The Future of the Energy Charter Treaty in a post-Achmea Era

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Abstract—The CJEU's decision in *Achmea* marked the end of intra-EU Bilateral Investment Treaties, due to their incompatibility with the autonomy of the EU legal order. Subsequent questions have surfaced over whether *Achmea* has the effect of prohibiting disputes between EU Member States under the Energy Charter Treaty (ECT), a Multilateral Investment Treaty of great importance in the field of Investor-State Dispute Settlement. This article assesses the strengths of the legal arguments for limiting or expanding the scope of *Achmea*. While arguments on both sides are compelling, *Achmea* should not have the effect of precluding intra-EU disputes under the ECT in the absence of a CJEU ruling. Moreover, going beyond the legal debate, the changing political climate requires us to examine reforms to the ECT that will preserve the autonomy of EU law. It is suggested that inspiration may be drawn from the Comprehensive Economic and Trade Agreement between EU and Canada, which included an Investment Court System that the ECT can potentially follow.

* The London School of Economics. I am grateful to Ms Natalie Teoh and the OUULJ editorial board for their helpful comments on earlier drafts. Any errors remain my own.

Introduction

On 5 May 2020, 23 EU Member States adopted the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (the BIT Termination Agreement).[1] In essence, the effect of the BIT Termination Agreement was to terminate all intra-EU bilateral investment treaties (BITs). This landmark moment was the direct result of the CJEU's judgment in *Slovak Republic v Achmea BV* (*Achmea*),[2] where the Grand Chamber held that intra-EU BITs and its Investor-State Dispute Settlement (ISDS) mechanism are incompatible with autonomy of the EU legal order.[3] In light of these developments, significant concerns have been raised by various stakeholders that the decision in *Achmea* could be applied to multilateral treaties, in particular, the Energy Charter Treaty (ECT) and the ISDS mechanism enshrined under Art 26 of the treaty.[4] This would mean that the ECT's ISDS mechanism for

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[1] The Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1.
[2] Case C-284/16 *Slovak Republic v Achmea BV* [2018] 4 WLR 87.
[3] ibid [57], [59]; A BIT refers to an investment treaty concluded between Country A and Country B which confers certain substantive rights, such as the obligation for countries not to expropriate foreign investments without due compensation, on investors from both countries. An investor from Country A can bring a claim against Country B, should Country B breach its obligations under the BIT, and vice versa. This process is known as Investor-State Dispute Settlement.
[4] Communication from the Commission to the European Parliament and the Council: Protection of Intra-EU Investment, at 3-4, COM (2018) 547 final (July 19, 2018); European Commission, 'Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection' (17 January 2019) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 9 May 2021.

intra-EU disputes will be in conflict with EU law, prompting the EU and its Member States to seek an amendment to the ECT's ISDS mechanism to ensure that it is in line with the EU legal framework.[5]

This article will first examine the reasoning of the CJEU in *Achmea* and how it gave EU Member States the impetus to terminate all intra-EU BITs. The potential implications of this on the future of the ECT will then be explored. It will be concluded that the arguments for the invalidation of the ECT's ISDS mechanism with respect to intra-EU disputes should not be favoured in the absence of a ruling from the CJEU. Lastly, regardless of the legal debate, the political trajectory of the EU and its Member States who wish to reform the ECT due to growing frustration with the current ISDS system must be addressed. As such, it is crucial that Contracting Parties modernise the ECT such that it is capable of simultaneously preserving the ECT's ISDS mechanism and avoiding clashes with the autonomy of EU law by upholding the constitutional structure of the EU.

1. The Decision in Achmea

The *Achmea* judgment arose out of a dispute between Achmea, a Dutch insurance company, and the Slovak Republic, after

[5] Markus Beham and Désirée Prantl, 'Intra-EU Investment Reform: What Options for the Energy Charter Treaty?' (*Kluwer Arbitration Blog*, 7 January 2020) <http://arbitrationblog.kluwerarbitration.com/2020/01/07/intra-eu-investment-reform-what-options-for-the-energy-charter-treaty/> accessed 6 November 2020.

legislative changes by the Slovakian government prohibited Achmea from distributing its profits earned from offering private sickness insurance policies in Slovakia.[6] Achmea thus brought a claim before an arbitral tribunal against the Slovak Republic pursuant to Art 8 of the Dutch-Slovak BIT, which provided for an ISDS mechanism. Despite the Slovak Republic challenging the tribunal's jurisdiction, an award of EUR 22.1 million was eventually rendered in favour of Achmea.

As the seat of arbitration was in Germany, the Slovak Republic subsequently sought to set aside the award before the German Federal Court on the grounds that Art 8 of the BIT was incompatible with Arts 267 and 344 TFEU.[7] Noting that the CJEU had yet to provide an answer for this question, the German Federal Court requested for a preliminary ruling.

The CJEU firstly referred to Art 344 TFEU, under which 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'[8] In other words, according to Art 344 TFEU, Member States agree that the only forums which can interpret or apply EU law are those that are part of the judicial system established by the Treaties. This judicial system, which includes national courts and the CJEU, ensures that the autonomy of the EU legal system is preserved by interpreting EU law in a consistent and uniform manner.[9] As such, an international treaty, such as an intra-EU BIT, cannot have the effect of shifting the allocation of powers fixed by the

[6] *Achmea* (n 2) [7]-[8].
[7] ibid [9]-[12].
[8] Art 344 TFEU.
[9] *Achmea* (n 2) [32]-[36].

Treaties, and allowing other tribunals outside the judicial system of the EU to interpret EU law.

Moreover, the CJEU was keen to emphasise that Member States must cooperate with one another to respect the autonomy of EU law.[10] The importance of autonomy was first examined in detail by the CJEU in the landmark judgment, Opinion 2/13 on the accession of the EU to the European Convention of Human Rights (ECHR).[11] In essence, the autonomy of EU law is best described as a 'body of principles drawn from the specific characteristics arising from the very nature of EU law'.[12] Such qualities of autonomy include EU law being an independent source of law, the primacy of EU law over national laws of the Member States, and its direct application to nationals and Member States themselves.[13] These aforementioned characteristics of EU law contribute to the constitutional structure of the EU in which 'mutually interdependent legal relations' bind the EU and its Member States. It is further observed that the constitutional structure of the EU is upheld and premised on Member States engaging in mutual trust and sincere cooperation to promote a set of common values.[14]

The autonomy of EU law is therefore both a structural and existential principle, contributing to the functioning and the very creation of the EU legal order, governing both the internal

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[10] Art 4(3) TEU.
[11] Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454; Case C-26/62 *Van Gend en Loos* [1963] CMLR 105 and case C-6/64 *Costa v ENEL* [1964] CMLR 425 which lay down the principle of autonomy of the EU legal system.
[12] Niamh Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) Nordic Journal of International Law 9, 19.
[13] *Achmea* (n 2) [32]-[36].
[14] Art 2 TEU; see also Opinion 2/13 (n 11) [168].

and external relations of the EU.[15] For example, in its external conception, the principle was employed by the CJEU to determine that EU fundamental rights standards should be prioritised over the content of fundamental rights from external sources such as the ECHR, allowing it to find that the EU could not accede to the ECHR.[16] It is the manner in which the principle of autonomy regulates such external relationships between the EU and other actors in the international plane that is of relevance to our present inquiry.

In this context, the CJEU in *Achmea* noted that Art 267 TFEU, which provides for the preliminary ruling procedure, is the jewel in the crown of the judicial system[17] as it serves to secure the consistency and autonomy of EU law.[18] Through preliminary rulings, the CJEU is able ensure that EU law is applied uniformly by national courts. Indeed, without the ability of national courts to refer questions to the CJEU, divergences between courts in the Member States as to the interpretation of EU law would be liable to jeopardise the very unity of the EU's legal order, and hence its autonomy.[19]

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[15] Jed Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (2016) EUI MWP 2016/07, 5.

[16] Shuibhne (n 12) 21.

[17] *Achmea* (n 2) [37]; see also Paul Craig, 'The Jurisdiction of Community Courts Reconsidered' (2001) 36 Texas International Law Journal 555, 559.

[18] Marie Stoyanov and Lucia Raimanova, 'The Court of Justice of the European Union finds the arbitration provision in The Netherlands-Slovakia BIT incompatible with EU law' (*Allen & Overy*, 30 March 2018). <https://www.allenovery.com/en-gb/global/news-and-insights/publications/arbitration-provision-in-the-netherlands-slovakia-bit-incompatible-with-eu-law> accessed 7 November 2020.

[19] Case C-314/85 *Foto-Frost* [1988] 3 CMLR 57 [15].

This concern was the very reason why the CJEU found that Art 8 of the Dutch-Slovak BIT was incompatible with EU law. Examining Art 8 closely, the CJEU observed that Art 8(6) of the Dutch-Slovak BIT requires the arbitral tribunal to 'take account in particular of the law in force of the contracting party concerned'. As Basedow describes, since EU law is intertwined with the national law of EU member states, the arbitral tribunal would thus have to interpret EU law if relevant to a given case.[20]

This would be in breach of EU law as the arbitral tribunal, which was ad hoc, is not part of the judicial system of the Netherlands or Slovakia, and therefore cannot be classified as a court or tribunal 'of a Member State' within the meaning of Art 267 TFEU.[21] As such, the arbitral tribunal is unable to make a preliminary reference request to the CJEU in relation to the valid interpretation of EU law, which threatens the autonomy and consistency of EU legal order as explained earlier. Given such a tribunal is outside the judicial system of the EU, it also undermines the principle of sincere cooperation should a tribunal interpret EU law.

Furthermore, whilst the CJEU did not explain its reasoning for this, it held that the existence of such an arbitral tribunal also contravened Art 344 TFEU. One possible rationale is that by submitting a dispute that may potentially involve the interpretation of EU law to an ad hoc arbitral tribunal outside the judicial system of the EU, the allocation of powers fixed by the Treaties is shifted, thereby breaching Art 344 TFEU.

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[20] Robert Basedow, 'The *Achmea* Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration' (2020) 23 Journal of International Economic Law 271.
[21] *Achmea* (n 2) [45]-[46].

In summary, the CJEU decided that Arts 267 and 344 TFEU must be interpreted as precluding ISDS provisions in BITs between EU Member States.[22] Central to the CJEU's reasoning is the idea that intra-EU BITs infringe on the autonomy of the EU legal order, which requires EU law to be interpreted in a uniform and consistent manner.[23]

2. The BIT Termination Agreement and the ECT

The decision in *Achmea* was widely accepted as signalling the end of intra-EU BITs. On 15 January 2019, a majority of the EU Member States released a declaration, expressing their intention to terminate all 190 intra-EU BITs, given that the ISDS arbitration clauses in these treaties are contrary to EU law and therefore inapplicable.[24] This was swiftly followed by the adoption of the BIT Termination Agreement on 5 May 2020,

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[22] ibid [60].

[23] ibid [35].

[24] European Commission, 'Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection' (17 January 2019) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 9 May 2021; see also Nikos Lavranos, 'The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One' (*Kluwer Arbitration Blog*, 1 December 2019) <http://arbitrationblog.kluwerarbitration.com/2019/12/01/the-eu-plurilateral-draft-termination-agreement-for-all-intra-eu-bits-an-end-of-the-post-achmea-saga-and-the-beginning-of-a-new-one/> accessed 7 November 2020.

which formalised the termination of all intra-EU BITs, and deprived any sunset clauses of their legal effects.[25]

Nonetheless, the BIT Termination Agreement stopped short of covering Intra-EU ISDS grounded in the Energy Charter Treaty.[26] In the preamble, it was acknowledged that the agreement does not cover intra-EU proceedings on the basis of Art 26 of the Energy Charter Treaty. It was decided that the matter would be dealt with at a later stage.[27]

3. Implications of Achmea on Intra-EU Disputes Grounded on the ECT

Known as the 'child' of the European Union,[28] the ECT is a multilateral treaty that provides a global legal framework which regulates and promotes all forms of energy cooperation, such as trade, investment, and transit.[29] Currently, the ECT has 57

[25] BIT Termination Agreement (n 1).
[26] Matteo Fermeglia and Alessandra Mistura, 'Killing all birds with one stone: Is this the end of Intra-EU BITs (as we know them)' (*EJIL: Talk!*, 26 May 2020) < https://www.ejiltalk.org/killing-all-birds-with-one-stone-is-this-the-end-of-intra-eu-bits-as-we-know-them/> accessed 7 November 2020.
[27] BIT Termination Agreement (n 1).
[28] Jan Kleinheisterkamp, 'The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European Law Perspective' (2011) LSE Legal Studies Working Paper No 7/2011.
[29] Ernesto Bonafé and Aurore Vanhay, *The role of the Energy Charter Treaty in fostering regional electricity market integration: Lessons learn from the EU and implications for Northeast Asia* (Energy Charter Secretariat, 2015) 22.

Contracting Parties, including a majority of the EU Member States, and the EU itself.[30]

In order to strengthen and safeguard the effectiveness of its substantive provisions, Art 26 of the ECT enables investors of a Contracting Party to bring claims against another Contracting Party for a breach of the latter's obligations under the ECT. Ad hoc tribunals and tribunals established under the International Centre for Settlement of Investment Disputes or the Arbitration Institute of the Stockholm Chamber of Commerce have jurisdiction to hear these claims under Art 26(4)(a) ECT. Similar to intra-EU BITs, Art 26 ECT would therefore also allow for investors from one EU Member State to sue another EU Member State, provided they are all Contracting Parties to the ECT.[31] From this perspective, if the reasoning in *Achmea* is extended to multilateral treaties such as the ECT, intra-EU disputes under the ECT may be incompatible with the autonomy of the EU legal order. It is estimated that cases of intra-EU disputes grounded on Art 26 account for 10% of all known ISDS proceedings worldwide, stressing the importance of this matter in the field of investment-treaty arbitration.[32]

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[30] Signatories/Contracting Parties (Energy Charter Treaty, 18 February 2019) <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories contracting-parties/> accessed 9 November 2020.

[31] Art 26 ECT; see also Thomas W Walde, 'European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects' (1995) 34 International Legal Materials 360, 360.

[32] Ciaran Cross and Vivian Kube, 'Is the arbitration clause of the Energy Charter Treaty compatible with EU law in its application between EU Member States' (2018) The Munich Environmental Institute 1, 10.

Various stakeholders have expressed vastly differing opinions with regards to the implication of *Achmea* for the future of the ECT. While the interpretation of *Achmea* and its relationship with the ECT will change depending on whether one adopts a public international law perspective, or views EU law as a superior legal order,[33] this article adopts the view that the intra-EU disputes should not be exempted from the purview of Art 26 ECT, especially without a decisive ruling from the CJEU.

A. European Commission and Majority of EU Member States: Intra-EU Disputes under Art 26 ECT are Incompatible with EU law

The European Commission (Commission),[34] and a majority of the EU Member States,[35] have declared that similar to *Achmea*, intra-EU arbitration under the ECT is incompatible with the autonomy of EU law. Notably, the two parties take slightly different approaches in coming to the same conclusion, with the EU Member States' approach being the more principled of the two.

For the Commission, the reasoning in *Achmea* applies directly to Art 26 ECT. It must be noted that the Commission's rationale for doing so is vague and requires us to make several inferences. The Commission firstly emphasised the primacy of

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[33] April Lacson, 'What Happens Now? The Future of Intra-EU Investor-State Dispute Settlement under the Energy Charter Treaty' (2019) 51 NYUJ Intl L & Pol 1327, 1340.

[34] Communication from the Commission to the European Parliament and the Council: Protection of Intra-EU Investment, at 3-4, COM (2018) 547 final (July 19, 2018).

[35] European Commission, 'Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection' (n 24).

EU law, thus alluding to notions of the EU as an autonomous legal order.[36] Presumably, just like the arbitral tribunal in *Achmea*, an arbitral tribunal constituted pursuant to Art 26 ECT may be required to interpret EU law. This is reasonable: as Kleinheisterkamp argues, EU law and the ECT overlap notably in relation to the protection and enforcement of investor rights.[37] As such, Art 26 ECT, analogous to Art 8 in the Dutch-Slovak BIT, would open the possibility of investors submitting disputes to a tribunal outside of the EU's judicial system. Here, said tribunal may be called upon to interpret EU law provisions, *without* the capacity to make a preliminary reference to the CJEU. This effectively contravenes Arts 267 and 344 TFEU as discussed earlier, and the incompatibility with the autonomous nature of the EU legal order means that intra-EU disputes under Art 26 ECT should be precluded.

Moreover, the Commission argues that the EU being a Contracting Party to the ECT does not affect the above findings. To them, the participation of the EU in the ECT 'has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States'.[38] There was, however, no further justification for this distinction, making such an assertion questionable. According to Basedow, given that the EU has ratified the ECT as an international agreement, it forms part of EU law. Based on Art 3(5) TEU, the EU has to abide by a 'strict observance' of international law,[39] which suggests that the ECT should at least in principle prevail

[36] Communication from the Commission (n 34).
[37] Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 1 Journal of International Economic Law 15, 99.
[38] Communication from the Commission (n 34) 4.
[39] Art 3(5) TEU.

over EU law where a conflict exists.[40] This argument appears fatal to the Commission's opinion.

Nonetheless, the exact status of international treaties in EU law is not as clear-cut as Basedow contends. Ziegler argues that international law, once directly applicable within the EU legal order, does not typically rank more highly than EU primary law.[41] In other words, from this perspective, the ECT has become part of the EU legal order, and affects both the relations between EU Member States and between the EU and third countries. However, it remains the case that the ECT must be compatible with EU law. On this basis, intra-EU disputes under Art 26 ECT must be precluded in light of *Achmea*. There are thus some grounds for supporting the Commission's view, although it is incorrect in its assertion that the ECT does not affect the relations between EU Member States.

In contrast, the reasoning behind the stance adopted by a majority of the EU Member States corrects the mistake made by the Commission. It accepts that international agreements concluded by the EU, including the ECT, are 'an integral part of the EU legal order, and must therefore be compatible with the Treaties'.[42] Following from this premise, the same reasoning in *Achmea* can be applied: an arbitral tribunal established under Art 26 ECT will be in violation of Arts 267 and 344 TFEU and will

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[40] Basedow (n 20) 275.

[41] Katja Ziegler, 'The Relationship between EU Law and International Law' University of Leicester School of Law Research Paper No 15-04, 11.

[42] European Commission, 'Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection' (n 24), also see Case C-266/16 *Western Sahara* [2018] 3 CMLR 15, [42]-[51] where the CJEU holds that international agreements ratified by the EU form part of the EU legal order, and must be compatible with the Treaties.

consequently be incompatible with the Treaties. A tribunal, which is not part of the judicial system of the EU and is unable to make preliminary references to the CJEU, cannot be allowed to interpret EU law. To do so would be to undermine EU law as an independent, autonomous source of law, infringing on the principle of mutual trust between Member States and ultimately subverting the constitutional structure of the EU.

B. Minority of EU Member States and Arbitral Tribunals: Achmea Has No Implication for Intra-EU Disputes

Yet, for a host of reasons, other stakeholders—including EU Member States, arbitral tribunals, national courts, and academic commentators—remain unconvinced by the Commission and Member States' efforts to carve out intra-EU disputes from the jurisdiction of Art 26 ECT.

For one, a minority of EU Member States, including Finland, Slovenia, and Luxembourg, noted that the *Achmea* judgment made no reference to Art 26 ECT whatsoever.[43] In *Achmea*, the CJEU deliberately distinguished intra-EU BITs from international agreements which were concluded by the EU itself, which is why the three states argued that its ruling can only be

[43] Press Release, European Commission, Declaration of the Representatives of the Government of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union 3 (Jan 16, 2019), <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> accessed 14 May 2021.

applied to other intra-EU BITs similar to that of the Dutch-Slovak BIT.[44]

It is possible the CJEU was simply erring on the side of caution, given that it was not asked by the German Federal Court to determine whether Art 26 ECT was incompatible with EU law. The CJEU did ultimately acknowledge that an international agreement ratified by the EU and providing for the establishment of a court responsible for the interpretation of its provisions must still respect the autonomy of the EU and its legal order.[45] This seems to be in line with the aforementioned notion that international agreements which form part of the EU legal order must still be compatible with EU primary law.[46]

However, the minority group of EU Member States also made an important reference to a number of international arbitration decisions made post-*Achmea* which have held that intra-EU disputes under Art 26 ECT are still applicable, and not contrary to EU law.[47] In particular, the decisions of *Masdar v Spain* (*Masdar*),[48] *Vattenfall AB v Germany*[49] (*Vattenfall*) *and Landesbank Baden-Württemberg v Spain*[50] (*LBBW*) are highly relevant.

Masdar was the first case to decide whether *Achmea* had any bearing on intra-EU disputes based on Art 26 ECT. As discussed above, the tribunal similarly noted that the scope of the

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[44] *Achmea* (n 2) [58].
[45] ibid [57].
[46] Ziegler (n 41).
[47] Press Release, Minority of EU Member States (n 43).
[48] *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain,* ICSID Case No. ARB/14/1, Award.
[49] *Vattenfall AB, et al. v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue.
[50] *Landesbank Baden-Württemberg et al. v Kingdom of Spain*, ICSID Case No. ARB 15/45, Decision on the 'Intra-EU' Jurisdictional Objection.

decision in *Achmea* was limited to intra-EU BITs, and does not apply to multilateral treaties such as the ECT.[51] It drew support from the Opinion of Advocate General Wathelet,[52] who acknowledged that *Achmea* was simply an opportunity for the CJEU to express its views on the question of compatibility between *intra-EU BITs* and their ISDS mechanisms with EU law. The Advocate General differentiated the ECT as a multilateral treaty, in which all Contracting Parties, including the EU, participate on an 'equal footing'. ISDS under Art 26 ECT could operate between EU Member States, and there was no suggestion that it was incompatible with the EU legal order.[53] As such, *Achmea* cannot be arbitrarily extended to multilateral treaties such as the ECT. Furthermore, the question of whether the ECT could be reconciled with EU law was not discussed by the CJEU, which led to the tribunal's conclusion that there is nothing to suggest that the ruling in *Achmea* implies that an EU investor is barred from bringing an investment arbitration proceeding against an EU Member State under Art 26 ECT.

The merits of the tribunal's findings in *Masdar* lies in its well-reasoned analysis of the scope of *Achmea*'s applicability based on a solid, textual interpretation of the CJEU's decision. Nonetheless, it does not directly address the arguments made by the Commission and the majority of EU Member States for extending the rationale and reasoning of the CJEU in *Achmea* to preclude intra-EU BITs pursuant to Art 26 ECT. Perhaps for this reason, *Masdar* was quickly followed by a number of tribunals who sought to expand on the reasons why *Achmea* was of no relevance to intra-EU investor-state arbitration proceedings

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[51] *Masdar* (n 48) [679].
[52] Case C-284/16 *Slovak Republic v Achmea BV* [2018] 4 WLR 87, Opinion of AG Wathelet, [23].
[53] ibid [43].

grounded on Art 26 ECT. In *Vattenfall*, the tribunal produced a detailed 72-page procedural decision examining the complex relationship between EU law and investment treaties as a creature of public international law.[54] Based on the general principle of treaty interpretation in public international law, the tribunal ultimately concluded that it had the jurisdiction to resolve the dispute between Vattenfall, a Swedish energy company (as Claimant), and Germany (as Respondent) over the latter's alleged breaches of its obligations under the ECT. The decision was centred on the argument that EU law, and the judgments of the CJEU, have no effect on an arbitral tribunal's jurisdiction founded solely on Art 26 ECT.

The tribunal first established that its 'competence to decide the dispute is derived from the consent of the Parties to arbitrate pursuant to the ECT'.[55] In the absence of any explicit choice of law clause for the law governing the tribunal's jurisdiction, the starting point for its jurisdictional analysis must therefore be Art 26 ECT itself.[56] Art 26 ECT, like all provisions in international treaties, must be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT).

The question is therefore whether EU law, and the *Achmea* decision, can inform the interpretation of Art 26 ECT through the provisions under the VCLT.[57] This was possible

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[54] Kirstin Schwedt and Hannes Ingwersen, 'Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way' (*Kluwer Arbitration Blog,* 13 December 2018) <http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/> accessed 14 November 2020.

[55] *Vattenfall* (n 49) [124].

[56] ibid, see also Schwedt and Ingwersen (n 54).

[57] The tribunal had rejected an alternative submission from Respondent that EU law and the *Achmea* judgment applied under Art

based on Art 31(3)(c) VCLT, which provides that when interpreting treaties, 'any relevant rules of international law applicable in the relations between the parties' must be taken into account. As such, if EU law can be proven as a source of international law, there may be an argument for the tribunal to consider the *Achmea* judgment in its interpretation of Art 26 ECT, by virtue of Art 31(3)(c) ECT.[58] While the tribunal accepted that EU law is international law 'because it is rooted in international treaties',[59] it nevertheless rejected that EU Treaties and the *Achmea* decision should be relied upon when construing the meaning of Art 26 ECT.[60]

According to the tribunal, Art 31(3)(c) is 'not the starting point of the interpretation exercise under the VCLT'.[61] Instead, the general rule of interpretation is enshrined under Art 31(1) VCLT. This requires the tribunal to interpret Art 26 ECT 'in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose.'[62] Priority is thus given to the text of the ECT itself. However, applying the *Achmea* decision would have the effect of directly contradicting the plain meaning of Art 26 ECT, which is to allow for disputes between an investor of a Contracting Party

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26(6) ECT. Art 26(6) ECT provides that the tribunal shall decide the issues in dispute in accordance with the ECT, and applicable rules of principles of international law. Arguably, if EU law was a part of international law, the *Achmea* judgment may have applied through Art 26(6). However, this was rejected by the tribunal on the basis that 'issues in dispute' only referred to the merits of the disputes and does not relate to the Tribunal's jurisdiction; see *Vattenfall* (n 49) [113]-[122].

[58] *Vattenfall* (n 49) [130]-[135].

[59] *Electrabel SA v Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015; *Vattenfall* (n 49) [146].

[60] *Vattenfall* (n 49) [152].

[61] ibid [153].

[62] Art 31(1) VCLT (emphasis added).

and a Contracting Party to be resolved by way of arbitration. From this perspective, it is illogical to interpret the treaty such as to preclude intra-EU disputes,[63] especially since Art 26 ECT did not explicitly provide for such a carve-out. Indeed, it has been noted by a number of tribunals that the EU should have included a 'disconnection clause' that shields intra-EU relationships from the scope of the Art 26 ECT if that was its intention.[64] The argument is even more persuasive when one undertakes an examination of the *travaux préparatoires*, which reveal that the EU could not have intended for Art 26 ECT to preclude intra-EU BITs.[65] According to Basedow, while the EU initially pressed for a disconnection clause, it subsequently conceded this demand due to hesitation from the other negotiating parties, therefore accepting the risks of Art 26 ECT's intra-EU applicability.[66]

Moreover, the tribunal considered that allowing *Achmea* to inform the interpretation of Art 26 ECT would produce an 'incoherent and anomalous result' as it creates multiple interpretations of the same provision.[67] This is in contrary to the requirement of terms of treaties having a single consistent meaning, in line with the *pacta sunt servanda* principle (Art 26 VCLT). By carving out intra-EU disputes from Art 26 ECT, the meaning and effect of Art 26 ECT will change according to the parties involved in the dispute.[68] A tribunal would have jurisdiction to adjudicate a dispute between an EU Member State and a non-EU Member State but would lack jurisdiction to do so

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[63] *Vattenfall* (n 49) [154].
[64] *Charanne BV & Investments S.A.R.L. v Spain*, SCC Case No. 062/2012, Award [433]-[436]; *Masdar* (n 48) [310]-[314]; *Vattenfall* (n 49) [182]; Basedow (n 20) 275.
[65] Basedow (n 20) 287-291.
[66] ibid.
[67] *Vattenfall* (n 49) [155]-[157].
[68] ibid.

if the dispute is between two EU Member States. Such an interpretation is prejudicial to legal certainty, and should not be endorsed unless explicitly provided for.

Notwithstanding the above arguments, the tribunal also held that Art 16 ECT could provide for a 'simpler and clearer' route to the same conclusion.[69] Art 16 ECT is a conflict of laws rule, which states that prior and subsequent international agreements between Contracting Parties cannot have the effect of derogating from the Dispute Settlement provisions of the ECT, where such provisions are more favourable to the Investor. A clash between Arts 267 and 344 TFEU and Art 26 ECT must thus be decided in favour of the latter, since Art 26 ECT is advantageous to the investor, who is empowered to bring a claim against Contracting Parties according to the investor-friendly provisions of the ECT.[70]

As observed by Schwedt and Ingwersen, the 'carefully crafted' decision in *Vattenfall* may serve as a blueprint for tribunals in similar cases, with a similar line of reasoning being adopted by the tribunal in *LBBW*.[71] The reasoning in *Vattenfall* is robust, and poses a direct challenge to the views held by the Commission and the majority of the EU Member States by outlining how, as a matter of public international law, the interpretation of Art 26 ECT cannot be defeated by the primacy and autonomy of the EU legal order.

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[69] ibid [192].

[70] Mathias Baudena, 'Investor-State Dispute Settlement: Understanding the System's Legitimacy Crisis in Constitutional Terms' (*LSE Law Review Blog*, 18 February 2021) <https://blog.lselawreview.com/2021/02/investor-state-dispute-settlement/> accessed 17 March 2021.

[71] Schwedt and Ingwersen (n 54).

The two opposing arguments and their differences in reasonings boils down to a difference in perspective.[72] The CJEU is an EU institution, and therefore views the EU legal order as an autonomous, superior legal order. Any international agreement must comply with the EU Treaties, which are accorded the status of primary law. It will therefore hesitate to allow for any derogation from Arts 267 and 344 TFEU. Conversely, arbitral tribunals approach the matter from a public international law perspective. The crux of the issue lies in the interpretation of Art 26 ECT and whether it confers jurisdiction on the tribunal. Since Art 26 ECT is a creature of international law, it is interpreted based on principles of international law, which gives the ECT and the TFEU equal weight as international treaties.

In the face of compelling arguments made by both sides, there is no clear-cut answer to the implications of *Achmea* for Art 26 ECT. Nonetheless, it is suggested that the views adopted by the various tribunals and a minority of the Member States are preferred. The Commission's position relies heavily on extending the rationale of *Achmea* to multilateral treaties, but fails to acknowledge that the CJEU made clear that its decision can only be applied to BITs such as the Dutch-Slovak BIT it was asked to examine. Even if a more generous, contextual reading of *Achmea* is applied, the EU law perspective should not be favoured over orthodox public international law. Arbitral tribunals established under the ambit of Art 26 ECT determine their competence to hear claims based on Art 26 itself and in accordance with the principles of interpretation laid down in the VCLT. Consequently, while Art 26 ECT is likely incompatible with the autonomy of the EU legal order since tribunals may be required to interpret provisions of EU law, the outcome of barring intra-

[72] Lacson (n 33) 1340.

EU disputes is equally incompatible with the ordinary meaning of Art 26 ECT, the *travaux préparatoires*, and Art 16 ECT.

4. Reforms and Looking Ahead

In view of the described deadlock and the lack of a decision from the CJEU on this specific issue, intra-EU disputes should arguably not be precluded from Art 26 ECT without a decisive and clear CJEU ruling. Simply ignoring the strong arguments for not precluding them would, as noted, be unconvincing and rather requires careful evaluation and reasoning. It remains to be seen whether the CJEU will have an opportunity to do so in the near future. As recently as 27 May 2020, the Svea Court of Appeal rejected the Kingdom of Spain's request for a preliminary ruling from the CJEU in order to clarify whether Art 26 ECT is applicable between EU Member States.[73] Yet in the current political climate, the desire of the Commission and a majority of the EU Member States to carve out intra-EU disputes from Art 26 ECT cannot be ignored. The EU is growing increasingly frustrated with the field of ISDS, owning to issues surrounding the transparency and accountability of the current ISDS mechanism.[74] This has also been reflected in its efforts at reforming the ISDS system, from including an Investment Court

[73] *Novenergia II—Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No 2015/06, Decision of the Svea Court of Appeal, 27 May 2020.

[74] Cecilia Malmström, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' (*European Commission,* 16 September 2015) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364> accessed 14 November 2020.

System in the Comprehensive Economic and Trade Agreement (CETA) to participating in the UNCITRAL Working Group III's Investor-State Dispute Settlement Reform. There is therefore a need to take the views of the Commission seriously, and examine possible reform options that will respect the autonomy of the EU legal order.

Several commentators have suggested that it is possible to amend the provisions of the ECT to provide for an explicit carve-out of intra-EU disputes from the existing provisions on dispute settlement in ECT.[75] This can be achieved through an *inter se* agreement pursuant to Art 41 VCLT, which allows a select group of Contracting Parties to conclude an agreement to modify the treaty between themselves. Alternatively, the EU may choose to rely on Art 42 ECT to pass an amendment to the ECT once the proposal has received approval from three-fourths of the Contracting Parties.

These options are politically and legally difficult. According to Art 41(b) VCLT, *inter se* agreements must not be incompatible with the 'object and purpose' of the treaty, and the modification cannot be prohibited by the treaty itself. Art 2 ECT provides that the purpose of the ECT is to establish a legal framework to promote long-term cooperation in the energy field. As such, the minority of EU Member States who are against the exclusion of intra-EU BITs may object to the modification on the basis that it deprives their investors of this legal framework to enforce their substantive rights under the ECT. Arguably, Art 16 ECT also becomes an obstacle to the *inter se* agreement, since it specifically bars any derogation from the Dispute Settlement provisions of the ECT, where such provisions are more favourable to the Investor. With regards to the amendment under

[75] Beham and Prantl (n 5); Basedow (n 20).

Art 42 ECT, the high threshold of three-quarters of the Contracting Parties may not be attainable. The EU, Euratom and 22 of its Member States currently form less than half of the total of 57 Contracting Parties.

Yet, there is hope that a satisfactory compromise can be reached through another means. In 2018, the Energy Charter Conference approved a list of topics for the discussion on the modernisation of the Energy Charter Treaty.[76] In response to this, the Council of the European Union published its negotiating directives, stating that the EU will strive to ensure that 'ongoing multilateral reforms of ISDS, such as those within UNCITRAL Working Group III and ICSID, will be applied to the ECT … including [the provision] of a future Multilateral Investment Court'.[77] Reference was also made to the need to bring the ECT provisions on ISDS in line with the 'modern standards of recently concluded agreements by the EU and its Member States', such that it is in line with the EU legal framework.[78] The EU's position was reaffirmed in the Energy Charter Conference's 'Policy Options for the Modernisation of the ECT' on 6 October 2019.[79]

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[76] Energy Charter Secretariat, 'Approved topics for the modernization for the Energy Charter Treaty' (International Energy Charter, 29 November 2018) <https://www.energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/> accessed 15 November 2020.

[77] General Secretariat of the Council, 'Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption' (Council of the European Union, 2 July 2019) < https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf> accessed 15 November 2020.

[78] ibid.

[79] Energy Charter Secretariat, 'Adoption by Correspondence – Policy Options for Modernisation of the ECT' (Energy Charter conference, Brussels, 6 October 2019)

Given that the discussions for reform within UNCITRAL Working Group III are still ongoing and involve significantly more stakeholders, a quicker solution may therefore lie in the introduction of an ECT Investment Court, modelled after a similar framework under CETA, which was recently deemed as compatible with the autonomy of EU law by the CJEU.[80] The ECT Investment Court would be characterised by several features that make it distinct from the current ISDS mechanism under Art 26 ECT. Similar to the CETA Investment Court, the ECT Investment Court would only have the jurisdiction to interpret and apply provisions under the ECT, and cannot determine the legality of a measure, alleged to constitute a breach of the ECT, under the domestic law of a Contracting Party.[81] To the extent that it must consider the domestic law of a Contracting Party, it must only do so as a matter of fact, following the prevailing interpretation given to the domestic law by the Courts.[82] Presumably, this would be akin to the manner in which the English courts deal with foreign law; as a 'matter of fact that must be proved to the satisfaction of the judge by expert evidence'.[83] Such an approach ensures that the autonomy of the EU legal order will not be infringed upon, since the ECT Investment Court will not be required to interpret EU law and its provisions.[84] There is no need for preliminary references, and the

<https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf> accessed 15 November 2020.

[80] Opinion 1/17 of the Court, EU-Canada CET Agreement, EU:C:2019:341.

[81] ibid [120]-[161].

[82] Art 8.31.2 CETA.

[83] *The Kyrgyz Republic v Stans Energy Corporation and Kutisay Mining LLC* [2017] EWHC 2539 (Comm) [18] (Simon Bryan QC).

[84] Opinion 1/17 (n 80) [131].

allocation of powers fixed by the EU treaties would not be affected.

Conclusion

The decision of the CJEU in *Achmea* has had remarkable implications on the field of international investment law. Apart from the termination of intra-EU BITs, questions still remain over its compatibility with intra-EU disputes grounded on Art 26 ECT. Various stakeholders have thus sought to either restrict or expand the effect of *Achmea*, depending on whether they adopt a public international law perspective, or view EU law as a superior legal order. While both lines of arguments are convincing, it is submitted that intra-EU disputes should not be precluded from Art 26 ECT in the absence of a clear ruling from the CJEU. Beyond the legal debates, it is clear that there is a strong desire on the part of the EU and a majority of its Member States to ensure that the ECT is in line with the autonomy of the EU legal order. Such political trajectory cannot be disregarded, and therefore an adequate reform is required in order to preserve the ECT's ISDS mechanism. This article has proposed that a possible solution may come in the form of an ECT Investment Court. Alternatively, it may be prudent for the Energy Charter Conference to adopt a 'wait-and-see' approach in view of the ongoing reform discussions conducted by the UNCITRAL Working Group III, and seek to apply similar reforms to the ECT.