Department of International and European Studies

MSc in Energy: Strategy, Law and Economics

ACHMEA CASE AS AN ILLUSTRATION OF AN ABSOLUTE JURISDICTIONAL CONFLICT:

CHALLENGES FOR THE ECT

Master Thesis

Author: Aikaterini Kokaraki

Supervisor: Dr. Anastasios Gourgourinis

Date of submission: 25.09.2019

Acknowledgement

For his valuable guidance, advice and cooperation during my work on the present Diploma Thesis, I would like to thank my supervisor and Lecturer in Public International Law of National and Kapodistrian University of Athens, Dr. Anastasios Gourgourinis. Moreover, I am very grateful to all my Professors of University of Piraeus who offered me valuable methodological tools in order to perceive the notion of energy from so many different scientific perspectives.

TABLE OF CONTENTS

List of Abbreviations……………………………………………………………………………………………………1

Preface……2-3

Investment Protection

i. The EU legal regime on investment protection…..………………………………………………………4-6

ii. International Investment Treaties with EU element……………………………………………………7-9

iii. European Commission's actions…………………………………………………………………………10-14

The Achmea Case

i. Background……………………………………………………………………………………………………15

ii. Slovakia's jurisdictional objection and European Commission's Intervention…………………..16-18

iii. The partial award on jurisdiction and its challenging in front of the German Courts………..19-21

iv. Advocate's General opinion, the request for preliminary ruling and the role of EC…………22-24

v. CJEU's Decision…………………………………………………………………………………………………25-32

vi. The Decision of General Federal Court of Justice and the rejection of Achmea's complaint on its right to be heard……………………………………………………………………33-36

Reactions

i. Reopening Cases…………………………………………………………………………………………………37-44

ii. Commission's Communication on the protection of intra EU investment……………………….45-47

iii. EU member states' declarations on the termination of intra EU BITS…………………………48-51

Challenges for the ECT

i. The Energy Charter Treaty………………………………………………………………………………………52-55

ii. The specialties of Energy Charter Treaty…………………………………………………………………56-58

iii. Does Achmea apply to ECT?...59-64

iv. The example of CETA……………………………………………………………………………………………65-66

Some thoughts………………………………………………………………………………………………………67-68

Bibliography – Websites…………………………………………………………………………………………… 69-75

LIST OF ABBREVIATIONS

AG - Advocate General

BIT - Bilateral Investment Treaty

BIT Tribunal - An arbitral tribunal constituted on the basis of Article 8 NL-SK BIT

CCP – Common commercial policy

CETA - Comprehensive Economic and Trade Agreement

Commission - European Commission

CFIUS - Committee on Foreign Investment in the United States

ECT - Energy Charter Treaty

European Union EU Treaties - Treaty on the European Union, Treaty on the Functioning of the European Union

FDI - Foreign direct investment

ICSID - International Centre for Settlement of Investment Disputes

IIA - International investment agreement

ISDS - Investor-state dispute settlement

ICS – Investment Court System

NL-SK BIT - Netherlands - Slovakia bilateral investment treaty

REIO - Regional Economic Integration Organization

TEU - Treaty on the European Union

TFEU - Treaty on the Functioning of the European Union

The Court, CJEU - The Court of Justice of the European Union

VCLT - Vienna Convention on the Law of Treaties

PREFACE

Towards the liberalization of the energy sector in the European area, with article 194 TFEU on shared completeness in energy issues to be a breakthrough in the European legal regime, several incompatibilities have been generated especially in the field of international energy investment where EU member states are actively involved. European Commission's opposition on the autonomous protection of investor - state arbitral tribunals under existing intra EU BITs and its efforts for their termination, found through the European targets on Foreign Direct Investment with emphasis on the energy sector, a clear legal base.

European Union's "backlash" against intra EU BITs reached its peak in Achmea case, in which took place the first ever interpretative preliminary ruling regarding the validity of an international agreement between EU member states. CJEU's decision seemed to be the last word to the debated issue relating to the incompatibility of intra EU bilateral investment treaties with the EU legal order. The ratio decidendi of Achmea decision is based on the fact that EU member states cannot derogate from the provisions of EU instruments provided to secure the primacy of EU law. This judgment is not only the most recent case on the complex relationship between EU law and international investment law, but also concerns the external dimension of the EU autonomy saga. Since the 1970s, the ECJ has applied the notion of autonomy to safeguard the EU legal order from external threats. Notwithstanding the attention that autonomy has received in the academic debate, for some it still remains a nebulous notion. Although, the purpose of EU autonomy is clear: it aims to protect the essential legal features of the EU. It is however difficult to predict its consequences and the ECJ is criticized for stretching its limits beyond what is legally necessary[1].

The content of such a decision is nothing less but a shockwave through the ranks of the proponents of investment treaty arbitration and large parts of the wider

[1] C. Contartese, M. Andenas, "EU autonomy and investor – state dispute settlement under inter se agreements between EU Member States: Achmea", Common Market Law Review 56: 157 – 192, 2019.

arbitration community. This thought is verified in the final decision of the German Federal Court of Justice, which - in line with CJEU's preliminary ruling - judged that there was no arbitration agreement between Achmea and Slovakia. After the issue of the aforementioned judgment a lot of tribunals' reactions have taken place with Achmea - based jurisdictional objections. Besides, Commission has already published a Communication emphasizing on the full protection of EU law in the international markets and the incompatibility of intra-EU BITs with EU primary law and thus their inapplicability. On January 15th, 2019, EU Member States signed a Declaration through which member states – in line with CJEU's preliminary ruling - agree in putting an end to Intra-EU BITs.

Special emphasis should be given to Energy Charter Treaty, which is not immune from challenges, especially if it is taken into consideration its multilateral element and the participation of European Union as an individual part in it. There is no doubt that the Achmea decision motivated concerns regarding the ECT's application in intra EU disputes and its possible conflict with the level of investment protection granted in the European legal space. In parallel, a possible correlation between the Achmea decision and the Comprehensive Economic and Trade Agreement (CETA) between Canada and EU and its Member States could not be overlooked. Under the prism of Opinion 1/17, which aimed at safeguarding the role of the EU Member States' courts, the compatibility of CETA's dispute settlement mechanism with the EU Treaties and the Fundamental rights was tested, leading eventually to the agreement's ratification.

INVESTMENT PROTECTION

i. The EU legal regime on investment protection.

In order to examine closely the levels of European protection in the investment sector worldwide, it is necessary to clarify in the first place the two main pillars of the European legal regime capable of acting as obstacles to any autonomous international dispute settlement mechanism in the context of the EU: the autonomy of EU law and the role of the CJEU.

The principle of autonomy generated by the CJEU's jurisprudence in the last five decades, with decisions Van Gend en Loos[2], Costa/E.N.E.L.[3] and Opinion 2/13[4] to shape the EU legal order the way we understand it nowadays. The principle of autonomy is distinguished in internal autonomy - independence of the EU legal order from the Member States, illustrated in notions of primacy and direct effect – and external autonomy - independence from the system of international law. Autonomy is a key concept for the functioning of the EU as an international actor with the ability to determine its interactions with other international legal regimes[5].

Furthermore, the role of CJEU for the protection of EU law is crucial. According to article 19§1 TEU, the Court "shall ensure that in the interpretation and application of

---

[2] Judgment of the Court of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van end & Loos v Netherlands Inland Revenue Administration, Reference for a preliminary ruling: Tariefcommissie – Netherlands, Case 26-62.

[3] Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, Case 6-64.

[4] Opinion of the Court (Full Court) of 18 December 2014, Opinion pursuant to Article 218(11) TFEU. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties, Case Opinion 2/13.

[5] J. Odermatt, "When A Fence Becomes A Cage", European University Institute, 2016, http://cadmus.eui.eu/bitstream/handle/1814/41046/MWP_2016_07.pdf?sequence=1.

the Treaties the law is observed". Consequently, the CJEU has exclusive jurisdiction to provide binding and final interpretation of EU law. In addition, the Court itself has held, that its jurisdiction forms a "fundamental feature of the EU system"[6]. In parallel, the preliminary reference mechanism provided under Article 267 TFEU is considered as a keystone of the functioning of the EU judicial system, through which a judicial dialogue between a court or tribunal of Member State and the CJEU is facilitated[7].

The Treaty of Lisbon signed on December 13th, 2007 was a breakthrough in the EU's common commercial policy - which defines inter alia the Union's policy in areas of trade and investments - providing in parallel a clear legal base for energy issues[8]. More specifically, the shared competence between the EU and member states was replaced by exclusive EU competence in Foreign Direct Investment under the Common Commercial Policy which until then was handled by the individual member states. According to article 207 TFEU, as it was formed after the Lisbon Treaty, "the common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action (emphasis added)".

Besides, through article 194 TFEU, it was established shared competeness between European Union instruments and member states in energy issues, in respect to the principles of conferral and subsidiarity, as the European Parliament and the Council are authorized with the establishment of the necessary measures for the successful

---

[6] Supra note 3.

[7] L. Ankersmith, "Achmea: The Beginning of the End for ISDS in and with Europe?", Investment Treaty News, Issue 1. Volume 9, 04.2018, https://www.iisd.org/sites/default/files/publications/iisd-itn-april-2018-english.pdf.

[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

fulfilment of European energy goals, after the consultation of the Economic and Social Committee and the Committee of Regions.

ii. International Investment Treaties with EU element.

Through the long way for the liberalization of the electricity and natural gas markets and the creation of an internal market without borders allowing free movement of services and products – including energy - in the European area, the need of independent provisions in the energy sector seemed crucial. Since then, EU Member States independently negotiated and concluded international agreements on the protection of foreign investments, leading to a complex network of International Investment Agreements concluded by member states inter se, as well as with extra - EU states. During that time, arbitrations resulting either from intra-EU/extra-EU BITs, or the agreements themselves, were of no direct concern to the EU[9]. BITs are, in the words of the Commission, "[t]he most visible manifestation of Member States' policies on investment over the last 50 years"[10].

Under the term intra-EU BITs are described bilateral investment treaties concluded between two EU Member States. Generally, intra-EU agreements are governed by the principle of supremacy, so if there is conflict between an intra-EU international agreement with EU law, the latter prevails[11]. Extra-EU BITs are international investment agreements concluded between EU Member States and third countries, differentiated between agreements signed prior a member state's accession to EU and new international agreements. Regarding "prior" agreements, article 351 TFEU allows their maintenance with an obligation of the member state to eliminate any conflict with EU law. Significantly, as far as that kind of BITs are concerned, there was issued a regulation in order to create a transitional regime for such agreements until the

---

[9] G. A. Bermann, "Navigating EU Law and the Law of International Arbitration", Arbitration International, 2012, p. 440.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy, COM/2010/0343 final.

[11] P. J. Kuijper et al, "The Law of EU External Relations. Cases, materials, and commentary on the EU as an international legal actor", 2nd edition, Oxford: Oxford University Press, 2015, p. 810.

EU will negotiate agreements with third states of its own[12]. In the end, the third category of multilateral or mixed treaties is shaped by more than two states, members or not of EU, as well as organizations such as European Union itself. The conclusion of mixed agreements is much more complicated not only through its ratification but through its amendment or termination as well.

The protection of international investments through Bilateral or Multilateral Investment Treaties is based on certain principles that create a significant corpus of shared common objectives. The fact that BITs contain similar provisions, has led some scholars to the conclusion that they may now express the customary international law standards for foreign investment[13]. These treaties create actionable standards of conduct for governments in their treatment of foreign investment, and typically provide dispute settlement mechanisms through international arbitration to resolve disputes arising from allegations of a violation of the treaty[14]. Especially they contain guarantees of stable, equitable, favorable and transparent conditions for investments, fair and equitable treatment and constant protection and security, as well as guarantees against discriminatory treatment, expropriation or equivalent measures. Besides, umbrella clauses contain guarantee performance by host governments of their contractual obligations to covered investors. Significantly, many BITs guarantee covered investors (unconditionally or conditionally) freedom of transfers in relation to their investments, including transfers of the initial capital, returns, contractual payments, proceeds of sale of investments and compensation arising out of disputes[15].

With emphasis on Treaties with intense European element, most of them had been concluded between Central and Eastern European states, prior to their accession

[12] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

[13] D. R. Bishop et al, "Foreign Investment Disputes, Cases Materials and Commentary", Kluwer Law.

[14] D. R. Bishop et al, "The Breadth and Complexity of the International Energy Industry", 12-13.

[15] Graham Coop, "Energy Charter Treaty and the European Union: Is Conflict Inevitable?", Journal of Energy & Natural Resources Law.

to the EU, and older members of the EU. After the former acceded to the EU in 2004, 2007, and 2013, there were thoughts concerning the compatibility of BITs between new EU Member States with EU law[16]. These thoughts became more intensive under the light of the Treaty of Lisbon, that created a clear legal framework for the internal market and established EU's exclusive competence in the field of foreign direct investment[17]. More specifically, a lot of considerations have been generated regarding the possibility of EU law infringements through a Member State's conduct in the foreign investment field. In the EU system, Member States are not permitted to act at any field in a way that offends applicable EU law and policy, including such key transversal principles as the free movement of goods, persons, services and capital[18]. Although, it was of great need for EU's stability to develop in the field of the intra-EU BITs, even more solid forms of protection for intra-EU investments than already existed.

[16] Dr. Szilárd Gáspár Szilágyi, **"**Guest Post: The CJEU Strikes Again in Achmea. Is this the end of investor-State arbitration under intra-EU BITs?**",** International Economic Law and Policy Blog.

[17] Treaty of Lisbon, supra n.2. Besides enabling the EU, going forward, to enter into new investment treaties and to occupy the front line in defending investor protection claims, the Lisbon Treaty authorizes the EU to formulate an autonomous foreign direct investment policy. The EU may accordingly adopt legislation establishing a Union-wide set of policies for both inward and outward foreign investment protection. It is not yet clear what policy instruments the EU will develop pursuant to this authority. Marc Bungenberg, 'Centralizing European BIT Making under the Lisbon Treaty' (paper presented at 2008 Biennial Interest Group Conference, Washington DC, Nov. 13-15, 2008), pp. 15-16, http://www.asil.org/files/ielconferencepapers/bungenberg.pdf.

[18] G. Bermann, Arbitration International, Volume 28, Issue 3, 2012, pg. 440.

iii. European Commission's actions.

European Commission always takes a clear position regarding international investments ruled by the autonomous legal regime of investment treaties where an EU member state is a party. Based on the principle of primacy of EU law, European Commission suggests that after the accession of a state to European Union, this kind of treaties are no longer applicable as not preceding EU law.

In 2003 the European Commission initiated discussions with eight joining in EU countries as well as the US, to face the incompatibilities with EU law arising from BITs between these eight countries and the United States. This led to a Memorandum of Understanding providing for carve-outs of the agricultural and other specific industrial sectors, where under current EU rules preferential treatment is given to EU operators, from the scope of the BITs. Remarkably, the MOU did not settle the issue of safeguard measures to preserve the functioning of the economic and monetary union[19].

The Commission had ratcheted up its criticism of these intra – EU BITs in confidential legal positions filed in a series of investor state arbitrations[20]. More specifically, according to Commission's Letter of January 13rd, 2006 in the case Eastern Sugar B.V. vs Czech Republic, "for facts occurring after accession, the BIT was not applicable to matters falling under Community competence. Only certain residual matters, such as diplomatic representation, expropriation and eventually investment promotion, would appear to remain in question. Therefore, where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions – or should the EU adopt such rules in the future – Community law will automatically prevail over the non-conforming BIT provisions"[21].

[19] Chr. Söderlund, "The future of the Energy Charter Treaty in the context of the Lisbon Treaty", Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, JurisNet, LLC 2011.

[20] Luke Eric Peterson, "European Commission and Member States will meet to discuss whether BITs are needed within European Union", IAReporter, 28.09.2010.

[21] Eastern Sugar B.V. v. The Czech Republic, SCC Case No. 088/2004, Partial Award 27.03.2007, see EC Letter of 13.01.2006, pg.24.

Besides, in September 2008 Commission intervened directly in three arbitration proceedings against Hungary, Electrabel, AES Summit Generation and EDF v. Hungary, through amici curiae briefs. Hungary in the mid – 1990s had entered into long term power purchase agreements (PPAs) with foreign investors for the provision of electric energy. This kind of PPAs contained certain covenants regarding pricing and market privileges in order to assure the investors of a foreseeable return on their investment. By the accession to the European Union in 2007, the landscape changed and Commission stated that power purchase agreements between the investors and a Hungarian State - owned entity violated EU law as they could restrict competition, without taking into consideration the protection granted by the investment treaty and leaving little room for the application of investment treaties between Member States[22].

Although, despite its arguments regarding EU law primacy, European Commission in both above mentioned cases had acknowledged that an automatic termination of such intra – EU BITs is impossible. This implies recognition that the question of the intra-EU BITs' validity and applicability needs to be determined according to the rules of treaty law[23]. More specifically, in Eastern Sugar case, it was stated that however, the effective prevalence of the EU acquis does not entail, at the same time, the automatic termination of the concerned BITs or, necessarily, the non-application of all their provisions. Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. Although, such a termination could have a retroactive effect.

Another step of European Commission towards the termination of intra – EU BITs had been made through its Communication to the Council, the European

[22] C. von Krause, "The European Commission's opposition to intra-EU BITs and its impact on investment arbitration", 28.09.2010, Kluwer Arbitration Blog.

[23] A. Reinisch, "Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations", Legal issues of economic integration, 2012.

Parliament, the European Economic and Social Committee and the Committee of the Regions of July 7th, 2010[24]. The Communication emphasized on the development of a common international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth as set out in the Europe 2020 strategy. In parallel to this Communication, the Commission had adopted a proposal for a Regulation that would establish transitional arrangements relating to investment agreements between Member States and third countries. Its objective was to provide legal certainty to both EU and foreign investors operating under the terms of these agreements. According to the Communication, as in all areas of European policy-making, the thrust of the Union's action should be to deliver better results as a Union than the results that have been or could have been obtained by Member States individually. Thus, the Union's future action in this field should be inspired and guided by the best available standards, so as to offer a level playing field of a high quality to all EU investors.

European Commission's pressure regarding the termination of intra EU BITs was escalated through Letters of Formal notice, initiating the first stage of infrigement proceedings. In 2004 Commission initiated infrigement proceedings against Denmark, Austria, Finland and Sweden, requesting them to remove existing incompatibilities between the EU law provisions and BITs signed before their accession to EU. The problem was the standard provision of the impugned BITs guaranteed investors the unconditional right to transfer capital without undue delay and in a freely convertible currency, a provision which was though in a potential conflict with articles 52§2, 59 and 60§ of the EC Treaty, authorizing the EU Council in exceptional circumstances to impose restrictions on capital movements between the EU and third countries[25].

According to its Press Release of June 18th, 2015 European Commission pointed

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment.

[25] Chr. Söderlund, "The future of the Energy Charter Treaty in the context of the Lisbon Treaty", Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, JurisNet, LLC 2011.

that since EU enlargement, such 'extra' reassurances (provided by intra EU BITs) should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular freedom of establishment and free movement of capital). Jonathan Hill, EU Commissioner for Financial Services, Financial Stability and Capital Markets Union had stated that "Intra-EU bilateral investment treaties are out - dated and as Italy and Ireland have shown by already terminating their intra-EU BITs, no longer necessary in a single market of 28 Member States. We must all act together to make sure that the regulatory framework for cross-border investment in the single market works effectively. In that context, the Commission is ready to explore the possibility of a mechanism for the quick and efficient mediation of investment disputes"[26]. All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law. According to the Commission, these treaties are out - dated and no longer necessary, since all Member States are subject to the same rules on cross-border investments, such as freedom of establishment and of capital[27]. For all these reasons, the Commission had decided to request five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) to bring the intra-EU BITs between them to an end[28].

Furthermore, Commission in its Consultation Document on the Prevention and amicable resolution of disputes between investors and public authorities within the single market, pointed out some thoughts regarding incompatibilities between investment arbitration, brought either under the ECT or under bilateral investment

[26] "EC Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties", IENE.

[27] "European Commission requests Member States to terminate intra-EU BITs", Investment Treaty News, IISD, 04.08.2015..

[28] European Commission - Press release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties", 18.06.2015.

treaties and EU law[29]. According the thoughts described in the purpose of that document, the Bilateral Investment Treaties still in force among Member States (Intra-EU BITs) and the unlawful application of the Energy Charter Treaty (ECT) to intra-EU disputes through arbitration tribunals present arbitration as a binding dispute settlement mechanism. Awards rendered by those arbitration tribunals are usually not subject to judicial review by national courts and the Court of Justice. This poses serious legal issues and is one of the reasons why intra-EU BITs as well as the intra-EU application of the ECT by arbitration tribunals are considered incompatible with EU law.

Schematically there are two concerns, first that intra-EU investment arbitration excludes judicial review by national courts and the EU Court of Justice, preventing such courts from ensuring the full effect of EU law and second that those treaties overlap and create a risk of conflict with provisions of primary and secondary law, leading to the creation of a complete system of investment protection for intra-EU investments.

[29] Consultation Document of European Commission, Prevention and amicable resolution of disputes between investors and public authorities within the single market, 2017.

THE ACHMEA CASE

i. Background.

The dispute arose under the 1992 “Agreement on Encouragement and Reciprocal Protection of Investments”, between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic. The Dutch insurance group named Achmea (formerly known as Eureko B.V.), with an established subsidiary, Union Healthcare, in Slovakia, claimed damages under a BIT dating from 1991 due to the partial reversal of the privatization of the Slovak health care system. More specifically, when Slovakia decided to reform its health system and open its market for private medical insurance services in 2004, Achmea’s market share was about 8.5% by the beginning of 2007. Although, in 2006 the new government regime partially reversed the liberalization of the health insurance market leading to the restriction of private health insurers’ rights and the prohibition of the distribution of profits generated by the sale of such services.

In 2011 Slovakia's Constitutional Court ruled that this prohibition was contrary to the Slovak Constitution, and the distribution of profits was once again allowed. Although, Achmea claimed that this amounted to an indirect expropriation with damages of 60 million and initiated arbitral proceedings in October 2008 pursuant to Article 8 of the Netherlands-Slovakia BIT (1992, NL-SK BIT), requesting damages from Slovakia. The tribunal was constituted in Frankfurt – with the arbitration proceedings to by governed by German law - based on the provisions of the BIT and following the UNCITRAL ad hoc Arbitration Rules.

ii. Slovakia's jurisdictional objection and European Commission's Intervention.

In the arbitral proceedings, Slovakia objected to the jurisdiction of the arbitral tribunal, arguing that the arbitration clause in the BIT, consisting of an offer to conclude an arbitration agreement with an investor from the other contracting state, was invalid due to a violation of EU law[30]. The main arguments used were the following.

According article 59§1 of the Vienna Convention, the BIT was automatically terminated on Slovakia's accession in European Union because of the same content between BIT and EC Treaty, as they covered the same types of investors and investments, served the same purposes, offered the same standards of protection and provided for equivalent remedies[31]. Consequently, there was a clear intention by the parties to automatically terminate the BIT through Slovakia's accession to the European Union and alternatively, the provisions of the BIT and the EC Treaty were incompatible resulting to EC Treaty's prevalence. At this point, Achmea's response was based on the fact that Slovak Republic had not raised a similar objection in the earlier Austrian Airlines v. Slovak Republic arbitration, where an investor from another EU member-state sought to rely on a long - standing BIT between Austria and the Slovak Republic[32].

Based on article 30 of the VCLT, Slovakia argued that the arbitration clause in the BIT did not apply any longer after Slovakia's accession in European Union due to its incompatible provisions with EU law. On the other hand, Achmea claimed that the BIT and EC Treaty were unrelated, while there was no incompatibility matter regarding the arbitration clause and the EC Treaty provisions.

Besides, ECJ's exclusive jurisdiction over the dispute was underlined based on its "interpretative monopoly" with regard to EU law, while the tribunal had no jurisdiction to settle a dispute governed by EU law. In case a provision of intra EU BITs come into

---

[30] "PLC-Further application on intra-EU BIT to Frankfurt Higher Regional Court", 2013, http://gld.practicallaw.com/1-524-4375?q=investment+arbitration.

[31] PLC Arbitration, "UNCITRAL tribunal rules Slovak-Dutch BIT not affected by Slovakia's EU membership", PLC Arbitration, 17.11.2010, Practical Law, Thomson Reuters.

[32] Austrian Airlines v. The Slovak Republic, UNCITRAL, italaw.

conflict with EU law, only EU legal institutions are the appropriate forum for adjudicating disputes between EU investors and EU member states[33]. The fundamental notions of EU law, such as supremacy and direct effect, could not allow parallel application of EU law and the BIT, with European legal regime to supersede not only legal systems of the member states, but also BITs provisions signed between the member states.

In addition, it was claimed that the dispute was not arbitrable under the German law, because the seat of the arbitration, as it was governed by EU law.

The case got the attention of European Commission according to which Slovakia's membership in European Union had led to the resolution of the dispute under the European judicial system and not under the dispute settlement mechanism of Slovak-Dutch BIT. Consequently, an amicus brief was written inviting the tribunal to decline jurisdiction, because the ISDS mechanism in the BIT "conflicts with EU law on the exclusive competence of EU courts for claims which involve EU law, even for claims where EU law would only partially be affected". Through its written observations of July 7th, 2010, Commission had stated that, "as a result of the supremacy of EU law vis-ΰ-vis pre-accession treaties between Member States, conflicts between BIT provisions and EU law cannot be resolved by interpreting and applying the relevant EU law provisions in the light of the BIT. Only the inverse approach is possible, namely interpretation of the BIT norms in the light of EU law. The foregoing has implications as regards the ability of investors to rely on provisions of an intra-EU BIT that are in conflict with EU law. Under EU law, a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law. This includes resort to judicial settlement mechanisms that conflict with the EU judicial system. Furthermore, in the EU legal system, national legislation of an EU Member State that is incompatible with EU law does not become 'invalid'. It merely cannot be applied where it conflicts with EU law. The same applies in the Commission's view, to existing intra-EU BITs that contain provisions that are

[33] L. E. Peterson, "Investor announces victory in intra – EU BIT arbitration with Slovakia arising out of health insurance policy changes", 10.12.2012, IAReporter.

incompatible with EU law: neither the BIT as such nor the conflicting provisions become ‘invalid’. But they cannot be applied where they conflict with EU law”[34].

[34] Eureko B.V v. Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, 26.10.2010, see written observations of the European Commission, pg. 51.

iii. The partial award on jurisdiction and its challenging in front of the German Courts.

On November 26, 2010 the arbitral tribunal confirmed its jurisdiction to hear the claims from Achmea on the breach of the Netherlands – Slovakia BIT, by rendering an interim award[35]. In doing so, arbitrators rejected arguments by the Slovak Republic, and the European Commission, that cast doubt on the continued validity of that BIT for purposes of dispute resolution between investors of an EU state and another EU state[36].

According to the tribunal, the BIT was not terminated or displaced by EU law under Article 59 of the VCLT. Vienna Convention did not allow automatic termination of treaties, but the parties should follow a procedure described in article 65§1, which included a formal notification that Slovakia had failed to give. That kind of notification, responding to the claim of the breach of the BIT, was not available to Slovakia because the claimant was not a party to the BIT.

Besides, the tribunal pointed that there was no evidence of any intention of EU law provisions to displace the provisions of the BIT entirely. In addition, based on article 59 of the VCLT, termination of the entire treaty and its application could be triggered only in the case of a broad incompatibility between the BIT and EU law, which never took place.

Furthermore, according to the tribunal, the BIT provisions on fair and equitable treatment, full protection and security and protection against expropriation, extend beyond protections granted under EU law. Moreover, investor-state arbitration under the BIT is an autonomous investor right which could not be replaced by member states' national courts.

Regarding the fact that a BIT is granting wider rights to investors than those granted by EU law could amount to a discrimination, could not allow the elimination of

[35] Eureko B.V v. Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, 26.10.2010.

[36] L. E. Peterson, "German Court rejects Slovak republic's suggestion that arbitrators were wrong to find jurisdiction over intra-EU investment Treaty dispute", IAReporter, 10.05.2012.

investor's rights under a signed BIT. Besides, the host member state was not prohibited from granting equivalent rights to investors from other member states[37].

Followingly, the case proceeded to a final award on the merits. On May 10, 2012 the Final Award was rendered with Slovakia to be obliged to pay damages in the amount of 22.1 million euros to Achmea, for breaching the standard of Fair and Equitable Treatment (FET) under the BIT, as well as the obligation of ensuring free transfer of payments[38].

As Frankfurt was the seat of arbitration, Slovakia challenged the decision in German courts, arguing again that the arbitral award was invalid because of the tribunal's lack of jurisdiction. More specifically, Slovakia brought an action before the Higher Regional Court of Frankfurt and requested the court to set aside the interim award on jurisdiction and to hold that the arbitral tribunal did not have jurisdiction[39]. Slovakia stated that through the arbitral procedure it was deprived of the right to be heard, while it argued that certain alleged breaches of law by the company, including Slovak laws on procurement and health insurance, meant that the investment was not protected under the BIT and the disputes were not arbitrable.

Regarding its arguments based on EU law, Slovakia cited an incompatibility between the arbitration clause of 8 of the BIT with articles 18, 267 and 344 TFEU. Based on article 18 for non-discrimination, Slovakia argued that the BIT's arbitration clause will possibly lead to discrimination between Dutch and the other EU investors. Besides, considering the opinion that such discrimination would be faced if Slovakia broadened its own consent to arbitration encompassing investors from other EU countries, Slovakia argued that this would just increase the incompatibility between the BIT and the EU law.

---

[37] PLC Arbitration, "UNCITRAL tribunal rules Slovak-Dutch BIT not affected by Slovakia's EU membership", PLC Arbitration, 17.11.2010, Practical Law, Thomson Reuters.

[38] Achmea B.V. (former known as Eureko B.V.) v. Slovak Republic, The final award of 7.12.2012, PCA Case No. 2008-13.

[39] S. Wilske et al, "Further application on intra-EU BIT to Frankfurt Higher Regional Court", Practical Law, 28.02.2013.

Concerning article 267 on preliminary reference, Slovakia stated that BIT arbitral tribunals could not refer questions of EU law to the European Court of Justice. As such the government warned that the uniform application of EU law was jeopardized in circumstances where such an arbitral tribunal nevertheless delves into issues such as the compliance by an EU member state of its EU law obligations.

Slovakia also expressed regarding article 344 and its strictures against dispute settlement mechanisms that derogate from European Union's own dispute processes. Slovakia contended that this article should be read as extending to investor state mechanisms, as well as state to state mechanisms. In making this argument, Slovakia echoed a position taken by the European Commission in a different arbitration under the Netherlands – Slovakia BIT[40].

On 8.12.2014, the Higher Regional Court of Frankfurt upheld the jurisdictional findings of the arbitral tribunal and rejected the Slovakian arguments of lack of jurisdiction[41]. Despite the court's holding that its prior judgment on jurisdictional award was not strictly binding upon the present case, it did not depart from its essential reasoning on the validity BIT's arbitration clause. With respect to article 344, the court insisted again that this clause merely prohibited derogation from state to state dispute mechanisms for resolution of EU law questions. Moreover, because EU treaties do not provide any sort of investor state dispute resolution process, there was no basis for finding that the mechanism found in article 8.2 of the BIT somehow detracted from the EU treaties. Equally, and in keeping more or less with Achmea's arguments, the German court noted that BIT arbitral awards remained subject to scrutiny by domestic courts, thus ensuring that any derogations from EU law could be policed[42].

---

[40] L. E. Peterson, "German Court sees no clash between Achmea v. Slovakia arbitral award and EU law, and is unmoved by persistent arguments of European Commission", 08.01.2015, IAReporter.

[41] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic).

[42] Luke Eric Peterson, "German Court sees no clash between Achmea v. Slovakia arbitral award and EU law, and is unmoved by persistent arguments of European Commission", 08.01.2015, IAReporter.

iv. Advocate's General opinion, the request for preliminary ruling and the role of European Commission.

When the German Court dismissed the action, Slovakia appealed the dismissal on a point of law to Bundesgerichtshof*,* the Federal Court of Justice of Germany. The Advocate General Wathelet argued that intra-EU bilateral investment treaties and investment treaty arbitration based on Bilateral Investment Treaties were perfectly in line with European legal regime with the ISDS tribunal not to be a rival to the EU's judicial system, but part of it[43].

According to his opinion, arbitral tribunals based on intra-EU bilateral investment treaties should be approached the same way domestic courts of the bloc's Member States are. The BIT did not constitute discrimination on grounds of nationality and thus did not violate Article 18 TFEU by granting preferential treatment to Dutch investors.

The Advocate General therefore proposed that the ISDS tribunal is a court or tribunal within the meaning of Article 267 TFEU, common to two Member States and was therefore able to request the CJEU to issue a preliminary ruling on questions of EU law. The AG came to this conclusion by first suggesting that an ISDS tribunal is in fact a "court or tribunal" within the meaning of Article 267 TFEU and secondly that this "court or tribunal" is not an international court or tribunal but rather something like the Benelux court and should therefore be in the position to make preliminary references[44].

---

[43]Opinion of Advocate General Wathelet delivered on 19 September 2017, Slowakische Republik v Achmea BV., Request for a preliminary ruling from the Bundesgerichtshof. Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic — Provision enabling an investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party — Compatibility with Articles 18, 267 and 344 TFEU — Concept of 'court or tribunal' — Autonomy of EU law, Case C-284/16.

[44] A. Carta, L. Ankersmit, "AG Wathelet In C-284/16. Achmea: Saving ISDS?", 08.01.2018, European Law Blog, http://europeanlawblog.eu/2018/01/08/ag-wathelet-in-c-28416-achmea-saving-isds/.

In addition, it was noted that investor-state disputes – contrary to intra-Member State disputes – did not fall within the scope of Article 344 TFEU and such disputes did not concern the interpretation or application of the EU Treaties[45].

The German Federal Court of Justice, through hearing the case on appeal, evaluated the issue to be one of "considerable importance" and referred a set of questions to the CJEU under the Article 267 TFEU preliminary reference procedure[46]. More specifically, there were posed three questions aiming to clarify the relationship between international investment arbitration and EU law in the intra EU context[47]. First, whether Article 344 TFEU precluded the application of a provision providing for ISA under an intra-EU BIT. Second, in case of a negative answer to the first question, whether Article 267 TFEU would preclude the application of such a provision. Third, in case the first two questions were answered in the negative, whether Article 18 TFEU precluded the application of this provision[48].

European Commission once again took part in the judicial proceedings through its written observations on August 6th, 2016. According to them, the requirements of article 30 §3 of the VCLT were met, with certain provisions of the BIT, such as the investor-state arbitration mechanism, to raise "fundamental questions regarding compatibility with EU law". More specifically, it was clarified that there was no issue regarding arbitration mechanisms contained in BITs between an EU member state and a non-EU member state. Although in case of intra-EU BITs, it was stressed that there was "at the very last a partial overlap" of legal norms which "call into question the

---

[45] "The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!", Clément Fouchard, Marc Krestin, 07.03.2018, Kluwer Arbitration Blog.

[46] Consolidated version of the Treaty on the Functioning of the European Union – Part Six: Institutional and Financial Provisions – Title I: INSTITUTIONAL PROVISIONS - Chapter 1: The institutions - Section 5: The Court of Justice of the European Union - Article 267 (ex Article 234 TEC).

[47] G.M. Alvarez, "The Achmea Case: More Questions than Answers?", Jurisprudencia estatal internacional comentada, RBA No 59, Jul-Set/2018.

[48] Consolidated version of the Treaty on the Functioning of the European Union – Part Two: Non – Discrimination and Citizenship of the Union - Article 18 (ex Article 12 TEC).

permissibility of the continued existence of intra-EU BITs", concluding that "the arguments in favor of maintaining an investor state arbitration mechanism for intra-EU BITS are not persuasive from an internal EU las perspective".

Commission underlined the crucial role of mutual trust, as a fundamental principle in the administration of justice in the EU, which was undermined through investor-state arbitration. Possible disputes between member states' investors should be settled in national courts or referred to the European Commission. In addition, it was noticed that investor-state arbitration under intra-EU BITs could generate discriminations between investors from different member states leading to a conflict with EU major principles. There is no possibility of positive resolutions, by granting all investors the same preferential rights.

Besides, EU law's supremacy over intra-EU BITs was pointed. Based on Commission's opinion, this kind of supremacy does not cancel BITs, but it inactivates them in case of conflict with the EU law. In the light of that supremacy, Commission stressed that the principle "pacta sunt servanda" does not apply to agreements concluded between EU member states which clash with the EU law obligations of those member states. Consequently, based on public international law and the Vienna Convention on the Law of Treaties, EU Treaties are "later" treaties (lex posterior) and their provisions must over-ride BIT provisions that clash with EU law obligations[49].

[49] L. E. Peterson, "Arbitrators uphold jurisdiction over investor claim against Slovakia. Dispute over health insurance investments not derailed by Slovak accession the European Union", IAReporter, 04.11.2010.

v. CJEU's Decision.

While Advocate General did not acknowledge any incompatibility between the ISDS mechanism under the NL-SK BIT and EU law, the CJEU presented on 6 March 2018 a completely different position. Departing from Advocate's very innovative approach, which maintained the 190 existing intra-EU BITs while at the same time ensured that their application and interpretation is consistent with EU law[50], the CJEU put in priority the notions of autonomy, uniform interpretation and effectiveness of EU law.

The CJEU received three preliminary questions from the German Federal Court of Justice and decided to focus on the compatibility of the intra – EU BIT ISDS with articles 267 and 344 TFEU, while it held that there was no need to answer the third preliminary question on the principle of non – discrimination and compatibility with article 18 TFEU. The Court held that arbitration clauses in international agreements between two Member States, such as the one in the Slovak – Netherlands BIT, are incompatible with articles 267 and 344 TFEU because such dispute resolution clauses adversely affect the autonomy of EU law[51].

According to CJEU, an international agreement should not affect the power allocation under the EU Treaties and the autonomy of the EU legal system described in article 344 TFEU, under which "Member States undertake not to submit a dispute that

---

[50] N. Lavranos, "CJEU Advocate General: intra-EU ISDS arbitration compatible with EU law", Borderlex, 19.09.2017.

[51] "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, 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" (CJEU C-284/16 Achmea,§62)."

involves the interpretation or application of the EU Treaties to a method of dispute settlement other than those provided for in the EU Treaties". The CJEU stated that EU law is characterized – inter alia – by the fact that it stems from an independent source of law, the EU Treaties, and by its primacy over the law of the EU Member States. These characteristics, according the CJEU, "have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally…". Based on this fundamental premise, Member States are obliged to ensure, in their respective territories, uniform and consistent application of EU law[52]. Besides, CJEU took into consideration the value system that Member States share with main objectives the principles of mutual trust and sincere cooperation under Article 4§3 TEU. Third, there was highlighted the need of consistency and uniformity of EU judicial system – comprised of the CJEU and national courts – which is interpreted through the preliminary reference system under Article 267 TFEU.

Having set out the constitutional context, the actual analysis of the questions referred followed three stages. First, the Court considered whether investment tribunals interpret (or affect) EU law and concluded that, as EU law is both international law and national law, tribunals are very likely to interpret (or at least affect) EU law. Secondly, it concluded that an investment tribunal established pursuant to the BIT is not a "court or tribunal of a Member State" in the sense of Article 267 TFEU, because it is not part of the judicial framework established by the EU Treaties. Thirdly, it was stated that there was no sufficiently guaranteed mechanism to ensure the full effectiveness of EU law in the scheme of BIT investment arbitration provisions. A tribunal that is not a court or tribunal of a Member State is neither capable of sending a preliminary reference to the CJEU nor is it certain that a national court would - or even could - review its award for compliance with fundamental EU law during a national enforcement or recognition procedure, as tribunals can and regularly do sit in third countries.

[52] C. Fouchard, M. Krestin "The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!", Kluwer Arbitration Blog, 07.03.2018.

Based on article 8 of the NL-SK BIT, CJEU stated that the arbitral tribunal had to consider as applicable law, the law of the contracting parties and their international agreements, including EU law. Under this thought, the arbitral tribunal should aim at interpreting or applying EU law, with emphasis on the principles of freedom of establishment and free movement of capital. In case that such arbitral tribunals are situated in the EU judicial system, it should be ensured that their decisions are subject to "mechanisms capable of ensuring the full effectiveness of the rules of the EU". More specifically, under Article 8§6 of the BIT between the Netherlands and the Slovak Republic the applicable law is "the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law". While Achmea held that the arbitral tribunal would only rule on alleged infringement of the BIT, the ECJ disagreed. According to the Court, "given the nature and characteristics of EU law…, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States". As a consequence, the Court explained that "it follows that on that 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, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital".

Contrary to AG Wathelet the CJEU underlined that the arbitral tribunal was not part of the judicial systems of either the Netherlands or Slovakia. The exceptional nature of its jurisdiction, so the CJEU, is one of the principal reasons for the existence of the BIT's arbitration clause[53]. The ECJ's main reasoning relied on whether full effectiveness of EU law can be ensured within the ISDS mechanism foreseen under the Netherlands-Slovakia BIT. It is with this question in mind that the Court assessed whether the arbitral tribunal in question is situated within the EU judicial system. This means that even an ex post link between the arbitral tribunal and the EU judicial system through, for instance,

[53] Ibid.

the possibility of review of an investment tribunal's award by a Member State court, may not be considered a sufficiently satisfactory solution[54]. Under EU law, effectiveness of law is of great importance, as the Union's legal order relies on the correct implementation in and by the EU Member States. Effectiveness is a broad notion, "including implementation, enforcement and compliance[55].

Therefore, the tribunal could not be classified as a Member State "court or tribunal" under Article 267 TFEU and it could not make a preliminary reference to the CJEU. According to the Court, the arbitral tribunal cannot be classified as a court common to several Member States. The decision in Achmea is final, issued by an arbitral tribunal that determines its own procedure applying the UNCITRAL arbitration rules. The CJEU held that the awards of such a tribunal are not subject to review by Member State courts to an extent that would allow them to refer a question to the CJEU on issues of EU law raised before the arbitral tribunal. The Court also differentiated between awards of commercial arbitrations and investor-state arbitrations, as the latter remove disputes from the judicial systems of the Member States and thus the EU. Commercial arbitration based on contract is different from an investment treaty regime agreed by States based on an alternative dispute resolution system with substantive rules of investment protection. Taking all the above into consideration, according to the Court, the ISDS mechanism under the BIT under examination could not ensure that arising disputes could be solved without affecting the effectiveness of EU law, its special features and autonomy in combination with the principle of mutual trust between the Member States.

In conclusion, except from the autonomy of EU law, uniform interpretation and effectiveness of EU law were issues of Court's highest consideration. Because of the very limited review of ISA awards, there is no adequate mechanism to control how those tribunals might have interpreted and applied EU law. In case of lack of such a control

[54] Supra note 1.

[55] Snyder, "The effectiveness of European Community law: Institutions, processes, tools and techniques", 56 Modern Law Review, 1993.

mechanism, there is a possibility of Member States to enforce an award interpreting EU law differently than the CJEU, resulting in different application of EU law between Member States. Consequently, the uniformity and effectiveness of EU law would be jeopardized. Regarding the third question it was not answered by the CJEU because it positively answered first two.

Through the effort to analyze the Court's decision, the emphasis should be given to the notion of EU autonomy as it is demonstrated in the Court's decision, which seems to pass by that under international law there is no hierarchy between international treaties. The autonomy of EU law is what makes EU law a legal order[56]. EU law depends on its autonomous character for its constitutional character and its ability to ensure the effectiveness of EU law. This formal legal autonomy allows the Court of Justice to uphold the claim that the effects of EU law within the national legal order are a matter of EU law, rather than national law[57]. The preliminary ruling is the institutional backbone of this effectiveness and the mechanism that allows in an ongoing dialogue between the Court of Justice and the national judiciary a regular confirmation of the Court's autonomy claim by national courts[58]. In the preliminary ruling under examination, the Court's position on the protection of EU autonomy - in absolute line with its settled case law so far – is related to the maintaining of every field of EU law under the substantive reach of the preliminary reference procedure. More specifically, the Court held that the EU judicial system would be undermined if disputes could be removed from it by bringing them before arbitral tribunals, which, besides the fact that they are not subject to an exhaustion of domestic remedies rule, do not form part of the EU judicial system and consequently cannot ask the Court of Justice preliminary questions. The emphasis was given in the applicability of article 344 TFEU. The CJEU ruled that, pursuant to the

[56] C. Eckes, "EU powers under external pressure – How the EU's external actions alter its internal structures", Oxford University Press, 2019.

[57] C. Eckes, "Some reflections on Achmea's broader consequences for investment arbitration", European Papers, Vol. 4, 2019, No 1, pp. 79-97.

[58] Supra note 55.

NL-SK BIT, the arbitral tribunal is called to rule only on potential infringements of the NL-SK BIT but to this end it must, in accordance with article 8§6 NL-SK BIT, take into account the law in force in the concerned contracting Party and any relevant agreements between the contracting parties. More specifically, the CJEU noted the applicable law included in the domestic law of the member state concerned and other relevant agreements between the parties to the treaty. It followed that EU law which forms part of the national laws of member states may be part of applicable law. As a result, the CJEU found that an arbitral tribunal established pursuant to the Czechoslovakia – Netherlands BIT might need to interpret and apply EU law. Since such application and interpretation would be made by an arbitral tribunal, the CJEU found that such application and interpretation could potentially affect the autonomy of the EU legal order[59].

The Court's decision besides confirms that the principle of mutual trust applies to intra EU BITs and prevents the application of alternative dispute settlement mechanisms in disputes generated from them. This principle, which is based on the shared commitment to the values in article 2 TEU and the enforcement of these values in the member states. Considering these facts, the possible objective of an alternative dispute settlement mechanism could demonstrate a level of mistrust. According to the Court, the removal of disputes from the preliminary ruling procedure leads to an incomplete application of EU law as a result of the fact that some disputes within the scope of EU law may end up before arbitral tribunals that are not classified as "court" within the meaning of article 267 TFEU and hence cannot refer questions to the Court of Justice[60].

A lot of discussion has been taking place around the Achmea decision with many critical arguments to be expressed. Firstly, under examination has been the CJEU's jurisdiction to give a preliminary ruling regarding the interpretation of the BIT's

[59] Q. Decleve, "Achmea: Consequences on applicable law and ISDS clauses in extra – EU BITs and future EU trade and investment agreements", European Papers, vol. 4, No 1, pp. 99 – 108.

[60] Supra note 56.

provisions. According to the Court's case law, if the EU itself is not a contracting party to an International Treaty, there is no jurisdiction of the CJEU for preliminary ruling regarding the interpretation of international treaty provisions binding for Member States outside the EU legal regime[61]. Even if there was a case of exceptional direct interpretation or a case of an indirect interpretation taking place only to the extent necessary to determine whether EU law precludes its application, the Court avoided to base its ruling on customary rules of treaty interpretation. More specially, the CJEU in Achmea did not even mention article 31 VCLT so as to interpret the Netherlands – Slovakia BIT, let alone article 32 VCLT. This apparent non – resource to the customary rules on treaty interpretation by the CJEU in Achmea is particularly problematic, not only because one is left to speculate how the incompatibility finding would fit with an interpretative analysis under article 31 VCLT, but also because it appears that the Court proceeded without paying heed to the interpretative presumption against normative conflict[62].

Besides, it has been underlined the elliptical way of the CJEU's reasoning, given that the validity of nearly 180 intra-EU BITs would be affected. More specifically, the Court was limited in stressing that the arbitral tribunal is not part of the judicial system of the Netherlands nor of Slovakia because "it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of article 8 of the BIT". Besides, in line with the Advocate General, the German Government and the referring German judge insisting on non-application of 344 TFEU to disputes between individuals and between individuals and Member States, the CJEU implicitly accepted the applicability of the article in the circumstances of the case. Moreover, the Court's silence was intense regarding the possibility that the arbitration clause contained in article 8 NL-SK BIT would create a discrimination among investors on grounds of their nationality.

[61] See CJEU Case C-533/08 TNT Express Nederland, CJEU Case C-132/09 Commission v. Belgium etc.

[62] A. Gourgourinis, "After Achmea: Maintaining the EU compatibility of intra – EU BITs through treaty interpretation", Koninklije Brill NV, Leiden, 2018.

Furthermore, the CJEU's argument that an arbitral tribunal cannot pose a preliminary question pursuant to Art. 267 TFEU leads to commends of lack of coherence of the Court's decision. Hence the adverse effect on the autonomy of the EU legal order: it cannot be guaranteed that an arbitral award is subject to review by a court of a Member State nor, as a result, that the questions of EU law that the arbitral tribunal may have to address are submitted to the CJ by means of a reference for a preliminary ruling pursuant to Art. 267 TFEU.

Another negative point stressed is radicalism of the Court's decision. The CJEU did not consider the possible alternatives to avoid the inactivation of the arbitration clause at stake. Possible alternatives could be the distinguishing between arbitral tribunals leading to third states jurisdiction and others that lead to jurisdiction of Member States or the opportunity of making the validity of the clause conditional upon the possibility, for a national judge, of reviewing the compatibility of the arbitral award with EU law.

Another issue arising of the Court's decision, is the lack of distinguishing between pre – accession and post – accession international obligations of the Member States. In fact, it approached the issue from a constitutional point of view. The reasoning seems to be that ISDS clauses breach the autonomy of EU law and thereby endanger the consistent and coherent application of EU law within the Union's Single Market by avoiding the preliminary reference, which is supposed to ensure the correct application of EU law within the territory of the Union. That concept of autonomy falls squarely within the notion of the foundations of the EU law, from which no EU institution can derogate, not even an international agreement. This makes the effect of the Achmea judgement on the ECT unclear, in relation with its extra – EU application and to disputes between EU Member States and nationals of third States[63].

[63] M. Kappold, M. De Boeck, "The European Union and the Energy Charter Treaty: What next after Achmea?", SSRN, 02.11.2018.

vi. The Decision of General Federal Court of Justice and the rejection of Achmea's complaint on its right to be heard.

On 31 October 2018 in line with CJEU's judgement, the German Federal Court of Justice decided to set aside the award in Achmea v Slovak Republic, stating that there never was a valid arbitration agreement between Achmea and the Slovak Republic[64]. Consequently, it was overturned the 2014 judgment of the Higher Regional Court of Frankfurt that had dismissed an application to set aside that award.

Despite the Court's initial views on the case, its final decision - in line with CJEU's preliminary ruling – judged that there was no arbitration agreement between Achmea and Slovakia. More specifically, it held that when Slovakia joined the EU on 1 May 2004, and thus before Achmea initiated arbitration proceedings in 2008, the state's offer to investors to conduct arbitration proceedings became inapplicable. As a result, there was no valid offer for Achmea to accept when it commenced arbitration against Slovakia.

Based on the German Arbitration Law, an invalid arbitration agreement between parties constitutes ground for setting aside an arbitral award, so the Court decided that a non-existing arbitration agreement is equivalent to an invalid agreement. The Court noted that, in principle, an arbitration agreement between the parties could have been concluded through the commencement of arbitration proceedings by Achmea. By initiating arbitration proceedings, the investor usually accepts the offer made by a state in a BIT to conduct arbitration proceedings with investors from another state. Although, in the case under examination, there was no valid Slovakian offer at the time the arbitration proceedings were initiated. The offer was originally provided in Article 8§2 of the Netherlands-Slovakia BIT, but through Slovakia's accession to EU the offer became inapplicable because article 8 of the Netherlands-Slovakia BIT is not compatible with the

[64] G. Fasfalis, "The aftermath of Achmea: where do we stand?", Practical Arbitration Blog, Thomson Reuters, 02.01.2019.

principle of sincere cooperation among EU member states (article 344 TFEU) and the autonomy of EU law ensured by the preliminary ruling procedure (article 267 TFEU).

The German Court underlined that EU law became part of the applicable law to the dispute under Article 8§6 of the Netherlands-Slovakia BIT, though Slovakia's membership in European Union on 1 May 2004. Consequently, the treaty became an Intra-EU BIT and article 8§2 was no longer applicable due to its incompatibility with European legal provisions[65]. The BGH recognized that Article 8 of the Netherlands-Slovakia BIT is contained in a treaty that is generally binding only on the Netherlands and Slovakia. The provision's inapplicability, however, caused Slovakia's offer to conduct arbitration proceedings with Dutch investors to lapse. In short, there was no longer a corresponding Slovakian offer that Achmea could have accepted by initiating arbitration proceedings. In this way, the BIT is inseparably linked to the arbitration agreement[66].

Followingly to the issuance of the above-mentioned decision from German Federal Court of Justice, Achmea lodged a complaint based on the thought that setting aside the award violated its right to be heard. Although that complaint was rejected by the German Court in the decision of 24 January 2019. The complaint was based on the following three issues: the denial of effective legal protection and the protection of legitimate expectations, the state immunity of the Netherlands and the customary international law.

Regarding the denial of effective legal protection, Achmea complained that the German Court had not taken into consideration its submission that the ECJ's decision denied it effective legal protection and that the protection of legitimate expectations required providing transitional provisions for arbitral proceedings in which an award has

---

[65] Bundergerichtshof Decision of 31.10.2018, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=89393&pos=0&anz=1.

[66] "The German Federal Court of Justice rules in Achmea – entry into the EU renders Slovakia's offer for Intra-EU arbitration inapplicable", CMS Law-Now, 13.12.2018.

already been rendered. The German Court, however, pointed to its previous ruling in October 2018 that – in line with the ECJ ruling – Achmea could obtain effective legal protection before the Slovak courts and was thereby not deprived of its substantive claims. The Court took note of Achmea's submission on structural deficits of the Slovak judiciary but stated that this would not allow the Court to deviate from the ECJ's assessment[67].

The second argument regarding the Court's lack of consideration on Achmea's submission on the principle of state immunity under international law, according to which the courts of one state may not review the sovereign acts of another state, was equally unsuccessful. The German Court pointed out that the subject of the set-aside proceedings was not the validity of the BIT concluded between the Slovak Republic and the Netherlands, but the invalidity of the arbitral award. In this context, the validity of the BIT's arbitration clause was only a preliminary question not covered by the principle of state immunity.

In the end, Achmea's complaint that the German Federal Court had ignored its submission on customary international law was rejected too. In the decision of 31 October 2018, it was already addressed Achmea's argument that the ECJ ruling amounted to a general rule of international law, which - as a component of federal law pursuant to the German Constitution – could be the subject of a referral to the German Federal Constitutional Court.

The Court additionally rejected the complaint on the basis that the Court had disregarded its submission that the ECJ ruling violated the customary international law principle of pacta sunt servanda, as it is underlined in article 26 of the Vienna Convention. The Court pointed that member states waived their rights under international law among each other when such rights are in conflict with EU law,

---

[67] M. Weiler, S. Schwalb , "German Federal Supreme Court rejects Achmea's complaint that its right to be heard was violated", Lexology, 03.04.2019.

consequently there can be no customary international law between the member states that contradicts EU law.

REACTIONS

i. Reopening Cases.

Only one year from the CJEU's Achmea decision, the post Achmea debate has entered a new stage canvassed in tribunals' reactions, with main axis a lot of Achmea - based jurisdictional objections. Importantly since then, there are no decisions issued by intra-EU investment tribunals depriving their jurisdiction, as reflected in four publicly available or reported decisions following that Judgment.

The tribunal in UP and C.D Holding Internationale v. Hungary rejected Achmea-based objections on the fact that Hungary could not rely on EU law and Achmea to escape its public international law obligations under the ICSID Convention[68]. More specifically it was pointed that "in the present Award, the Tribunal does not consider that a detailed discussion of the substance of Achmea is required, because the present case differs in determinative aspects from the case in Achmea". That difference in determinative aspects from the case in Achmea was considered to be that the arbitral tribunal in UP and CD Holding v. Hungary operated under the ICSID Convention, to which Hungary is a Contracting Party, and the validity of which has not been put into question by the judgment in Achmea. Based on the above, the tribunal's argument that Hungary had not shown that EU law, as interpreted in Achmea, has the effect that consent has been validly withdrawn retroactively overlooks the fundanmental point that consent to arbitration did not have to be withdrawn, because it had never been validly given in the first place[69].

In case of Masdar Solar & Wind Cooperatief U.A. (Dutch) v Kingdom of Spain, there were claimed breaches of fair and equitable treatment as well as minimum

---

[68] UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35.

[69] S. Centeno Huerta, N. Kuplewatzky, "On Achmea, the autonomy of Union law, mutual trust and what lies ahead", European Papers, Vol. 4, 2019, No 1, pp. 61-78.

standard of treatment, including denial of justice claims. These claims arose out of a series of energy reforms undertaken by the government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers[70]. In a final award of May 16, 2018, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) ordered Spain to pay damages of EUR 64.5 million plus pre- and post-award compound interest.

Following Achmea decision, Spain tried to bring in the case the matter of incompatibility between ECT and EU legal regime. It was argued that Achmea decision confirmed the intra-EU objection that was raised regarding article 26 and its lack of application to intra-EU disputes: as Masdar was a Dutch enterprise, EU law would have primacy over the ECT. At that time, the tribunal addressing the question as part of its award, it concluded that nothing in the text of the ECT precluded intra-EU disputes from its scope and that EU law is not incompatible with the provision for investor–state arbitration contained in the ECT. The two legal orders could be applied together as regards this arbitration, because only the ECT deals with investor–state arbitration and nothing in EU law can be interpreted as precluding investor–state arbitration under the ECT and the ICSID Convention[71].

Finally, the tribunal declined Spain's request and denied to reopen and examine the arbitration under the prism of Achmea decision concluding that the Achmea Judgment is simply silent on the subject of the ECT[72]. According to the tribunal, Achmea was of limited application that did not affect the specific case, but only Netherlands-Slovakia BIT or an international agreement between EU Member States of

[70] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1.

[71] T. Menon, "ICSID tribunal finds Spain in breach of the FET standard under the Energy Charter Treaty", Investment Treaty News, International Institute for Sustainable Development, 30.07.2018.

[72] Supra note 70.

that kind. The tribunal stressed that the ECT is not a bilateral treaty between EU Member States but a multilateral agreement with EU to be a party too.

Besides, the Advocate's General Wathelet opinion was mentioned, according to whom Achmea case just examined the validity of ISDS clauses in BITs between EU Member States. Finally, the Masdar tribunal duly noted that the Achmea decision consciously chose not to refer to the ECT and to Wathelet's distinction between dispute settlement mechanisms in these two different types of agreements and concluded that Achmea did not apply to ECT arbitrations and thus did not affect the *Masdar* case[73].

The interest turns on cases where the tribunal seemed to take into consideration the CJEU's decision through the examination of the respondents' jurisdictional objection.

In Vattenfall v. Federal Republic of Germany case, the claims came out of Germany's enactment of legislation to phase out nuclear power plants in the country by 2022[74]. In Vattenfall II – for which an award is pending - the company is claiming compensation for losses ostensibly incurred as a result of Germany's response to the Fukushima disaster in Japan, after which Germany committed to close all its nuclear power plants by 2022. The 4.7 billion EUR being claimed in Vattenfall II is the largest amount known to have been claimed in a dispute between an EU investor and an EU member state. This is also among the 21 largest compensation claims ever made in any ISDS case worldwide.

Prior to the CJEU's Achmea ruling, Germany had not raised the "intra-EU objection", but the objection was put forward by the EU Commission, which had intervened as amicus curiae – as it has routinely done in intra-EU disputes in recent years. Following Achmea, Germany formally raised the intra-EU objection and argued

[73] D. Orta et al "In the wake of Achmea: Early assessments, consequences and approaches", Expert Guides, 20.09.2018.

[74] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I), ICSID Case No. ARB/09/6.

together with the EU Commission that the CJEU's findings applied not only to intra-EU BITs, but also to multilateral agreements such as the ECT[75].

The claimants argued that Germany's objection – raised six years after arbitral proceedings were commenced in 2012, and 18 months after the hearing in October 2016 – came far too late. Although, the tribunal under the light of Achmea, beginning with article 26 ECT on dispute settlement and the possibility of taking into consideration EU law through its interpretation[76]. More specifically, the tribunal addressed two principal issues: the implications of the CJEU's judgment (finding the ISDS clause in the Netherland – Slovakia BIT incompatible with EU law) for arbitral tribunals constituted under investment treaties governed by public international law and the impact of the judgment on claims under the multilateral ECT[77] Although it acknowledged the interaction between EU and international law, based on article 31 of the Vienna Convention on the Law of Treaties (VCLT), it did not accept EU Treaties as an interpreting instrument for ECT. According to the tribunal, 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"[78]. Based on the tribunal's thoughts, if EU is called for the interpretation of a multilateral treaty, would lead to an "incoherent and anomalous result" that would alter ECT's purpose, which only can be fulfilled through a single consistent meaning.

Besides, Article 16 ECT was used by the arbitrators as "a simpler and clearer route to the answer to the jurisdictional challenge", which states that no provisions

[75] "In the Aftermath of Achmea – Does Vattenfall Ensure the Future for Intra-EU Investment Arbitration?", CMS Law-Now, 25.09.2018.

[76] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

[77] K. Schwedt, "Post – Achmea: Vattenfall tribunal maintains jurisdiction over intra – EU Energy Charter Treaty claim against Germany", Arbitration Links, 13.09.2018.

[78] Vattenfall AB and others v. Federal Republic of Germany, ICSD Case No. ARB/12/12, Decision on the Achmea Case, 31.08.2018.

concerning the subject matter of Part III or V of the ECT in prior or subsequent international agreements between two or more parties to the ECT could lead to derogations from articles more favorable to investor or investment. In the issue under examination, article 16 ECT would lead to the prevalence of article 26 ECT.

The arbitrators do not see a conflict between Article 26 ECT and Articles 267, 344 TFEU, but remark obiter dictum that even if such a conflict existed, EU law would not prevail over the ECT, applying conflict rules. In particular, article 16 ECT is examined by the arbitrators as lex specialis, posing an insurmountable obstacle to respondent's argument that EU law prevails over the ECT. Besides, the tribunal through the public international law rule of article 41 VCLT for limiting the cases in which multilateral agreements can be bilaterally modified, puts an additional argument on the effectiveness of article 16 ECT. Additionally, the tribunal underlines the lack of definition of the obligations established by the investment treaty. If article 26 should not apply to disputes between an investor of one EU member state and another EU member state it would had been ruled. More specifically, "in the Tribunal's view, the clearer conflict rule in article 16 ECT must prevail over a rule derived from a contrario interpretation of article 351 TFEU which cannot be found in the text of the TFEU itself. As a matter of public international law, the Tribunal cannot be asked to leave aside a clear rule in favor of a counter textual one. This is the case irrespective of whether or not EU law is considered to prevail over international treaties within the EU internal legal order". Throughout its decision, the Vattenfall tribunal emphasized that it analyzed the relevant matters from the perspective of public international law[79]

The above analyzed arguments on the limitation of the Achmea Judgement to the Netherlands – Slovakia BIT without extension to ECT should be approached with skepticism. If the Court's ruling was supposed to cover only the BITs signed between EU member states, it would have clarified it. While the Bundesgerichtshof's question

[79] C. Verbung, "The dichotomy between European Union Law and International Law: Responses to the Achmea Judgment of the European Court of Justice", Groningen Journal of International Law, 26.11.2018.

referred to “a provision in a bilateral investment protection agreement”, the Court’s judgement used wider terms, such as “a provision in an international agreement concluded between Member States”. Consequently, Achmea speaks not in terms of treaties, but in terms of claims, issues, and parties: articles 267 and 344 TFEU establish clear boundaries of exclusive jurisdiction of dispute settlement mechanisms between the member states[80]. Especially in the Vattenfall tribunal, the emphasis is given to article 16 ECT, as a special conflict rule between ECT and EU law, without considering the role of EU primacy in international scenery. Despite the article’s application to disputes contracting parties to the ECT between which EU law does not operate, it is totally inapplicable between member states under the prism of EU law primacy.

In case of Novenergia v. Spain, heard under the SCC Rules and legal seat in Stockholm, it was decided on January of 2018 that Spain broke the Fair and Equitable Treatment clause of the ECT and Spain had to pay compensation of € 53,3 million to Novenergia, a Luxembourg fund which had invested in photovoltaic plants in Spain.

The key question for the tribunal was whether the investor has legitimate expectations of stability and held that such expectations “arise naturally from undertakings and assurances” given by the state. According to the tribunal, Spain’s 2013 - 2014 reforms, which replaced the 2007 regime with a new regime guaranteeing only a “reasonable rate of return” were a “radical and unexpected” departure from the 2007 regime. At the time of its investment decision, Novenergia had a legitimate expectation that the 2007 regime would remain relatively stable. The tribunal found that the 2013 - 2014 reforms had a “significant damaging economic effect” on Novenergia’s plants, decreasing revenues by 24% – 32%, and awarded damages accordingly[81].

---

[80] Supra note 56.

[81] R. Power, “Novenergia v. Kingdom of Spain, the ECT and the ECJ: Where to now for intra – EU ECT claims?”, Kluwer Arbitration Blog, 20.03.2018.

The European Commission in its Decision of November 10th, 2017 it attacked ECT claims brought by investors against Spain and other EU states through criticizing the concept of the ECT claims, stating that the EC considers that "any provision that provides for investor-State arbitration between two Member States is contrary to [European] Union law…Union law provides for a complete set of rules on investment protection…Member States are hence not competent to conclude bilateral or multilateral agreements between themselves". The Decision concluded that "[f]or those reasons, ECT does not apply to investors from other Member States initiating disputes against another Member States"[82]. Additionally, it was stated that if an arbitral tribunal awarded an investor compensation in respect of losses caused by Spain's reform of the Special Regime, that would constitute state aid; and if Spain paid such an award, it would require EC approval. Besides it was highlighted that "this Decision is part of Union law, and as such also binding on Arbitration Tribunals, where they apply Union law. The exclusive forum for challenging its validity are [sic] the European Courts".

Under the light of Achmea case and after Spain's request, the Svea Court stayed the enforcement of the award. According to Spanish government there was an excess of arbitral tribunal's jurisdiction, as article 26 of the ECT is not valid in intra-EU relations due to lack of arbitration agreement in disputes brought by investors from other EU member states. Besides, Spain argued that even if the Court finds that Article 26 offers any arbitration opportunity, it is not valid as a parallel procedural system would be developed by EU member states to try cases that should be properly tried within the EU judicial system.

In parallel, Spain encourages Svea Court of Appeal to set a preliminary reference under Article 267 of the TFEU to the CJEU. Spain made this request in the alternative, i.e. if the Svea Court were to find that Article 26 of the ECT is applicable, the ECJ must be

[82] Official Journal of the European Union, C 442, 22 December 2017.

consulted[83]. Despite the reluctance of Swedish courts for preliminary references, the fact that ECJ in the Achmea case only concerned intra-EU bilateral investment treaties, and not multilateral treaties -such as the ECT- would lead to a second referral to the ECJ in which the Court would then have to rule on the compatibility of the arbitration clause in the ECT with EU law.

[83] J. Dahlquist, "Spain challenges Novenergia arbitral award in Swedish court, relying on the Achmea judgment", 23.05.2018, https://aquiescencia.net/2018/05/23/spain-challenges-novenergia-arbitral-award-in-swedish-court-relying-on-the-achmea-judgment/.

ii. Commission's Communication on the protection of intra EU investment.

There is no doubt that the Achmea judgment has several broader implications in the future of European regime and international investments as well. This can be observed already from the structure of the Court's answer. Despite the judicial economy usually used by CJEU in preliminary references, in the specific case the Court was not limited only in the compatibility of the investor state arbitration described in article 8 of NL-SK BIT with EU legal regime. Instead, the language employed by the Court - for example, "a tribunal such as that referred to in Article 8 of the BIT" or "arbitration proceedings such as those referred to in Article 8 of the BIT", ensures that the arguments and holdings of this case have a wider application. In other words, any ISA mechanism under an intra-EU BIT, "such as" the one under the NL-SK BIT, is incompatible with EU law[84].

Additionally, the actions of the Commission to end intra-EU BITs has now been successfully concluded, as ISDS proceedings on the basis of intra-EU BITs, the ECT or the ICS or MIC will now be substantially prevented. Through Achmea judgment, the level of investment and investor protection in the European area is now vague, allowing member states ground for expropriation or discriminatory measures against foreign investors without punishment.

Achmea decision is the flag that the EU Commission needed to reinvigorate its campaign against intra-EU ITA[85]. On 19th day of July 2018 Commission published a Communication to the European Parliament and the Council on the protection of cross-border investments within the Capital Markets Union, confirming that investors from

[84] Dr. Szilárd Gáspár Szilágyi, "Guest Post: The CJEI strikes again in Achmea Is this the end of investor–state arbitration under intra-EU BITS?" International Economic Law and Policy Blog, 07.03.2018.

[85] "2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration", Deyan Dragiev, Kluwer Arbitration Blog, 16.01.2019.

EU Member States are fully protected in the Single Market by EU law and the protection of these rights is ensured by the EU national courts and the European Court of Justice. The Communication not only referred in the Achmea judgment, but took a clear position regarding its application on multilateral agreements such as the Energy Charter Treaty. According to Commission's thoughts, "Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States" [86].

There is no doubt that Communication's content was in absolute consistency with Commission's position regarding international arbitration in investment disputes with EU element. Based on CJEU's decision concerning Achmea case, Commission can now express with confidence that EU investors can no longer rely on intra-EU bilateral investment treaties, pointing that they are illegal as they overlap with the EU single market rules and discriminate between EU investors [87]. More specifically, "as a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to

[86] Communication from the Commission to the European Parliament and the Council, "Protection of intra-EU investment", 19.07.2018.

[87] European Commission Press Release, "Capital Markets Union: Commission provides guidance on protection of cross border EU investments", Brussels, 19.06.2018.

pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra – EU BITs”.

ii. EU member states' declarations on the termination of intra EU BITS.

If the CJEU's opinion on incompatibility of EU law and international investment treaties consisted of European signatories was adopted, member States – parties in such treaties would have to remove mechanisms of dispute settlement similar the one in Netherlands – Slovakia BIT. This obligation arises from Article 351 TFEU too, through which Member States have to take all appropriate steps to eliminate the incompatibilities between their international agreements that precede their accession to the EU and EU law. Although, the court did not say anything as to the necessary steps that member states have to take, whether they are required to either renegotiate their intra-EU BITs by removing the ISDS provisions or terminate them altogether[88].

In January 15th, 2019, EU Member States signed the 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[89]. Through this Declaration, member states made a clear step towards the ending of Intra-EU BITs by confirming full respect to the CJEU's preliminary ruling on the incompatibility of intra-EU BITs with the EU provisions.

According to the Declaration, "Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State

[88] N. Lavranos, "Insight: The end of intra-EU BITs – what next?", Borderlex, 09.03.2018.

[89] "Declaration of the representatives of the Governments of the member states, of 15 January 2019 on the legal consequences of the judgement of the Court of Justice in Achmea and on investment protection in the European Union".

arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty".

Through this declaration, twenty-two of the twenty-eight EU Member States (Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, the Netherlands, Austria, Poland, Portugal, Romania, Slovakia and the UK) have now committed to take all necessary steps for the termination of all the existing intra-EU BITs, while they are not going to sign any new one. Besides, they have pledged to notify arbitral tribunals of the non-arbitrability of claims arising from or in connection with such BITs and Energy Charter Treaty claims and to request to set-aside related intra-EU awards as well.

A second declaration, dated on January 16th, was jointly signed five other states including Finland, Luxembourg, Malta, Slovenia, and Sweden, proceeds in the same terms as the first declaration, but concludes that, regarding investor-State arbitration under the ECT, "[i]t would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty"[90]. These states observe that the Achmea Judgment is silent on the question of intra-EU investor-State arbitration under the ECT and consider it inappropriate to opine on the issue, with the first five expressly noting that the question is currently contested before the Svea Court of Appeal in Sweden. This separate version of the Declaration is departing from the majority on the same issue concerning the impact of the Achmea judgment on the applicability of the ECT arbitration clause.

The third declaration, signed only by Hungary with the same date as above differs from the afore-mentioned declarations in its exclusion of the commitment regarding pending investment arbitration cases brought by Member State-controlled entities against other Member States, and states that the Achmea Judgment concerns only intra-EU BITs. Unlike the second declaration, Hungary makes no reference to

[90] Debevoice & Plimpton, "EU Member States Issue Declarations to Terminate Intra-EU Bilateral Investment Treaties", Debevoise In Depth,23.01.2019.

Novenergia and adopts a separate version of the Declaration regarding the effect of the Achmea case on the investor-State arbitration clause contained in the ECT, which may be fueled by pending disputes. More specifically, it notes that, as the Achmea Judgment does not address investor-State arbitration under the ECT, "it is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra-EU application of the ECT"[91].

Despite their differences, the above declarations agree on a number of common conclusions arising from the Achmea judgment. All investor-to-State arbitration clauses contained in BITs concluded between Member States are contrary to EU law and inapplicable; Host and home States of intra-EU investors will inform tribunals of pending intra-EU arbitrations of the consequences arising from the preceding point, and will request the courts – including in third countries – which are to decide in proceedings relating to an intra-EU investment arbitration award, to set aside these awards or not to enforce them; No new intra-EU investment arbitration proceedings should be initiated under intra-EU BITs; By 6 December 2019, Member States will formally terminate all intra-EU BITs by means of a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally; Member States will ensure effective legal protection against State measures that are the object of pending intra-EU arbitration proceedings; Member States, together with the Commission, will discuss without undue delay whether any additional steps are necessary to draw all the consequences from the Achmea judgment in relation to the intra-EU application of the ECT.

Nonetheless, although general media assign much higher importance to the Declaration, from the perspective of public international law, the Declaration has no direct legal power and did not and cannot terminate or modify the existing intra-EU BITs. Member states declared, inter alia, that they are terminating their intra-EU BITs by 6 December 2019, drawing the attention of arbitral tribunals in ongoing intra-EU arbitral proceedings initiated by "their" investors to the consequences of the Achmea decision

---

[91] Ibid.

and pursuing annulment or non-enforcement of existing intra-EU arbitral awards contrary to EU law[92]. Although the Declaration is simply an expression of the intention of the Member States to terminate these treaties in the future.

Besides, the varying approaches by member states regarding the ECT demonstrates that debate is still open regarding the inapplicability of investor – State arbitration clauses contained in multilateral agreements to which the EU itself and non – member states are parties[93]. Although, the different views on the extent of the applicability of the Achmea case may potentially result in investors seeking more arbitration friendly jurisdictions in the future, however for now the Declaration might be considered as an inappropriate measure of the European Commission and the respective Member States to interfere with ongoing arbitral proceedings[94]. Furthermore, another issue that should not be ignored is that the declarations fail to mention that the offer to arbitrate could at best be considered implicitly terminated at the time both contracting parties had become EU members while member states' express intent to terminate the BITs by 6 December 2019 rather contradicts such an argument and exposes its weakness[95]. Additionally, based on the "sunset clauses", that maintain BIT protection of investments that occurred prior to termination of a BIT for a certain period, and despite the declaration's notice of their inapplicability, the opportunity for investment arbitration may be remained for a reasonable time period[96].

---

[92] S. Schwalb, M. Weiler, "German Federal Supreme Court rejects Achmea's complaint that its right to be heard was violated", Lexology.

[93] D. Kohegyi, K. S. Gans, "EU Member States issue a joint declaration on the legal consequences of the Achmea decision", DLA PIPER, 18.01.2019.

[94] "EU Member States adopt declaration on the termination of all bilateral investment treaties", CMS Law-Now, 14.02.2019.

[95] J. Tropper, "Alea iacta est? Post – Achmea investment arbitration in light of recent declarations by EU – member states", Volkerrechtsblog, 24.01.2019.

[96] Ibid.

CHALLENGES FOR THE ECT

i. The Energy Charter Treaty.

One of the main issues arisen regarding the CJEU position on the Achmea case and the decision issued from the German Federal Court of Justice, is its possible application not only to BITs but on multilateral agreements such as the Energy Charter Treaty [97].

The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998. Currently there are fifty-three Signatories and Contracting Parties to the Treaty. This includes both the European Union and Euratom. The idea for the ECT originated in a proposal of the Dutch government to the Council of the European Communities in June 1991 to create — in addition to the European Coal and Steel Community (ECSC) and Euratom — a European Energy Community. The aim was, in reaction to the end of the Cold War, to secure a market economy approach for the reconstruction and restructuring in the energy sector in the former communist countries[98]. Countries rich in natural resources with technically outdated installations in varying degrees of disrepair, cash - starved and with no domestically functioning financial markets, on the one hand, and, on the other, countries with advanced market economy systems, operating in dynamic financial markets and with highly developed technologies for exploration, production and transportation of energy aspiring to those dormant energy resources, seemed a perfect match[99].

---

[97] D. Dragiev, "2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration", 16.01.2019, http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/.

[98] Jan Kleinheisterkamp, "Investment Protection and EU law: The intra – and extra – EU dimension of the Energy Charter Treaty", Journal of International Economic Law, Vol. 15 No. 1, Oxford University Press 2012.

[99] Chr. Söderlund, "The future of the Energy Charter Treaty in the context of the Lisbon Treaty", Energy

The Energy Charter Treaty provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. The Treaty's provisions focus on four broad areas i) the protection of foreign investments, based on the extension of national treatment, or most-favored nation treatment (whichever is more favorable) and protection against key non-commercial risks, ii) non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on WTO rules, and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation, iii) the resolution of disputes between participating states, and - in the case of investments - between investors and host states, iv)the promotion of energy efficiency, and attempts to minimize the environmental impact of energy production and use[100].

It is the only multinational treaty specifically dealing with investment issues in the energy industry[101]. The introduction to the ECT explains that its fundamental aim is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimizing the risks associated with energy-related investments and trade. It ensures the protection of foreign energy investments based on the principle of non-discrimination[102]. The treaty also provides governmental consent to ad hoc international arbitration to resolve disputes with foreign investors arising from their substantive obligations[103].

The implications of Achmea case to the ECT are of high practical importance as ECT is the most commonly invoked International Investment Treaty in intra – EU

Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, JurisNet, LLC 2011.

[100] The Energy Charter Treaty, International Energy Charter.

[101] C. Baltag, "The Energy Charter Treaty: The Notion of Investor", 25 Int'l Arbitration Law Library, 8 (2012).

[102] Introduction to the Energy Charter Treaty, available at www.encharter.org/fileadmin/user_upload/document/EN.pdf.

[103] D. Bishop et al, "The Breadth and Complexity of the International Energy Industry",12-13.

investment disputes. According to the late Professor Thomas Wälde, a great defender of arbitration in the energy sector, "investment treaties' first significance to oil, gas and energy investors is that they provide an international arbitral jurisdiction even if the investor had been unable to negotiate one in the first place by contract. In that sense, they are of greatest benefit to junior companies with less international experience and bargaining leverage. Large international oil companies traditionally have been less interested in investment arbitration as they thought they could fend for themselves and negotiate contract-based arbitration clauses themselves"[104].

More specifically, in the last couple of years the number of investment claims in the renewable energy sector has risen with Europe to be one of the regions worldwide with the most ICSID cases. According to ICSID's latest statistics, disputes arising in the energy sector globally comprised more cases than any other industry sector, with 41% of registered cases in 2018[105]. According to UNCTAD, investment disputes on the basis of the Energy Charter Treaty, which also contains an ISDS clause, account for about 20 percent of all known investment arbitrations globally by the end of 2016. Many of these cases constitute intra-EU disputes and, more recently, often relate to the withdrawal of government support schemes for renewable energy. Spain particularly has been subject to over 30 claims under this regime. The claims of the Swedish power company Vattenfall against Germany were both brought on the basis of the ECT[106].

The increase of intra-EU–ECT disputes could be attributed particularly to two events. First, Member States that were using preferential tax schemes to accelerate the decentralization of their own electricity markets had to discontinue this special

[104] T. Wälde, "International Arbitration in Oil, Gas and Energy" in L.W. Newman and R.D. Hill (eds), Leading Arbitrators' Guide to International Arbitration (Juris, second edition), p. 771.

[105] The ICSID Caseload – Statistics (Issue 2019-1), International Center of Settlement of Investment Disputes, World Bank Group, pg.28, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

[106] S. Hindelang, "The Limited Immediate Effects of CJEU's Achmea Judgement", Verfassungsblog, 09.03.2018, https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/.

treatment in order to comply with the new EU laws on State aid. Second, Member States' national decarbonization targets that were aimed at promoting clean energy sources were relying heavily on offering foreign investors special schemes of national feed-in tariffs (FITs). FITs as clean energy strategies were ambitious and did not foresee the financial and technological challenges within the renewable industry. As a consequence, national schemes went beyond the financial capabilities of some Member States, and these FITs had to be withdrawn from foreign investors[107].

As mentioned above there has already prompted action from several EU respondent States facing investment treaty claims. For example, Spain has invoked the Achmea decision in multiple set-aside proceedings against adverse ECT awards, including in the Novenergia arbitration, as analyzed above. Although, tribunals sitting in ECT arbitrations have rejected Achmea's application to the ECT, the broad language of Achmea could be misinterpreted to apply its reasoning beyond the facts at issue in the Achmea case. This arguably creates at least some level of uncertainty in the future claims that investors may advance under the ECT, especially in light of the European Commission's recent doubling down on its efforts to put an end to intra-EU ISDS mechanisms[108].

---

[107] G. M. Alvarez, "Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension", ICSID Review, Vol. 33, No. 2 (2018), pp. 560–58.

[108] D. M. Orta et al, "In the wake of Achmea: Early assessments, consequences, and approaches", Expert Guides, 20.09.2018, https://www.expertguides.com/articles/in-the-wake-of-achmea-early-assessments-consequences-and-approaches/arozygrp.

ii. The specialties of the ECT.

Despite its practical importance in the international energy investment sector, the ECT has specific features that generate thoughts regarding the treatment of the ECT the same way as intra EU BITs and the Achmea's possible expansion to it.

The ECT provides a multilateral framework for energy cooperation, which focuses on four areas: foreign investments, trade, transit and environmental protections. Second, unlike intra-EU BITs, the ECT was collectively signed by the European Coal and Steel Community, Euratom and the European Communities, surviving today as ECT signatories the European Commission and Euratom[109]. More specifically the multilateral element of the ECT, as well as the fact that EU is an independent and formal party to it, complicate the possible treatment of ECT in the general route to the termination of treaties with overlapping effects in the European investment protection. Third, the ECT is an international treaty that includes in its signatories not only all of the Member States of the EU but also includes other third states.

Several issues arise regarding the membership of European Union itself in the ECT. Concerning that not only is the EU a party to the treaty but 15 Member States were already members of the European Communities when they became parties to the ECT, the ECT has had an intra-EU dimension from its beginning. This intra-EU aspect continued to exist with the accession of Central and Eastern European countries to the EU, countries that were already ECT members. Further, there is no disconnection clause in the ECT between its EU signatories[110]. Consequently, the ECT is binding between Member States and the EU itself, and, therefore, all of the signatories have agreed to assume obligations inter se[111].

---

[109] Supra note 90.

[110] M. Smrkolj, 'The Use of the "Disconnection Clause" in International Treaties: What Does It Tell Us about the EC/EU as an Actor in the Sphere of Public International Law?', 14.05.2008, http://ssrn.com/abstract=1133002.

[111] Supra note 90.

Based on the above, an uncontroversial point generates, while the EU could well be a defendant in an ECT claim, an EU national or a company organized according to the laws of a EU member state could not bring a claim against the Union, since they would not be "Investors of another Contracting Party" as required by Article 26§1 ECT[112]. Besides, another issue arises based on the argument that EU by entering into the ECT would have limited its own competence to restrict capital movements specifically for the energy sector. Consequently, by accepting investor-state arbitration under Article 26 ECT, this dispute settlement mechanism cannot be deemed incompatible with the TFEU provisions on the role of the ECJ in interpreting and applying EU law. This line of argument may well be acceptable before an arbitral tribunal under international law, but certainly not from an internal EU law point of view. The EU institutions have no powers to modify the provisions of the EU Treaties by way of the conclusion of an international treaty, only through amendment provisions of article 49[113]. Furthermore, the - internal - supremacy of primary EU law also defeats the possible broader argument that the fact that the EU has entered into the ECT as an intra-EU agreement would render obsolete the entire discussion about the compatibility of intra-EU BIT with EU law. It is not because the EU institutions commit the EU to certain obligations under international law that primary EU law is effectively changed or undermined.

Despite the involvement of the EU itself and third countries, from an EU law perspective, there seems to be no sufficient reason why investment disputes between an investor from one and another member state based on the ECT should be treated in a different way from what is described in the CJEU's Achmea Judgement[114]. Although, European Commission has been utterly unsuccessful in convincing arbitral tribunals in ECT-based arbitrations of the special circumstances in intra-EU cases, despite the fact that in terms of consistency it is hard to leave the ECT untouched while obliging member states to bring their extra-EU BITs in line with EU law (or, in the alternative, to terminate

[112] M. Burgstaller, 'European Law and Investment Treaties', Journal of International Arbitration 181, 2009.

[113] Ibid.

[114] Supra note 77.

them). Looking at the arbitrators' arguments it is doubtful that this position will change in the light of the CJEU's Achmea Judgement. As long as Member States' courts do not get their hands on the awards and regularly annul them, intra-EU arbitration on the basis of the ECT may just go on.

iii. Does Achmea Decision apply to ECT?

One opinion on the issue under examination notices that due to Achmea's specific characteristics (Frankfurt as the seat of arbitration and German law applicable to the arbitral proceedings; the judicial review falling within the competence of German courts; the fact that in the review process, the German Federal Court of Justice submitted a number of preliminary questions to the CJEU), it is supposed to apply only to BITs and not multilateral treaties and only to those BITs concluded between the Member States. As the ECT is not a bilateral treaty between the Member States but a multilateral treaty to which the EU is also a party, the above decision cannot affect it. It is reasonable to wonder, why the CJEU did not clearly say that its ruling also relates to intra-EU disputes under the ECT or why the CJEU did not reject the opinion of the Advocate, that was focused on the distinction between intra-EU BITs and the ECT. In particular, if the AG noted that the ECT was concluded "as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing", why the CJEU did not correct the AG's reasoning and address the exclusion of ISDS mechanism in intra- EU disputes[115].

The fact that CJEU expressly made a differentiation between investment treaties with EU as a party and those without EU could be translated as an attempt for a different legal treatment. If CJEU wanted Achmea decision to cover the ECT, it would be expressly mentioned to avoid confusion regarding a possible infringement of Article 216§2 TFEU or the ECT provisions. Not doing this, the CJEU basically concluded that the ISDS provision in the ECT is not contrary to the EU legal order[116]. Despite the necessity and sufficiency of the abovementioned thought, the possibility that the Achmea decision referred to the ECT, as well could not be ignored.

---

[115] Supra note 108.

[116] A. Bakos, "Post-Achmea Energy Charter Treaty Coherence and Stability: Upheld or Hindered?", https://efilablog.org/2018/07/27/post-achmea-energy-charter-treaty-coherence-and-stability-upheld-or-hindered/.

Moreover, European Union as a signatory in the ECT has given its "unconditional consent" to the submission of a dispute to international arbitration" under Article 26§3a. This kind of consent is presented to have exactly the same content without limitations compared to individual EU Member States. Consequently, EU has already agreed that arbitration is supposed be the competent settlement mechanism for disputes arising from the ECT, resulting to the restriction of CJEU jurisdiction. Any CJEU ruling that sought to undermine this would be undermining the political will of the signatories, and arguably also - as an institution of the EU - acting contrary to the EU's obligations under the ECT[117]. EU has never taken part in an ECT dispute as it does not have sovereignty over the energy resources of its constituent member states. Although, in a possible future dispute it would be hard argue that it lacked the capacity to set out the correct understanding of EU law to the tribunal. Despite the fact that EU member states cannot derogate from the provisions of EU instruments based on the primacy of EU law, in contrast to the Netherlands and Slovakia BIT which is the subject-matter of Achmea, the EU itself is a signatory to the ECT, and has agreed to claims under the ECT being determined by the arbitration mechanism specified in the ECT[118] .

Another argument for the maintenance of the ECT despite the Achmea decision, arises from the Declaration of January 16th signed jointly by Finland, Luxembourg, Malta, Slovenia and Sweden[119], which departs from the above-mentioned Declaration of January 15th. According to that Declaration, "the Achmea case concerns the interpretation of EU law in relation to an investor – state arbitration clause in a bilateral investment treaty between Member States. The Member States note that the Achmea judgment is silent on the investor – state arbitration clause in the Energy Charter Treaty. A number of international arbitration tribunals post the Achmea judgment have

[117] "What next for intra-EU Investment Arbitration? Thoughts on the Achmea Decision", Neil Newing, Lucy Alexander, Leo Meredith,21.04.201, Kluwer Arbitration Blog.

[118] Supra note 60.

[119] Declaration of the representatives of the governments of the Member States of 16 January on the enforcement of the judgement of the Court of Justice in Achmea and on investment protection in the European Union.

concluded that the Energy Charter Treaty contains an investor – State arbitration clause applicable between EU Member States. This interpretation is currently contested before a national court in a Member State. Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty".

Another issue that arises in case it is accepted that Achmea decision covers the ECT, is the fact that there are non-EU Member States signatories to the ECT. These parties have never agreed in EU law supremacy. This could create a situation where EU investors are unable to bring claims in arbitration against EU Member States, but non-EU investors are, effectively creating two classes of investor within the ECT, contrary to the wording of the treaty[120]. Although, non-discrimination is the cornerstone of the ECT's investment protection. Furthermore, in case it is accepted that Achmea decision covers the ECT resulting to its termination in accordance with intra-EU BITs, there should not be ignored the implementation of such termination.

Considerations are born regarding the cases brought under the ECT by the investors of one EU Member State against another EU Member State. It can be easily argued that the ISDS mechanism under the ECT, to the extent that it is used between EU Member States and EU investors, is also incompatible with EU law. This could, in effect, abruptly end the more than the 30 ECT disputes that European investors have brought against Spain, Italy and other member states for the retroactive withdrawal of subsidies for renewable energy. Similarly, member states may not have to pay any ECT awards any longer, which would make a big difference, for example, for Spain, which recently lost two ECT cases and has been ordered to pay almost 200 million euros in total in damages[121].

---

[120] Ibid.

[121] N. Lavranos, "Insight: The end of intra-EU BITs – what next?", Borderlex, 09.03.2018, https://www.borderlex.eu/comment-end-of-intra-eu-bits-what-next/.

Despite the consistently positive conclusions drawn by the individual ECT tribunals in favor of the compatibility of the ECT arbitration mechanism with EU law, the CJEU's recent ruling in Achmea may ring the death knell for the future of arbitration of investment claims against an EU Member State under intra-EU investment treaty frameworks[122]. More specifically, there are arguments raised regarding the non - applicability of the ECT to intra-EU disputes and its future considering the Achmea case.

Firstly, Article 16 ECT explicitly prohibits any inter se modifications that reduce the level of protection for investors provided for under the ECT, providing a clear rule on conflicts between the ECT and any other international agreement, whose terms "concern the subject matter of Part III (Investment Promotion and Protection) or V (Dispute Settlement) of ECT. According to that rule, applicable are the provisions which are "more favorable to the investor or investment". In other words, article 16 ECT clearly states that the contracting parties to the ECT, including the EU, have agreed that, any prior or subsequent treaties that parties enter into with each other, shall not be construed so as to derogate from substantive protections or the right to dispute settlement mechanism of the ECT, where the ECT provision is more favorable to the investor or investment[123]. Consequently, this position makes clear that in case of a conflict between the ECT and EU law, the ECT should prevail because it is a more favorable agreement for investors in the EU. In parallel, some scholars submit that any other interpretation would also be invalid under international law on treaty interpretation, due to the centrality of the ISDS clause to the purpose of the ECT and its "individual rights dimension"[124]. Although, it has also been argued the existence of an "implicit disconnection clause" that inactivates ECT's arbitration mechanism to intra-EU disputes and makes it "exceptionally possible, under public international law, and in the

---

[122] G. Blanke, "Trends in International Energy Arbitration: Can ECT Claims be Arbitrated? Some Initial Considerations in the Light of the CJEU's Ruling in Achmea", 37 ASA Bulletin 1/2019 (March).

[123] I. Damjanovic, N. de Sadeleer, "I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal", European Papers, Vol. 4, 2019, No 1.

[124] C. Cross, Dr. V. Kube, "Is the arbitration clause of the Energy Charter Treaty compatible with EU law in its application between EU Member States?", Umweltinstitut München e.V., 02.2018.

context of the inter se relations of the EU Member States, to disregard the regulation of the respective public international law treaty, and in deviating from the previously mentioned principles, apply EC internal law"[125]. In line with this opinion, it has been argued that despite the fact that investment tribunals heavily rely on article 16 ECT as a "clearer conflict rule", it remains controversial and should rather be understood as an interpretative rule explicitly referring to "construing" rights. Instead, articles 351 TFEU and 30 VCLT are the relevant conflict rules to be applied in intra-EU disputes under the ECT[126].

Another argument regarding the non - applicability of the ECT to intra EU disputes is inextricably linked to the status of the EU as a Regional Economic Integration Organization (REIO) that has signed in the ECT. Under the article 1§3 ECT, Regional Economic Integration Organization "an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters". The character of the EU as a REIO cannot be ignored, including the fact that energy integration in the EU single market has been work in progress since the beginning of the ECT, ultimately serving the interests of investors. In particular, an investment by an investor from one EU Member State in the area of another EU Member State is made within the "area" of the EU as a REIO, which is the area belonging to the same contracting party even when it involves two different EU Member States. As a result, the EU's offer to arbitrate in the Art. 26 ECT is only made to investors from non-EU Member States, thus eliminating the EU Member States' individual standing as respondents under the ECT[127]. One the other hand, despite the above mentioned, if article 26 ECT was only applicable in disputes between investors from

[125] C. Tietje, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States.", Institute of Economic Law Transnational Economic Law Research Center (TELC), School of Law, Martin Luther University Halle- Wittenberg, 2008.

[126] Supra note 108.

[127] Supra note 108.

non-EU member states, it would have been explicitly arranged in the ECT, through a disconnection clause or the adoption of a supplementary instrument.

iv. The example of CETA.

The similarity between the ISCS mechanism in Achmea and the ICS in CETA, which aim at offering an alternative mechanism of dispute settlement that is neither embedded in the national constitutional system nor subject to review by the ordinary judiciary, lead to thoughts regarding the possible consequences of Achmea decision to the ICS tribunals.

The emphasis given in the Achmea regarding the autonomy of the EU legal order and despite the tangible differences between the ISDS mechanism in Achmea and the ICS under CETA, there were fundamental concerns that the removal of disputes from the preliminary ruling procedure could become the backbone of the autonomy and effectiveness of EU law seem to apply in the same way to both[128].

In opinion procedure 1/17[129], the Court was requested to decide on the compatibility between EU Treaties and the Canada – EU Comprehensive Economic and Trade Agreement (CETA), which includes an investor-to-public authorities dispute settlement mechanism[130].

Having the "compatibility test" of Achmea as a starting point for the evaluation of CETA dispute settlement mechanism in relation to EU legal order, an answer was tried to be given. Firstly, a tribunal should be situated within the judicial system of the EU as described in article 267 TFEU. Secondly, there should be adopted awards subject to review by a court of a member state, which may then issue a preliminary request to the Court of Justice. Thirdly, the arbitral tribunal should not resolve disputes liable to relate to the interpretation or application of EU law. The fact that the CETA tribunal seems to lack all the elements contained in the Achmea test, combined with the applicability of principle of autonomy to both intra and extra EU tribunals and the implicit statement of the Court that Achmea may have consequences beyond purely intra – EU situations,

[128] Ch. Eckes, "Some reflections on Achmea's broader consequences for investment arbitration", European Papers, Vol. 4, 2019, No 1, pp. 79-97.

[129] Request for an opinion to the Court of Justice, submitted by Belgium on 30.10.2017.

[130] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, signed on 30.10.2016.

could lead the Court to announce incompatibility between ICS and EU law[131].

On April 30th 2019, the CJEU concluded that the ICS is compatible with EU law, resulting to the ratification and entry into force of the agreement on the ICS. Although, it its underlined that CETA tribunals under ICS can only apply or interpret CETA provisions and by no means EU law provisions. Besides, it has been noted by the Court that the CETA tribunals "have no jurisdiction to call into question the choices democratically made within a party relating to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights"[132].

More specifically, regarding the principle of autonomy of EU law the Court accepted that while the ICS in CETA was separate from the EU judicial system, this would not automatically be in conflict with the principle of the autonomy of the EU legal order, taking the line of co-existence of EU law with international law[133]. According to the Court, the principle of autonomy of EU law would only be breached if the CETA ICS could interpret and apply EU rules other than the provisions of the CETA, or issue awards having the effect of the EU institutions from operating in accordance with the EU constitutional framework[134].

---

[131] M. Gatti, "Opinion 1/17 in light of Achmea: Chronicle of an opinion foretold?", European Papers, Vol. 4, 2019, No 1, pp. 109-121, www.europeanpapers.eu.

[132] N. Lavranos, "The harvest Report of the first half of 2019", Kluwer Arbitration Blog, 07.06.2010.

[133] E. Szyszczak, "Opinion 1/12: Towards a modern EU approach to investor – state dispute settlement",

[134] Opinion 1/17 of the Court (Full Court), 30 April 2019, http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=707133.

SOME THOUGHTS

There is no doubt that, because of all these potential effects on investment law and arbitration, there are good reasons to believe that Achmea will remain in law textbooks as a landmark case on the relationship between EU law and international investment law[135]. Notably, under the prism of the Member States' recent declarations and the nine commitments that they have undertaken to follow "without undue delay", the implications of the decision seem to be of high practical importance.

The international activity of the investor through bilateral or multilateral treaties has elevated him to the status of a (partial) subject in international law[136]. This kind of elevation explains the dimensions of a possible inactivation of investment treaties to the future of international investments where the uncertainty is escalating. Under the light of Achmea and the already examined cases, where states seek to set aside awards rendered in intra-EU disputes, investors might well think twice before bringing such cases in the future[137]. They will possibly move on restructuring their investments in order to ensure that their corporate structure includes at least one entity outside the EU in a country that has a BIT with the relevant EU state. Besides, it is unclear how tribunals will react to being "informed" that there is no valid consent to arbitrate, especially given the reactions of tribunals to the Achmea judgement to date[138].

Regarding the ECT's possible termination or amendment, contrary to BITS, it is a difficult task given the high threshold to do so. According to article 42 ECT, proposed

---

[135] S. Barbou des Places, Emanuele Cimiotta, Juan Santos Vara, "Achmea between the orthodoxy of the Court of Justice and its multi placated implications: An introduction", European Papers Vol.4, 2019, No 1, pp. 7 -17.

[136] T. R. Braun, "Globalization-driven innovation: The investor as a partial subject in Public International Law – An inquiry into the nature and limits of investor rights", Jean Monnet Working Paper, 04.2013.

[137] M. Scherer, "The (changing) landscape of investment arbitration in the energy sector after the Achmea judgment", 04.06.2018, http://oxia.ouplaw.com/page/704.

[138] Supra note 90.

amendments have to be submitted to the Energy Charter Conference in order to be adopted. This kind of adoption requires at least three quarters of ECT parties present to vote for the proposal. Despite their possible adoption, the amendments only bind those parties which ratify, accept or approve them. Practically, Member States could publish a joint agreement to the effect that they will not apply the ECT inter se, but the validity and the effectiveness of such a declaration seems questionable, as the ECT itself specifically protects investors against effects of any less favorable provisions by virtue of other international agreements.

In light of all these circumstances and in case it is adopted that the Achmea decision except from the intra EU BITs covers the ECT too, one possible way for the EU and its Member States to resolve the above described uncertainty is to interpret the ECT with the effect of excluding arbitration in intra-EU disputes. A joint agreement between the signatories of the ECT through which all the disputes arising in the intra EU investment environment will be settled by the EU law provisions, could possibly lead to the survival of the ECT and the creation of balance between International and European law in the energy investment sector.

BIBLIOGRAPHY

- Alvarez G. M., “Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension”, ICSID Review, Vol. 33, No. 2 (2018), pp. 560–58.
- Alvarez G. M., “The Achmea Case: More Questions than Answers?”, Jurisprudencia estatal internacional comentada, RBA No 59, Jul-Set/2018.
- Ankersmith L., “Achmea: The Beginning of the End for ISDS in and with Europe?”, Investment Treaty News, Issue 1. Volume 9, 04.2018.
- Bakos A., “Post-Achmea Energy Charter Treaty Coherence and Stability: Upheld or Hindered?”, Efila Blog.
- Baltag C., “The Energy Charter Treaty: The Notion of Investor”, 25 Int’l Arbitration Law Library, 8 (2012).
- Barbou des Places et al, “Achmea between the orthodoxy of the Court of Justice and its multi placated implications: An introduction”, European Papers Vol.4, 2019, No 1.
- Bermann G. A., “Navigating EU Law and the Law of International Arbitration”, Arbitration International, 2012.
- Bishop D. R. et al, “Foreign Investment Disputes, Cases Materials and Commentary”, Kluwer Law.
- Bishop D. R. et al, “The Breadth and Complexity of the International Energy Industry”.
- Blanke G., “Trends in International Energy Arbitration: Can ECT Claims be Arbitrated? Some Initial Considerations in the Light of the CJEU’s Ruling in Achmea”, 37 ASA Bulletin 1/2019 (March).
- Braun T. R., “Globalization-driven innovation: The investor as a partial subject in Public International Law – An inquiry into the nature and limits of investor rights”, Jean Monnet Working Paper, 04.2013.

- Bungenberg M., “Centralizing European BIT Making under the Lisbon Treaty”, paper presented at 2008 Biennial Interest Group Conference, Washington DC, 13-15.11.2008.
- Burgstaller M., ‘European Law and Investment Treaties’, Journal of International Arbitration 181, 2009.
- Carta A., L. Ankersmit, “AG Wathelet In C-284/16. Achmea: Saving ISDS?”, European Law Blog, 08.01.2018.
- Centeno Huerta S., Kuplewatzky N., “On Achmea, the autonomy of Union law, mutual trust and what lies ahead”, European Papers, Vol. 4, 2019, No 1.
- Contartese C., M. Andenas, “EU autonomy and investor – state dispute settlement under inter se agreements between EU Member States: Achmea”, Common Market Law Review 56: 157 – 192, 2019.
- Coop Graham, “Energy Charter Treaty and the European Union: Is Conflict Inevitable?”, Journal of Energy & Natural Resources Law.
- Cross C., Dr. V. Kube, “Is the arbitration clause of the Energy Charter Treaty compatible with EU law in its application between EU Member States?”, Umweltinstitut München e.V., 02.2018.
- Damjanovic I., N. de Sadeleer, “I Would Rather Be a Respondent State Before a Domestic Court in the EU than Before an International Investment Tribunal”, European Papers, Vol. 4, 2019, No 1.
- Decleve Q., “Achmea: Consequences on applicable law and ISDS clauses in extra – EU BITs and future EU trade and investment agreements”, European Papers, vol. 4, No 1.
- Dragiev D., “2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration”, Kluwer Arbitration Blog, 16.01.2019.
- Eckes C., “EU powers under external pressure – How the EU’s external actions alter its internal structures”, Oxford University Press, 2019.
- Eckes C., “Some reflections on Achmea’s broader consequences for investment arbitration”, European Papers, Vol. 4, 2019, No 1.

- Fasfalis G., "The aftermath of Achmea: where do we stand?", Practical Arbitration Blog, Thomson Reuters, 02.01.2019.
- Fouchard Cl., M. Krestin, "The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!", Kluwer Arbitration Blog, 07.03.2018.
- Gatti M., "Opinion 1/17 in light of Achmea: Chronicle of an opinion foretold?", European Papers, Vol. 4, 2019, No 1.
- Gourgourinis A., "After Achmea: Maintaining the EU compatibility of intra – EU BITs through treaty interpretation", Koninklije Brill NV, Leiden, 2018.
- Hindelang S., "The Limited Immediate Effects of CJEU's Achmea Judgement", Verfassungsblog, 09.03.2018.
- Kappold M., M. De Boeck, "The European Union and the Energy Charter Treaty: What next after Achmea?", SSRN, 02.11.2018.
- Kleinheisterkamp J., "Investment Protection and EU law: The intra – and extra – EU dimension of the Energy Charter Treaty", Journal of International Economic Law, Vol. 15 No. 1, Oxford University Press 2012.
- Kohegyi D., Gans K. S., "EU Member States issue a joint declaration on the legal consequences of the Achmea decision", DLA PIPER, 18.01.2019.
- Krause, "The European Commission's opposition to intra-EU BITs and its impact on investment arbitration", 28.09.2010, Kluwer Arbitration Blog.
- Kuijper P. J. et al, "The Law of EU External Relations. Cases, materials, and commentary on the EU as an international legal actor", 2nd edition, Oxford: Oxford University Press, 2015.
- Lavranos N., "CJEU Advocate General: intra-EU ISDS arbitration compatible with EU law", Borderlex, 19.09.2017.
- Lavranos N., "Insight: The end of intra-EU BITs – what next?", Borderlex, 09.03.2018.
- Lavranos N., "The harvest Report of the first half of 2019", Kluwer Arbitration Blog, 07.06.2010.

- Menon T., “ICSID tribunal finds Spain in breach of the FET standard under the Energy Charter Treaty”, Investment Treaty News, International Institute for Sustainable Development, 30.07.2018.
- Newing N. et al, “What next for intra-EU Investment Arbitration? Thoughts on the Achmea Decision”, Kluwer Arbitration Blog, 21.04.2018.
- Odermatt J., “When A Fence Becomes A Cage”, European University Institute, 2016.
- Orta D. et al “In the wake of Achmea: Early assessments, consequences and approaches”, Expert Guides, 20.09.2018.
- Peterson L. E., “Arbitrators uphold jurisdiction over investor claim against Slovakia. Dispute over health insurance investments not derailed by Slovak accession the European Union”, IAReporter, 04.11.2010.
- Peterson L. E., “European Commission and Member States will meet to discuss whether BITs are needed within European Union”, IAReporter, 28.09.2010.
- Peterson L. E., “German Court rejects Slovak republic’s suggestion that arbitrators were wrong to find jurisdiction over intra-EU investment Treaty dispute”, IAReporter, 10.05.2012.
- Peterson L. E., “German Court sees no clash between Achmea v. Slovakia arbitral award and EU law, and is unmoved by persistent arguments of European Commission”, IAReporter, 08.01.2015.
- Peterson L. E., “Investor announces victory in intra – EU BIT arbitration with Slovakia arising out of health insurance policy changes”, IAReporter, 10.12.2012.
- Power R., “Novenergia v. Kingdom of Spain, the ECT and the ECJ: Where to now for intra – EU ECT claims?”, Kluwer Arbitration Blog, 20.03.2018.
- Reinisch A., “Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations”, Legal issues of economic integration, 2012.
- Scherer M., “The (changing) landscape of investment arbitration in the energy sector after the Achmea judgment”, Investment Claims, 04.06.2018.

- Schwalb S., Weiler M., “German Federal Supreme Court rejects Achmea's complaint that its right to be heard was violated”, Lexology.
- Schwedt K., “Post – Achmea: Vattenfall tribunal maintains jurisdiction over intra – EU Energy Charter Treaty claim against Germany”, Arbitration Links, 13.09.2018.
- Smrkolj M., ‘The Use of the ‘‘Disconnection Clause’’ in International Treaties: What Does It Tell Us about the EC/EU as an Actor in the Sphere of Public International Law?’, SSRN,14.05.2008.
- Snyder, “The effectiveness of European Community law: Institutions, processes, tools and techniques”, 56 Modern Law Review, 1993.
- Söderlund Chr., “The future of the Energy Charter Treaty in the context of the Lisbon Treaty”, Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, JurisNet, LLC 2011.
- Dr. Szilárd Gáspár Szilágyi, “Guest Post: The CJEI strikes again in Achmea Is this the end of investor–state arbitration under intra-EU BITS?” International Economic Law and Policy Blog, 07.03.2018.
- Szyszczak E., “Opinion 1/12: Towards a modern EU approach to investor – state dispute settlement”.
- Tietje C., “The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States.”, Institute of Economic Law Transnational Economic Law Research Center (TELC), School of Law, Martin Luther University Halle- Wittenberg, 2008.
- Tropper J., “Alea iacta est? Post – Achmea investment arbitration in light of recent declarations by EU – member states”, Volkerrechtsblog, 24.01.2019.
- Verbung C., “The dichotomy between European Union Law and International Law: Responses to the Achmea Judgment of the European Court of Justice”, Groningen Journal of International Law, 26.11.2018.

- Wälde T., “International Arbitration in Oil, Gas and Energy”, L.W. Newman and R.D. Hill (eds), Leading Arbitrators’ Guide to International Arbitration (Juris, second edition).
- Weiler M., Schwalb S., “German Federal Supreme Court rejects Achmea's complaint that its right to be heard was violated”, Lexology, 03.04.2019.
- Wilske S. et al, “Further application on intra-EU BIT to Frankfurt Higher Regional Court”, Practical Law, 28.02.2013.

WEBSITES

- https://eur-lex.europa.eu/
- http://europa.eu/
- https://icsid.worldbank.org/
- https://energycharter.org/
- https://uncitral.org/
- https://unctad.org/
- https://investmentpolicyhub.unctad.org/
- www.unilex.info/
- https://www.italaw.com/
- http:// kluwerarbitration.com
- http://www.arbitrationlaw.com
- https://uk.practicallaw.thomsonreuters.com.
- https://www.iareporter.com/
- https://verfassungsblog.de
- https://www.expertguides.com/
- http://europeanlawblog.eu/
- http://www.cms-lawnow.com/
- https://www.lexology.com/
- https://investmentpolicyhub.unctad.org/
- https://worldtradelaw.typepad.com/
- https://borderlex.eu/
- www.europeanpapers.eu/
- https://efilablog.org/
- http://oxia.ouplaw.com/