rule only on possible infringements of the intra-EU BIT, the fact remains that to do so, it must take account of the national law of the contracting states and other agreements between those states, including EU law. It follows that the arbitral tribunal deciding the dispute under an intra-EU BIT may be called on to interpret or even apply EU law, particularly the provisions concerning fundamental freedoms, including the freedom of establishment and the free movement of capital.

3.3. The Arbitral Tribunal Should Not Be Considered a National Court or Tribunal of an EU Member State

Next, and again contrary to the Advocate General’s opinion, the CJEU expressed the view that an arbitral tribunal established to settle a dispute arising regarding an intra-EU BIT, such as that between Slovakia and Netherlands, should not be considered a national court or tribunal of an EU Member State within the meaning of Article 267, which regulates the preliminary ruling procedure, and therefore it has no power to refer to the CJEU for a preliminary ruling.

3.4. The Arbitral Award Issued under Intra-EU BIT Is Not Subject to Review by the Courts of EU Member States
Moving on to the next issue, the CJEU once again expressed its disagreement with the Advocate General by stating that an arbitral award issued by an arbitral tribunal under the Netherlands-Slovakia BIT is, in principle, final and can be subject to judicial review exercised only by the competent national court, acting within the applicable national procedural law determined based on the selection of the arbitration seat (lex loci arbitri), which is to be chosen by the tribunal itself. As the CJEU noted, it follows that the tribunal chooses its seat and consequently the law applicable, which often provides only for a limited review of the arbitral award, concerning, in particular, the validity of the arbitration agreement.

Further, the CJEU acknowledged its previously stated point of view that regarding commercial arbitration, such a limited review of arbitral awards by the courts of the EU Member States, which in principle only allows an examination of the fundamental provisions of EU law and, if necessary, the question to be referred to the CJEU, may be justified, however this principle does not apply to intra-UE investor-state investment arbitration conducted under Article 8 of the Netherlands-Slovakia BIT.

The CJEU explained this distinction while referring to the fact that commercial arbitration is based on the parties’ consent to arbitrate expressed in their arbitration agreement, whereas investor-state arbitration is based on a BIT by which two EU Member States agree to exclude disputes which may concern the application or interpretation of EU law from the jurisdiction of their own courts, and thus also from the system of judicial remedies which the TFEU requires them to establish to ensure effective judicial protection of the fields of law. On those covered by EU grounds, the CJEU concluded that, by signing the BIT, Slovakia and the Netherlands established a mechanism for settling disputes between an investor and an EU Member State which is not capable of ensuring the uniform application and full effectiveness of EU law, even though they might concern the interpretation or application of that law.

At the same time, the CJEU recalled that given its settled case law, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on EU institutions, including the CJEU, is not in principle incompatible with EU law. However, for this to happen the European Union must be a party to such agreement. However, in the case of the Netherlands-Slovakia BIT, the possibility of referring disputes, which may relate to the interpretation of both that agreement and of EU law, to a body which is not part of the EU’s judicial system, is provided for in an agreement which has not been concluded by the European Union but by its Member States. Therefore, according to the CJEU, the dispute resolution clause in this agreement may call into question not only the principle of mutual trust between the EU Member States but also the preservation of the specific characteristics of EU law, ensured by the preliminary ruling procedure provided for in Article 267 of the TFEU.

In those circumstances, the CJEU concluded that the arbitration clause in the Netherlands-Slovakia BIT damages the autonomy of EU law and is therefore incompatible with EU law.

Consequently, in answer to the preliminary questions 1 and 2 mentioned above, the CJEU held that “Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international
agreement concluded between the Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.” Further, given the positive nature of this answer, the CJEU considered that there was no need to answer question 3.

IV. ANALYSIS OF THE IMPACT OF THE CJEU JUDGMENT ON INTRA-EU ARBITRATIONS BROUGHT UNDER THE ECT

4.1. General Remarks on the ECT

The ECT is an international treaty that creates a uniform legal regime covering a wide scope of energy-sector related issues, from commerce, investment protection and transit, to dispute resolution and the improvement of energy efficiency.

The ECT was signed in December 1994 and entered into force in April 1998. Currently, it has 53 Signatories (Contracting Parties), including 51 states (including all EU Member States), the European Union, and the European Atomic Energy Community. Almost all of them have ratified the ECT, except for Australia, Belarus, Norway, and the Russian Federation. In addition, 42 states, including the USA and China, as well as 13 international organisations, including the World Bank, have the status of observers to the ECT. This means that the ECT’s impact extends far beyond Europe and, as a result, is considered to constitute a primary and universal source of international legal rules related to energy co-operation on a global scale.

4.2. Investor-State Dispute Settlement Mechanism under Article 26 of the ECT

The ECT is a treaty that covers virtually all energy-related areas and contains dispute settlement provisions covering both state-to-state (SSDS) and investor-state (ISDS) disputes. The provisions relating to the latter type of disputes are set out in Article 26 of the ECT, which provides for conditions under which an investor can choose to submit an unresolved dispute to one of the fora indicated in Article 26(2-4) of the ECT, including international arbitration.

Importantly, under Article 26(3)(a) of the ECT, each Contracting Party gives its “unconditional consent to the submission of a dispute to international arbitration or conciliation under the

13 For more details about the ECT, see: https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ [accessed on 4 November 2020].

14 The investor chooses between the following fora: (a) the national court or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) international arbitration, electing from: (1) institutional arbitration (administered by one of the two arbitration institutions: (i) the International Centre for Settlement of Investment Disputes, “ICSID”; or (ii) the Arbitration Institute of the Stockholm Chamber of Commerce, “SCC”); and (2) a sole arbitrator or ad hoc arbitral tribunal, established under the UNCITRAL Arbitration Rules (Article 26(2) of the ECT).
provisions of this article.” This unconditional consent implies that the Contracting Party cannot withdraw its consent at the request of an investor to commence arbitral proceedings. The party’s consent is irrevocable and its withdrawal would not be legally effective. The Contracting Party can of course withdraw from the ECT\(^\text{15}\). However, even then, according to Article 47 of the ECT, it remains bound to honour its investment protection obligations and must honour them for 20 years following the effective date of its withdrawal\(^\text{16}\).

Another essential condition precedent to the commencement of arbitration under Article 26 of the ECT is the investor’s written consent for the dispute. Once the investor provides its consent, the state’s consent becomes legally binding and the investor is entitled to refer its claim directly before the arbitral tribunal under respective arbitration rules, as only then is there the consensus of both parties to submit their dispute to arbitration.

After submitting the dispute to an arbitration tribunal, the further paragraphs of Article 26 of the ECT become relevant, namely Article 26(6), which provides that the tribunal will decide the issues in dispute under the ECT and applicable rules and principles of international law, and Article 26(8), which provides that the arbitration award will be final and binding on the parties to the dispute, and that each Contracting Party (including the EU) is obliged to carry out these awards without delay and ensure their effective enforcement on its territory.

4.3. **Compatibility between Article 26 of the ECT and UE Law**

It could be argued that Article 26 of the ECT is inconsistent with EU law and, as such, should not apply to intra-EU investor-state disputes. This argument could be supported by the fundamental principles of the EU legal system, including the principle of primacy and autonomy outlined in Articles 267 and 344 of the TFEU, which apply to the national law of the EU Member States.

However, the fact is that comparing the relationship between EU law and national laws to the relationship between EU law and international treaties, especially the one to which the EU is a party and which are not limited to the EU Member States, is completely groundless, to say at least. In addition, there are no objective reasons to believe that there is not even a slight inconsistency between Article 26 of the ECT and EU law.

\(^{15}\) The procedure of withdrawing from the ECT is provided for in Article 47 of the ECT, according to which at any time after five years from the date on which the ECT entered into force for a Contracting Party, that Contracting Party may give written notification of its withdrawal from the treaty. Any such withdrawal will take effect on the expiry of one year after the date of receipt of the notification by the Depository, or on such later date as may be specified in the withdrawal notification. However, the provisions of the ECT will continue to apply to investments made in the territory of a Contracting Party by investors of other Contracting Parties or in the territory of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party’s withdrawal from the treaty takes effect for 20 years from that date.

This has been confirmed by arbitral tribunals in numerous cases where the tribunals’ jurisdiction was questioned, both before and since the Achmea Judgement.

For example, in Charanne v. Spain\(^{17}\), in an attempt to challenge the jurisdiction of the arbitration tribunal, Spain argued that the dispute settlement mechanism under the ECT was incompatible with EU law. It based its arguments on the premise that Article 344 of the TFEU regulates all disputes concerning the responsibility of EU Member States, including investor-state disputes, and requires that all such disputes remain within the jurisdiction of EU institutions, as they might all involve the application and, as a consequence, interpretation of EU law.

The arbitral tribunal rejected this argument and pointed out that Article 344 of the TFEU literally only refers to disputes between the EU Member States and not those between the EU Member States and private entities (investors) from those States\(^{18}\). In addition, as the tribunal rightly noted, accepting this argument would mean nothing but acknowledging that no arbitration tribunal (whether deciding a national or international dispute) could rule on any case that requires the application and interpretation of EU law. However, not only is it not always foreseeable from the outset whether a given case will require the application of EU law, but also and above all, there are in principle no contraindications for such case to be submitted to arbitration, and most certainly such contraindications do not follow from the wording of Article 344 of the TFEU\(^{19}\).

At the same time, citing the CJEU judgement in Ecco Swiss v. Benetton\(^{20}\), the tribunal stressed that it is “universally accepted” that arbitration tribunals not only have the power but also the duty to apply EU law\(^{21}\), which, it is worth noting, becomes a part of a state’s legal order automatically

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\(^{19}\) Especially considering, first of all, that the application and interpretation of EU law (as part of the legal order of EU Member States) is an integral part of the decision-making process of many arbitration tribunals, and, secondly, that arbitration is a form of dispute resolution which is provided for by the national laws of the majority, if not all, EU Member States. Furthermore, the use of arbitration as a method of settling intra-EU disputes has been fully accepted in EU law, as evidenced, e.g. by the wording of recital (12) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which stipulates in particular that nothing in that Regulation should prevent the courts of an EU Member State, when seized of an action in a matter regarding which the parties have entered into an arbitration agreement, from referring the parties to arbitration and from staying or dismissing the proceedings. As such, recital (12) emphasises the existence of the obligation of EU courts to honour any arbitration agreement, and, when justified, to use the available judicial measures to protect its due performance.


\(^{21}\) Charanne v. Spain, Award of 21 January 2016, par. 443.
on its accession to the EU. The tribunal, therefore, found it incorrect to argue that Article 344 of the TFEU prohibits EU Member States from submitting disputes that could involve an application and interpretation of EU law to dispute settlement proceedings other than those provided by the EU framework, which in this particular case was arbitration.

Further, in addressing some additional arguments made by Spain, the tribunal cited the Electrabel v. Hungary award and concluded that Article 344 of the TFEU is intended not to exclude in-EU disputes from the jurisdiction of arbitration tribunals, but to provide the CJEU with the final word on how EU law is to be interpreted to ensure its uniform interpretation. Furthermore, as the tribunal stressed again citing Electrabel v. Hungary, the EU had accepted the possibility of in-EU investor-state arbitration under Article 26 of the ECT when it became a party to that treaty which, as should be noted, excludes any reservations narrowing the applicability of the ISDS clause (Article 46 of the ECT).

A similar position was taken in RREEF Infrastructure v. Spain, where the arbitral tribunal additionally emphasised that given that the parties to the ECT were not only the EU and its Member States, but also other non-EU States, and, thus, the ECT bound all of them, “it cannot be upheld that, by ratifying the ECT, those non-EU States have accepted EU law as prevailing over the ECT.” Therefore, given that the ECT constitutes the legal basis of the tribunal’s jurisdiction, which thus can be treated as its “constitutional” instrument, in the event of any contradictions between the ECT and EU law, the tribunal has to ensure the full application of the former.

As the tribunal noted, this argument is even more compelling given that Article 16 of the ECT, which is a conflict-of-rules provision that regulates the relationship between the ECT and other agreements (from which EU law should not be distinguished), clearly implies that if it is

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22 Ibid., par. 444.
26 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 (“RREEF Infrastructure v. Spain”).
28 Article 16 of the ECT provides that “[w]here two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Parts III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.”
necessary to specify a “hierarchy” of applicable norms, the tribunal should determine it from the perspective of public international law and not EU law, while fully protecting the ECT and the rights arising from its provisions, especially including its Part III and Part V (Article 16 (2) of the ECT).\textsuperscript{29}

That being said, the tribunal found that in a case where two treaties apply, they should be interpreted in such a way that they would not contradict each other. This canon of interpretation, as the tribunal noted, has been confirmed by the CJEU which, in its judgment in \textit{Commission v. Germany}\textsuperscript{30}, considered that EU law (or, to be more precise, “the provisions of secondary Community legislation”) should, as far as it is possible, be interpreted in a manner that is consistent with treaties concluded by the EU\textsuperscript{31}. Furthermore, the tribunal recalled that the EU was involved in the negotiation and promotion of the ECT. It is therefore difficult to imagine that the EU would have engaged itself in these activities and then would have signed the ECT if that had meant entering into obligations that were inconsistent with its own internal law, especially considering the wording of Article 207(3) of the TFEU, which requires the Council and the Commission to ensure that agreements negated and concluded by the EU are compatible with its internal policies and rules\textsuperscript{32}.

A similar position in this respect was taken by the arbitral tribunal in \textit{Isolux v. Spain}, which additionally pointed out that the ECT should be interpreted under Article 32 of the 1969 Vienna Convention on the Law of Treaties (the “\textit{VCLT}” or “\textit{Convention}”)\textsuperscript{33}, which stipulates that for the interpretation of a treaty, “supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion” can also be used\textsuperscript{34}. This remark, as the tribunal noted, would however lose its significance if there were a disconnection-clause excluding the application of the ECT to intra-EU relationships. Nevertheless, such clause has never been introduced to the ECT (or, to be more exact, it has been proposed/discussed but never agreed on), which essentially means that the EU has accepted the ECT as adopted, thereby confirming all of the provisions embodied in it apply fully to intra-EU relationships\textsuperscript{35}.

\textsuperscript{29} \textit{RREEF Infrastructure v. Spain}, Decision on jurisdiction of 6 June 2016, par. 75. See also \textit{Electrabel v. Hungary}, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, par. 4.112.


\textsuperscript{31} Ibid., par. 52.

\textsuperscript{32} \textit{RREEF Infrastructure v. Spain}, Judgement on Jurisdiction of 6 June 2016, par. 76.

\textsuperscript{33} The Convention was adopted on 22 May 1969, opened for signature on 23 May 1969, and entered into force on 27 January 1980. Poland acceded to the Convention on 27 April 1990.

\textsuperscript{34} \textit{Isolux v. Spain}, Award of 21 January 2016, par. 645. See also \textit{Electrabel v. Hungary}, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, par. 4.134.

\textsuperscript{35} \textit{Isolux v. Spain}, Award of 21 January 2016, par. 646.
On that note and to clarify the above-mentioned position, it is worth noting that if a party to a treaty wishes to exclude the application of that treaty to any extent, it should make a relevant reservation or propose to include a disconnection clause in its provisions (see Article 21 of the VCLT). As the right of reservation has been excluded under Article 46 of the ECT, during the negotiation process the Commission (acting on behalf of all European Communities) proposed introducing a disconnection clause to the ECT aimed at excluding the application of that treaty within the EU. However, this proposal was eventually dropped (it never went beyond the negotiating framework) and the Commission signed the ECT as adopted, which means that for the EU, this was not a principled matter. Otherwise, as can be expected, the Commission would not have signed the ECT.

Therefore, it can be assumed that towards the end of negotiations, after some initial hesitations, the Commission acknowledged the harmony between ECT and EU law and, as a result, decided that there was no need for a disconnection clause. It is not surprising then that arbitration tribunals, when examining the compatibility of Article 26 of the ECT with EU law, tend to reject the arguments of EU Member States about the existence of an “implicit disconnection clause” which excludes the application of Article 26 of the ECT in intra-EU relations.

The issue of a disconnection clause has been addressed, e.g. by the arbitral tribunal in Vattenfall v. Germany, which rejected Germany’s request to dismiss the investor’s claims for lack of jurisdiction, arguing, among other things, that because the EU had included such clauses in other treaties and the ECT final treaty draft eliminated such provision despite the EU’s proposal to include one during negotiations of the ECT, it is justified to assume that under the ECT the clause

36 The very fact that reservations are excluded by Article 46 of the ECT confirms the intention of the Contracting Parties to have the ECT unconditionally and integrally applied by all the Parties, regardless of whether a party is a state or an international organisation. See RREEF Infrastructure v. Spain, Judgement on jurisdiction of 6 June 2016, n 80.

37 As an additional clarification, the European Communities, sometimes referred to as the European Community, is the joint name of three international organisations that were governed by the same set of institutions: the European Coal and Steel Community (the “ECSC”), the European Economic Community (which was renamed the European Community (the “EC”) in 1993 by the Maastricht Treaty) and Euratom. Precisely on behalf of these three organisations the Commission negotiated and signed the ECT in 1994, as a result of which these Communities became the Contracting Parties to this treaty. At that time, the Member States of the European Communities were: Belgium, Denmark, France, Germany, Greece, Italy, Ireland, Luxembourg, Netherlands, Portugal, Spain and the United Kingdom, all of whom also signed the ECT. Subsequently, the Communities were incorporated into the EU in 1993 and they became its first pillar. Afterwards, the ECSC ceased to exist in 2002 when its founding treaty expired, leaving only the EC and Euratom as the Contracting Parties to the ECT. Then, on 1 December 2009 the EC was dissolved into the EU by the Treaty of Lisbon, with the EU becoming the legal successor to the EC (see Article 1 (3) TFEU) and, as result, a Contracting Party to the ECT. Euratom remained an entity distinct from the EU, while remaining a Contracting Party to the ECT.

38 Opinion of A. G. Wathelet of 19 September 2017, par. 43.

39 RREEF Infrastructure v. Spain, Decision on Jurisdiction of 6 June 2016, pars. 84–85; Charanne v. Spain, Award of 21 January 2016, par. 77.

was intentionally omitted. In this context, the tribunal noted that 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 respondents”, but “[t]hat was not done.”

In conclusion and contrary to what the majority of EU Member States seem to believe, there are no legitimate reasons for stating that an ISDS clause contained in the ECT is incompatible with EU law. And this fact is not only evidenced by the wording of the relevant provisions (Articles 267 and 344 of the TFEU versus Article 26 of the ECT), but also by the fact that the EU (or, to be more exact, the Commission) itself, which—despite having some initial concerns—signed the ECT in the given form and content (with no reservations, e.g. that the EU would treat the ECT only as “an instrument of the Union’s external energy policy” which does not apply to intra-EU situations), thus confirming that the ISDS clause that it contains is fully compatible with EU law.

Hence, the ECT provisions, including Article 26, should be applied by all Contracting Parties (including the EU and all of its Member States) with no exceptions or limitations in the context of either intra-EU or extra-EU arbitrations. In this context, it is worth recalling the reasoning given by the arbitral tribunal in Landesbank v. Spain, where it was concluded that “the ECT, as a multilateral treaty, involves obligations by each Contracting Party towards all other Contracting Parties; it is more than just a network of bilateral relationships and is therefore quite different from a BIT. The nature of the ECT as a single legal instrument in force in the same terms and to the same effect between all of its Contracting Parties is reinforced by the fact that reservations to the ECT are expressly prohibited by Article 46 of the ECT.”

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41 Vattenfall v. Germany, Decision on the Achmea Issue dated 31 August 2018, par. 187.
45 RREEF Infrastructure v. Spain, Decision on Jurisdiction of 6 June 2016, par. 82.
All that being said, it cannot be excluded that the Commission, or, to be more exact, the EU (as any other Contracting Party) has changed its mind, concluding that, e.g. its own law has developed a sufficient system of investment protection (although this seems not to be the case as the EU investment protection system is still at an early stage of development\(^{47}\)). However, if this really was the case, and if as result the EU really did not see any need to be bound by the ECT any longer, it should renegotiate its terms or withdraw from it in the prescribed manner, i.e. based on Article 47, and not try to impose on all the signatories its own view—dictated by its own interests and plans—on how the provisions of the ECT or, to be more exact, its Article 26, should be interpreted and applied.

4.4. **Effect of the Achmea Judgment on the Application and Interpretation of Article 26 of the ECT**

Given that intra-EU arbitration proceedings based on the ECT largely resemble those based on the BITs, it would appear that the CJEU Judgement in Achmea also applies by analogy to Article 26 of the ECT and the investor-state dispute settlement mechanisms embodied in it. However, the fact is that the scope of the preliminary questions submitted by the German Federal Court of Justice, and thus the scope of the Achmea Judgment, was limited strictly to the intra-EU BITs, and not to the BITs or to the (investment) treaties in general.

Such conclusion has been reached by many arbitral tribunals, including in *Masdar v. Spain*, which was the first tribunal to deal with the jurisdictional implications of the Achmea Judgement. The tribunal rejected Spain’s request to reopen the arbitral proceedings based on the CJUE Judgement in Achmea, referring to the Opinion of A. G. Wathelet and stating that the judgement in question applied “only” to the Netherlands-Slovakia BIT and, in a more general sense, to an international agreement between the EU Member States and not to the ECT which is a multilateral agreement to which the EU itself is a party\(^{48}\).

Similarly, in a more recent award in *Stadtwerke München v. Spain*, the arbitral tribunal concluded that in the Achmea Judgment, the CJEU “[…] did not consider the position of a tribunal constituted on the basis of the ECT. Its sole concern was the position of a tribunal constituted on the basis of a bilateral investment treaty between two Member States of the EU (here, the Netherlands and the Slovak Republic). This is clear not only from the manner in which the questions referred to by the Bundesgerichtshof to the Court of Justice were framed, but also by the use of the term “such as” in the conclusion of the Court of Justice in the above excerpt. Article 26 of the ECT cannot be assimilated to Article 8 of the Dutch-Slovak BIT, and thus understood to be a provision such as


the one included in the Dutch-Slovak BIT, as the ECT is not a bilateral treaty concluded between two Member States of the EU, but a multilateral treaty to which not only the EU Member States and the EU itself are Contracting Parties, but also other States outside the EU”49.

The CJEU itself confirmed this in its Opinion 1/17 of 30 April 2019 on the compatibility with EU law of the Investment Court System (the “ICS”) provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada (“CETA”). As opposed to its ruling in Achmea, in this case the CJEU followed the Opinion of A.G. Wathelet by distinguishing CETA from intra-EU BITs and highlighting that the principle of mutual trust, which underpins its decision in Achmea, does not apply in relations between the EU and third states50.

This conclusion is further substantiated by the fact that the CJEU’s decisions have, if at all51, a binding effect on the national courts of the EU Member States only when they face an identical or similar factual situation and legal problem. Meanwhile, a comparison between any intra-EU BIT (including the Netherlands-Slovakia BIT) and a multilateral treaty (such as the ECT) as well as the ISDS clauses contained in each of them, and the arbitration proceedings conducted with reference to those clauses, shows more differences than similarities. These differences involve two key aspects.

First, as mentioned above, the applicable law clause of Article 26(6) of the ECT stipulates that an arbitral tribunal will decide disputes (“issues in dispute”) under the ECT and applicable rules and principles of international law. Even though, as confirmed in Vattenfall v. Germany52 and Landesbank v. Spain53, the provision in question applies only to the merits of a dispute and not to issues or questions relating to the tribunal’s jurisdiction, it is worth emphasising that there is no reference to the domestic law of the Contracting States in this clause.

49 Stadtwerke München v. Spain, Award of 2 December 2019, par. 142.


51 As mentioned above, the binding effect of the CJEU’s preliminary rulings (judgements) causes a great deal of controversy not only among scholars, but also national courts which, despite the issuance of a preliminary ruling that they should (could) apply, often make an independent interpretation of EU law, which leads them to different conclusions than those of the CJEU. To justify their decisions in this respect, national courts often refer to the acte clair principle, indicating that the allegedly controversial provision of EU law was clear and its semantics left no scope for doubt.

52 Vattenfall v. Germany, Decision on the Achmea Issue dated 31 August 2018, par. 121.

This allows the assumption that the ECT itself constitutes a primary source of applicable rules and principles under which a breach of the ECT provisions is to be assessed. At the same time, these rules and principles—which are expected to be seen in the “wider juridical context” of international law, the source of which includes, e.g. investment treaty case law—are not connected with, and definitely not overridden by, any domestic law, especially not the law one of its own signatories such as the EU.

This means that, while in the Achmea case the arbitral tribunal had to apply the domestic law of the host state (which, as a part of applicable national law, also includes EU law), the ECT arbitral tribunals are obliged to decide disputes based on international law. This is the case even if there are situations in which tribunals apply national law, which, in the context of intra-EU disputes, might include EU law, the tribunals would consider it usually as a relevant fact, without really interpreting it. This is what happened, e.g. in AES v. Hungary, where the arbitral tribunal held that EU “has a dual nature: on the one hand, it is an international law regime; on the other hand, once introduced in the national legal orders, it is part of these legal orders […]”.

A similar conclusion as to the requirement to apply the ECT along with relevant rules and principles of international law (and not the national laws of the disputing parties, which, when at least one of disputing parties is an EU Member State or one of them is EU itself, also include EU law), should be drawn concerning the assessment of the tribunal’s jurisdiction or the interpretation of ECT provisions, including Article 26 of the ECT. This means, among other things, that if the interpretation of the ECT was required, the general rules of interpretation of the VCLT, as established in Articles 31 and 32, should be applied.

This was confirmed by the arbitral tribunal in Vattenfall v. Germany, which took the view that there was no room to apply EU Treaties (and, thus, indirectly the Achmea Judgement) to interpret the arbitration clause contained in another treaty such as the ECT, as “EU law does not constitute principles of international law” within the meaning of Article 31(3)(c) of the VCLT while adding

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54 Although EU law, as based on international treaties, may be regarded as a specific form or part of international law, the main body of EU law has some particular features which do not usually appear in international law: in particular, citizens can invoke rights guaranteed by EU law before courts in the EU Member States, whereas international law usually needs to be transposed into national law before citizens can plead it. In addition, EU law often prevails over the law of the EU Member States. This is why EU law should be distinguished from international law, especially in the context of multilateral agreements such as ECT. This has been confirmed by the CJEU regarding CETA in its Opinion 1/17 of 30 April 2019, where the CJEU concluded that “unlike in the case of bilateral investment treaties between Member States such as that at issue in the case which gave rise to the judgment in Achmea, EU law does not form part of the international law applicable between the Parties.” Opinion 1/17 of 30 April 2019, par. 110. Cf.


56 AES v. Hungary, Award of 13 September 2010, par. 7.6.10 et seq., available at: https://www.italaw.com/cases/193 [accessed on 2 November 2020].
that this could lead to an “incoherent and anomalous result” that would be inconsistent with the object and purpose of the ECT57.

Similarly, in Greentech v. Italy the arbitral tribunal concluded that “[i]n the context of the arbitral jurisdiction created by the ECT, reference to “international law” cannot be stretched to include EU law, absent doing violence to the text which would be impermissible under the Vienna Convention on the Law of Treaties, which in Article 31(1) provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”58

The CJEU itself confirmed this in its Opinion 1/17 of 30 April 2019 regarding CETA by stating that contrary to the situation in the Netherlands-Slovakia BIT in Aechmea “which contained a clause on the applicable law which could suggest that the arbitration tribunal concerned had jurisdiction to hear and determine disputes relating to the interpretation and application of EU law”, CETA clearly states “that the applicable law before the CETA Tribunal consists exclusively of the relevant provisions of that agreement, as interpreted in accordance with international law.” In this context, the CJEU also added that “[t]he domestic law of each Party, of which EU law forms part in the case of the Member States, can be taken into account by that Tribunal only as a matter of fact, and the meaning ascribed to domestic law is not binding on the courts and tribunals or the authorities of the defendant Party.”59

This brings us to the second and most important difference between the ECT and intra-EU BITs (or BITs in general), which has already been mentioned above: the fact that, contrary to the BITs, the ECT is not an agreement “between the Member States” but a “mixed agreement” concluded between the EU Member States, non-EU States, and the EU itself60, into which the latter entered based on its capacity to conclude international agreements, including those providing for the establishment of competent courts responsible for the interpretation of their provisions. Moreover, as already mentioned above, the EU voluntarily gave up on the idea of adding a disconnection

57 Vattenfall v. Germany, Decision on the Achmea Issue dated 31 August 2018, par. 162. See also, Kirstin Schwedt, Hannes Ingwersen, ‘Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way’, Kluwer Arbitration Blog, 13 December 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/ [accessed on 30 October 2020]. In this context, it is worth recalling what the tribunal in Landesbank v. Spain noted, that “it is common ground between the Parties that the ECT can furnish a basis for jurisdiction in proceedings between an Investor from outside the EU and an EU Member State or the EU itself, or between an Investor from an EU Member State and a State outside the EU. Thus, Spain does not contest that, even in its own view of EU law, EU law would be no obstacle to the jurisdiction of this Tribunal if the Claimants were from Japan or Australia rather than from Germany. Yet in such a case, issues of EU law (as part of the law of Spain) would be just as likely to arise and yet could not be referred to the CJEU for a preliminary ruling.”

58 Greentech v. Italy, Final Award dated 23 December 2018, par. 397.

59 Opinion 1/17 of 30 April 2019, par. 110.

60 Vattenfall v. Germany, Decision on the Achmea Issue dated 31 August 2018, par. 162. See also Greentech v. Italy, Final Award dated 23 December 2018, par. 398; Stadtwerke München v. Spain, Award of 2 December 2019, par. 142.
provision concerning Intra-EU relations, thus confirming that the ECT “is just as applicable in intra-EU disputes as in disputes between the EU, or an EU Member State, and an Investor from outside the EU”\textsuperscript{61}.

This was expressly confirmed by the CJEU itself in pars. 57 and 58 of the Achmea Judgment, where it stated that: “[i]t is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. [...] In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by the EU Member States.”

It follows that CJEU recognises the existence of two types of international agreements under which disputes related to the interpretation of EU law can be submitted to an adjudicating body which is not part of the EU judicial system: one to which EU is not a party and which might not always be considered as compatible with the EU law, thus creating some tension on the line between EU law and the agreement itself; and the one to which the EU is a party and which, for that reason only, are not—or, at least, given the principles of reasonableness, should not be—incompatible with EU law. Concerns are raised only regarding the former.

In addition, even if we were to accept that the Achmea Judgement affects the application and interpretation of the ECT (although, as described above, there are no legal basis for any such assumption), this would not mean that the ECT no longer applies Article 26 contained in it or it becomes inoperable in intra-EU disputes.

This line of argumentation has been challenged, e.g. by the arbitral tribunal in \textit{RREEF v. Spain}, where it was indicated that even if there was an inconsistency between the ECT and EU law (which, as the tribunal noted, was not the case in the present dispute), and it was impossible to reconcile this inconsistency through proper interpretation, an imperative obligation of any arbitral tribunal constituted under the ECT (resulting not only from Article 16 of the ECT but also from a public international law) is to apply the former. This is also so irrespective of whether such action would lead to a breach of EU law, because as the arbitral tribunal expressly stated EU law does not and should not prevail over public international law\textsuperscript{62}.

Similarly, the tribunal in \textit{Vattenfall v. Germany} also stated that there was no conflict between Article 26 of the ECT and Articles 267, 344 of the TFEU, but even if there were, EU law would not prevail over the ECT based on such principles as \textit{lex posterior} under Article 30(4)(a) VCLT or \textit{lex specialis} with a view to Articles 16 of the ECT and 351 of the TFEU. Focusing on Article 16 of the ECT, the tribunal concluded that if Articles 267 and 344 of the TFEU were to be

\textsuperscript{62} \textit{REEF Infrastructure v. Spain}, Decision on Jurisdiction of 6 June 2016, par. 87.
interpreted as prohibiting arbitration, it would mean that they concerned the same subject matter as Article 26 of the ECT. And this, in turn, would mean that Article 26 of the ECT, granting the possibility to pursue arbitration, is “more favourable to the Investor” than EU law, and, as such, should prevail over the latter.\(^63\)

On that note, it is worth pointing out that the same conclusion derives from the international rule embodied in Article 41 of the VCLT, which not only stipulates that any possible \textit{inter se} modification of a multilateral treaty is first of all subject to the applicable provisions of the treaty concerned (here, Article 16 of the ECT) but also states that such modification is precluded when it “is not prohibited by the treaty” and “does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”\(^64\)

The overall conclusion is therefore that the Achmea Judgement has no direct effect on the application or interpretation of the ISDS clause contained in Article 26 of the ECT. Indeed, no CJEU judgement has the power to automatically invalidate the ECT or make the ISDS clause contained in it ineffective or inoperable in intra-EU relationships, thus undermining the possibility to refer intra-EU disputes to ECT-based arbitration proceedings and to issue effective arbitration awards in their course.

Furthermore, the Declaration of January 2019 regarding the effects of the Achmea Judgment signed by 22 EU Member States is not a binding legal instrument, and therefore, as rightly stressed by the tribunal in \textit{Landesbank v. Spain}, it “cannot by itself alter the obligations of those States under the ECT even \textit{inter se}. To hold otherwise would be to ignore the effects of Article 16 of the ECT and the clear intention of the Contracting Parties to the ECT that the same text should apply to all Contracting Parties – an intention manifested in their agreement not to permit reservations to the ECT.”\(^65\)

The fact that there is no understanding among the Member States on the issue of the applicability of the Achmea Judgment to the ECT and that EU acknowledges the necessity to take additional steps, i.e. to deal with this issue has been confirmed in the preamble of the Termination Agreement, which states that “this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings based on Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage.”


4.5. Binding Effect of the ECT

According to Article 26 of the VCLT, the wording of which only confirms the adoption of the *pacta sunt servanda* principle at the international level, each treaty (international agreement) in force (and the ECT is undoubtedly one of them\(^66\)) is binding on its parties and should be performed in good faith\(^67\), which, as already mentioned on numerous occasions, in the case of the ECT refers to both the EU and its Member States.

Further, according to Article 27 of the VCLT, a party “may not invoke the provisions of its internal law as justification for its failure to perform the treaty”\(^68\). In the context of the ECT, this means that neither the EU (and its institutions) nor EU Member States (and their bodies), as Contracting Parties of the ECT, can invoke the provisions of their own law, including EU law, as an excuse for not fulfilling their obligations assumed under it. Otherwise, they might be considered internationally liable for damage caused by such actions under the ICL Articles\(^69\).

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\(^{66}\) It is worth clarifying that even though the VCLT applies in principle only to treaties concluded between the States, according to its Article 3 this fact does not affect the application of any of the rules set forth in the VCLT to which international agreements concluded between the States and other subjects of international law (here, the ECT) would be subject under international law independently of the VCLT (see, e.g. Anthony Aust, ‘Pacta Sunt Servanda’, in Rüdiger Wolfrum, *The Max Planck Encyclopedia of Public International Law*, Vol. 8, Oxford Public International Law 2015, par. 9). This remark is further justified given that these provisions were repeated in the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, which is still not yet in force. This, as some authors suggest, constitutes proof that both of these conventions contain universally applicable customary norms (see, e.g. Giorgio Gaja, ‘A ‘New’ Vienna Convention on Treaties between International and International Organisations: A Critical Commentary’ (British Yearbook of International Law 1998, Vol. 58), p. 263, 267 et seq.; Mark E Villiger, ‘The 1969 Vienna Convention on the Law of Trets: 40 Years After’ (Revueul des cours de l'Académie de droit international de La Haye 2011, Vol. 344), p. 54–55). It is therefore not surprising that the provisions of the VCLT are also commonly applied to the ECT, as confirmed in many cases (see, e.g. *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 30, par. 76 and 313 et seq.; *Isolux v. Spain*, Award of 21 January 2016, par. 645; *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, par. 4.134). Furthermore, the application of the VCLT to the ECT was also confirmed by the content of The Energy Charter Treaty, a Reader’s Guide issued by the Energy Charter Secretariat in 2002 (pp. 60 and 63), where the ECT was *expressis verbis* qualified as a treaty within the meaning of the VCLT.

\(^{67}\) A similar provision can be found in Article 32 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session in 2001 (the “ILC Articles”) which, as with Article 27 of the VCLT, applies by analogy to international organisations which, like states, cannot invoke their internal law as justification not to perform a given treaty or to challenge the validity of the previously expressed intention to be bound by its provisions (see, e.g., Ramses A. Wessel, ‘The EU as a Party to International Agreements’, in Alan Dashwood and Marc Maresceau (eds) *Law and Practice of EU External Relations - Salient Features of a Changing Landscape* (Cambridge University Press 2008), pp. 179–180).


\(^{69}\) The VCLT, like most treaties, does not contain provisions dealing with the consequences of its breach. A state in breach is nonetheless obliged to assume responsibility, as the International Court of Justice (“ICJ”) held in Gabčikovo-
The above-mentioned rules were adopted under Article 23 of the ECT, according to which Contracting Parties, including the EU and the Member States, are fully responsible for observing all provisions of the ECT and fulfilling the obligations contained in it, while making reasonable efforts to make sure that the same will be done by all institutions operating on their respective territories. Otherwise, the Contracting Party might, and should, be liable for the breach of not only the ECT but also the VCLT.

Moreover, the duty of the EU and its Member States to comply with the provisions of their international agreements, including the ECT, and to fulfil all of the obligations assumed under them, is based not only on the rules of international law and the provisions of the VCLT, but also on EU law itself, particularly on Article 216(2) of the TFEU, according to which agreements concluded by the EU with one or more third countries and international organisations are binding on the institutions of the EU and its Member States. The normative force of this provision, as some authors indicate, “lies in that it extends the order of bindingness from the interstate sphere of international law to address also EU institutions and Member States […]”

This means that both the EU and its institutions, as well as EU Member States and EU Member States’ authorities, have to observe the ECT as they do EU law because when this Treaty was signed by the Commission on behalf of the European Communities, it became part of the EU legal order. Therefore, any action or measure that breaches the provisions of the ECT should be considered as a breach of EU law, notably Article 216(2) of the TFEU.

Nagymaros Project (Hungary v. Slovakia): “It is […] well established that, when a State has committed an internationally wrongful act its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.” (1997 I.C.J 7, 38). In the event of a treaty violation, the rules on remedy are found in a body of law mentioned above in n. 52, i.e. the ILC Articles, which deals with general issues of a state’s (and international organisation’s) liability for a breach of its obligations found both in customary international law and treaty law. Article 1 of the ILC Articles specifies that every internationally wrongful act by a state entails the international responsibility of that state, which includes, as indicated further in Article 31, an obligation to make full reparation for the injury caused by such act. In this respect, many authorities rely on the Chorzow Factory case, decided in 1928 by the Permanent Court of International Justice (the “PCIJ”), the predecessor to the ICJ, which declared that: “It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation […] Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself”, adding that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” (Factory at Chorzow (Germany v. Poland), 1928 P.C.I.J. Series A No. 17, 27 and 47, respectively). See, e.g. John Quigley, ‘Must Treaty Violations Be Remedied?: A Critique of Sanchez-Llamas v. Oregon’ (Ga. J. Int'l & Comp. L. 2008, Vol. 35), pp. 355, 365 et seq.; ‘Article 27. Violation of Treaty Obligations’ (The American Journal of International Law 1035, Vol. 29), pp. 1079–1080, available at: www.jstor.org [accessed on 10 April 2019].


V. CONCLUSION

There are no legitimate reasons for stating that the validity or applicability of the ISDS clause contained in Article 26 of the ECT, similar to those contained in extra-EU BITs, FTAs or other multilateral investment treaties, should be affected by the Achmea Judgment. These means that investors can still bring intra-EU claims against States under the ECT.

This mainly results from the fact that the CJEU ruling in Achmea is silent on the mechanism for settling disputes between an investor and a host state in a multilateral context, let alone under the ECT. This ruling is strictly limited to arbitration clauses included in intra-EU BITs, i.e. bilateral investment treaties concluded between the EU Member States. Therefore, it cannot be applied to multilateral treaties such as the ECT, which has been concluded by the EU Member States, Non-EU countries, and by the EU itself. This has been confirmed in the preamble of the Termination Agreement.

Also important is the fact that the ECT voluntarily acceded to the ECT without making any reservations and in the absence of a relevant disconnection clause that would prevent its provisions from applying to the EU Member States. It can be therefore assumed that the EU considered a dispute resolution mechanism set out in Article 26 of the ECT, including the arbitration clause that it contains, as fully compatible with EU law. Even if this were not the case, the ECT (along with the applicable principles and rules of international law) would still prevail over EU law, which, from the perspective of the ECT, is (or, at least, should be treated as) nothing more than the law of one of the Contracting Parties.

Given the above, there is little surprise that to date arbitral tribunals have unanimously rejected the intra-EU Achmea-based jurisdictional objections regardless of whether they decide in favour of EU investors. This does not mean, however, that the debate regarding the consequences of the Achmea Judgement on intra-EU arbitrations under the ECT is over yet. On the contrary, given the EU’s position in the negotiations on the modernisation of the ECT (seeking to “bring the ECT provisions on investment protection in line with the modern standards of recently concluded agreements by the EU and its Member States”), it appears just to be heating up, with a highly anticipated position in the debate still to be taken by national courts.

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