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It Takes Two to Tango: The Compatibility Between ECT Article 26 and EU Law

– In the Light of *Achmea* and *Opinion 1/17*

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Summary

The compatibility of the investor-State dispute settlement (ISDS) mechanism in Article 26 of the Energy Chart Treaty (ECT) with EU law has been a topic of intense discussion within the EU for a number of years. This discussion has gained traction in the light of the Court of Justice of the European Union's (CJEU) judgement in Case C-284/16 *Achmea*, where the Court declared that ISDS mechanism in the Bilateral Investment Treaty (BIT) between the Netherlands and Slovakia was incompatible with EU law. The critics argue that the same reasoning applies to Article 26 ECT. Less than a year after *Achmea*, the CJEU released *Opinion 1/17* regarding the compatibility between the ISDS mechanism of CETA with EU law. In the opinion, the CJEU declared the ISDS mechanism of CETA compatible with EU law, despite its similarities with the ISDS mechanism in *Achmea*.

This thesis examines the CJEU's findings in *Achmea* and *Opinion 1/17*, in order to assess their implications the ECT. It is identified that the judgement in *Achmea* probably entails that intra-EU application of Article 26 ECT is incompatible with the autonomy of EU law. For extra-EU application, however, it is more difficult to assess. Furthermore, while *Opinion 1/17* opens the door to compatibility between EU law and ISDS mechanisms that consider EU law, the considerations are probably not applicable to the ECT.

Additionally, a clash of norms is identified. From an EU perspective, the incompatibility between Article 26 ECT and the autonomy of EU law should lead to the non-applicability of Article 26 ECT in intra-EU disputes. From an ECT and public international law perspective, ECT tribunals can probably validly uphold their jurisdiction and deliver Awards, even in intra-EU disputes. In the end EU law will probably triumph the EU's and the Member States' international obligations under the ECT. It is argued that that this would lead to undesirable consequences both for the respect for international law as well as the respect for the EU as a global actor.

Sammanfattning

Förenligheten mellan ISDS-mekanismen i Artikel 26 i Energistadgefördraget (ECT) och EU rätt har länge varit föremål för diskussion inom EU. Denna diskussion har de senaste åren fått all mer uppmärksamhet, sedan EU-domstolen i mål C-284/16 *Achmea* dömde att ISDS-mekanismen i det bilaterala investeringsavtalet (BIT) mellan Nederländerna och Slovakien var oförenligt med EU rätten. Enligt kritikerna går samma synsätt att applicera på ECT. Mindre än ett år efter domen i *Achmea* släppte EU-domstolen *Opinion 1/17* angående förenligheten mellan ISDS-mekanismen i CETA och EU-rätt. Där kom EU-domstolen fram till slutsatsen att den är förenlig med EU-rätten, trots likheterna med ISDS-mekanismen i *Achmea*.

Denna uppsats undersöker *Achmea* och *Opinion 1/17*, i syfte att bedöma implikationerna för tvistelösning under ECT Artikel 26. Det identifieras att EU-domstolens avgörande i *Achmea* innebär att tvistelösning inom EU (så kallade ”intra-EU disputes”) under ECT troligen är oförenligt med EU-rätten. Avseende tillämpning där investeraren inte är från EU (så kallade extra-EU disputes) är det svårare att bedöma förenligheten. *Opinion 1/17* öppnar visserligen för att tvistlösningsmekanismer som tar EU rätt i beaktning kan vara förenliga med EU-rätten, men detta gäller inte ECT.

Därutöver identifieras en normkonflikt mellan EU-rätt å ena sidan och ECT samt internationell rätt å andra sidan. Från ett EU-perspektiv innebär oförenligheten mellan artikel 26 ECT och EU-rätt att artikel 26 ECT inte ska tillämpas inom EU. Från ett folkrättsligt perspektiv däremot, kan ECT tribunaler upprätthålla sin jurisdiktion och släppa avgöranden, även i tvister inom EU. I slutändan skulle EU-rätten troligen gå före EU:s internationella åtaganden under ECT. Det argumenteras för att detta skulle leda oönskade konsekvenser både för respekten för internationell rätt och för EU som en global aktör.

Preface

I want to express my gratitude to everyone that has provided me with input during this period. This especially includes my supervisor, Xavier Groussot.

> ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity’

Robert Shuman, 1950

Abbreviations

BIT	Bilateral Investment Agreement
CJEU	Court of Justice of the European Union
CETA	EU-Canada Comprehensive Economic and Trade Agreement
ICJ	International Court of Justice
ECT	The Energy Charter Treaty
FTA	Free Trade Agreement
GC	General Court of the European Union
MIT	Multilateral Investment Agreement
PCIJ	Permanent Court of the European Union
TEU	Consolidated version of the Treaty on European Union [2012]
TFEU	Consolidated version of the Treaty on the Functioning of the European Union [2012]

1 Introduction

1.1 Background

The Energy Charter Treaty (ECT) is an international agreement that aims to promote international cooperation in the energy sector. The ECT covers a broad spectrum of issues in the energy sector, including promotion and protection of investments, trade in energy, energy transits, environmental aspects as well as dispute settlement under the Treaty. Ever since it was concluded in the 1990's, it has been polarising instrument. The most polarising aspect is the ECT's dispute settlement mechanism, which allows for investors to bring claims against States before an arbitral tribunal established under the ECT. Some view it as an effective remedy which affords legal certainty and stability in the field of energy investments. Other views it as a hindrance to democratic processes and an instrument which favour corporate interests instead of democratic legitimacy.

Claims by investors against EU Member States have steadily increased since the conclusion of the ECT. Against this background, the relationship between EU law and the ECT has increasingly been under discussion, with the Commission and a number of Member States arguing that the investor-State dispute settlement mechanism in the ECT is incompatible with EU law.[1] This argument has gained traction in the light of the CJEU's judgement in Case C-284/16 *Achmea*, where the Court found that the dispute settlement mechanism in the Bilateral Investment Treaty (BIT) between the Netherlands and Slovakia was incompatible with EU law.[2] According to the critics, the same reasoning apply also to the ECT. In the aftermath of the *Achmea* judgement, 22 Member States signed the 'Declaration of the Member States

[1] See, inter alia, Communication from the Commission to the European Parliament and the Council, COM(2018) 547 final, 19.7.2018. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0547&from=EN> (last visited 21 December 2020).

[2] Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158.

of 15 January 2019 on the legal consequences of the Achmea Judgement and on investment protection'.[3] The declaration *inter alia* stated that if the arbitration clause in the ECT was interpreted as including intra-EU disputes, it 'would be incompatible with the Treaties and thus would have to be disapplied'. Sweden and four other Member States issued a counter-declaration, which did not take any position as to *Achmea*'s relevancy towards the ECT.[4] Meanwhile, Hungary released a separate declaration rejecting *Achmea*'s relevancy for the ECT altogether.[5] On 5 May 2020, most Member States signed an agreement for the termination of all intra-EU BITs.[6] The agreement, however, explicitly excluded the ECT from its scope of application, meaning that the question is still open.[7]

Another recent case that may have implications for the ECT is *Opinion 1/17*, regarding the compatibility between the ISDS mechanism of CETA with EU law.[8] In the opinion, the Court declared the ISDS mechanism of CETA compatible with EU law, despite its similarities the arbitral tribunal in the *Achmea* case.

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[3] 'Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection', signed by France, Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, Croatia, Italy, Cyprus, Latvia, Lithuania, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia and the UK. <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> (last visited 22 December 2020).

[4] 'Declaration of the Representatives of the Governments of the Member States of 16 January on the Enforcement of the Judgements of the Court of Justice in *Achmea* and on Investment Protection in the European Union', signed by Finland, Luxembourg, Malta, Slovenia and Sweden. <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> (last visited 22 December 2020).

[5] 'Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union', signed by Hungary. <https://2015-2019.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf#!DocumentBrowse> (Last visited 22 December 2020).

[6] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJ L 169, 29.5.2020, p. 1–41.

[7] Ibid.

[8] Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part,* EU:C:2019:341.

In addition to the judicial development, a modernisation process of the ECT has been initiated.[9] The Joint Statement from the Energy Charter Conference in Rome 2009 included the notion of modernisation of the ECT, but it took until November 2019 until a modernisation group was established under the so called 'Tirana-Mandate'.[10] The first negotiation round was done in early July 2020.[11] Most likely, the modernisation process will take many years. In the meantime, disputes will continue to arise under the current ECT, meaning that courts and tribunals will be confronted with the question of compatibility.

The question of compatibility also has implications beyond the ECT, such as the relationship between EU law and international law, the division of competences between the EU and the Member States and the EU's possibilities to enter international agreements with dispute resolution mechanisms.

1.2 Aim and research questions

There are two aims with this essay. The first one is to better understand what consequences *Achmea* and *Opinion 1/17* may have on the ECT. The second aim is to explore the interplay between international law and EU law in the light of *Achmea* and *Opinion 1/17*. For these aims, the following research questions will be answered:

- How should the compatibility between Article 26 ECT and the autonomy of EU law be understood in the light of *Achmea* and *Opinion 1/17*?

[9] 'Negotiations on Modernisation of the ECT', 7 November 2019, Official Webpage of the Energy Charter Treaty, <https://www.energycharter.org/media/news/article/energy-charter-conference-gives-green-light-for-negotiations-on-modernisation-of-the-ect/> (last visited 22 December 2020).

[10] Ibid.

[11] ' Public Communication on the First Negotiation Round on the Modernisation of the ECT', 10 July 2020, <https://www.energycharter.org/media/news/article/public-communication-on-the-first-negotiation-round-on-the-modernisation-of-the-ect-publichn/> (last visited 22 December 2020).

- What are the practical consequences for the jurisdiction of ECT tribunals regarding intra-EU disputes, as well as the possibilities to enforce rendered Awards?

1.3 Delimitations

In order to give the reader a good understanding of the topic of this thesis, it is pedagogically necessary explain the basic functioning and historical context of the Energy Charter Treaty. However, this thesis will only explain the necessary parts of that Treaty and does not aim to provide a full picture.[12] The same is true for EU law. The development of the common commercial policy, including the dynamic between the EU and the Member States in the area of investment policy, is important to understand *Achmea* and *Opinion 1/17*. Due to the aim and research questions of this thesis, only the most central aspects to understand *Achmea* and *Opinion 1/17* will be included.[13]

In investment law generally, the definition of an investment is central and often a topic of discussion. That is, however, a separate discussion from this thesis and will not be included more than superficially.

Furthermore, as regards the compatibility of ECT Article 26 with EU law, only the most central arguments will be included. Respondent States and the Commission have, mostly unsuccessfully, argued for a wide range of solutions which cannot all be included here. This *inter alia* includes arguing for an implicit disconnection clause in the ECT[14]; arguing that the requirement of diversity of nationality is not fulfilled.[15]

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[12] For a full overview of the ECT, see Hober, Kaj, *The Energy Charter Treaty – A commentary*, Oxford University Press: 2020.

[13] For a more comprehensive overview of the development of the common commercial policy, see *inter alia*, Eeckhout, Piet, *EU External Relations Law*, 2nd ed, Oxford University Press: 2011.

[14] On this topic, see Basendow, Jürgen, Basendow, Jürgen, 'The *Achmea* Judgement and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration', *Journal of International Economic Law,* Volume 23 Issue 1 (2020), pages 271–292.

[15] On this topic, see Hober, *The Energy Charter Treaty – A commentary,* p. 417–420.

1.4 Methods and material

1.4.1 Methodological considerations

a. General methodological considerations

The starting point for this thesis is legal dogmatism, meaning that the state-of-play of the law will be described and systematised using relevant sources of law. EU law, public international law and the domestic law of Member States will be treated with consideration to their respective methods, legal hierarchies and sources of law.

b. Considerations with respect to international law

International law is the body of law binding on States in their relations with one another.[16] It is what determines their mutual rights and obligations. The doctrine on the sources of international law is codified in Article 38(1) of the Statute of the ICJ.[17] It mentions:

(1) International conventions, whether general or particular, establishing rules expressively recognised mu the contracting states
(2) International custom, as evidence of a general practise accepted as law,
(3) General principles of law recognized by civilised nations.
(4) Subsidiary means, including judicial decisions and teachings from scholars.

The word 'treaty' should be understood broadly. It can include everything from protocols and understandings to charters and declarations. Treaties are the major instrument of international cooperation.[18]

Regarding international customs, it should be pointed out that the content of an international custom is far from always known. To find out whether something is an international custom, one can *inter alia* look at judicial

[16] Orakhelashvili, Alexander, *Akehurt's Modern Introduction to International Law*, 8th ed, Routledge: 2019, p.1.
[17] Orakhelashvili, *Akehurt's Modern Introduction to International Law*, p. 31.
[18] Orakhelashvili, *Akehurt's Modern Introduction to International Law*, p. 32.

decisions from courts, multilateral treaties, and teachings from scholars. The concept of an international custom features two elements: one objective element of a 'general practise' and one subjective element of being 'accepted as law' (*'opinion juris*').[19]

Regarding general principles, it is well established that it includes *inter alia* the principles of *pacta sunt servanda, res judicata*, the right to be heard, *fraus omnia* and others.[20]

The subsidiary means are different from the above-mentioned sources of law in the sense that they do not create the rules of law, it is only used to provide evidence or describe the process of the creation of those laws.[21]

c. Considerations with respect to EU law

With respect to EU law, one should keep in mind that the EU, unlike other international treaties, has created a legal order with its own institutions and own nature of law.[22] Legal acts of the EU can be divided into three categories: (1) EU primary law, (2) EU secondary law and (3) non-binding norms. Under primary law falls the TFEU, the TEU, the Charter and the general principles of EU law.[23] Secondary law includes Regulations, Directives and Decisions.[24] Non-binding norms *inter alia* includes recommendations and announcements.[25]

Furthermore, one should note that the CJEU is considered to have exclusive jurisdiction over the *definitive* interpretation of EU law.[26] The main methods

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[19] Orakhelashvili, *Akehurt's Modern Introduction to International Law*, p.31–45.

[20]Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: 2006 (reprint); Hobér, *The Energy Charter Treaty – A commentary,* s. 453.

[21] Orakhelashvili, Alexander, *Akehurt's Modern Introduction to International*, p.31.

[22] See *inter alia*: Case C-26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, para 12; Case C-6/64 *Costa v. E.N.E.L* EU:C:1964:66, para 593; Opinion 2/13 *Accession of the European Union to ECHR* EU:C:2014:2454, para 157.

[23] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012], OJ C 326, 26.10.2012, p. 47–390, Art. 1(2); Consolidated version of the Treaty on European Union (TEU) [2012], OJ C 326, 26.10.2012, p. 13–390, Art 6.

[24] TFEU, Art. 288.

[25] TFEU, Art. 288.

[26] TEU, Article 19; Opinion 2/13, para 246.

of interpretation used by the CJEU are grammatical, systematic and purposive.[27]

Moreover, it should be mentioned that preliminary rulings from the CJEU are of great importance to EU law. It is how *Achmea* and many other significant cases of EU law reached the CJEU. The system of preliminary rulings allows national courts to refer questions of interpretation of EU law to the CJEU. There are three criteria for the CJEU to give such rulings: (1) the question must be raised before a Court or Tribunal of a Member State (2) the question must concern interpretation of EU law and (3) a ruling from the CJEU must be necessary for the national Court to rule on the issue.[28] Rulings from the CJEU are binding on all Member States.[29]

In the context of EU accession to or establishment of international agreements, Opinions from the CJEU are of great significance. Member States, the European Parliament, the Council or the Commission may obtain such an opinion on the compatibility of the agreement with the Treaties. Should the CJEU consider that the envisaged international agreement is not compatible, the agreement cannot enter into force unless amended or if the Treaties are changed.[30]

Regarding the relationship between EU law and international law, the Treaties stipulate that the EU shall contribute to the strict observance and development of international law.[31]

1.4.2 Material

The choice of material includes mainly includes court judgements, articles from legal scholars and legal literature.

Regarding works from scholars, awareness and carefulness should be upheld. To the extent possible, I have always consulted several sources

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[27] Rösler, Hannes in: Basedow, Jürgen. Zimmermann, Reinhard (eds.). *The Max Planck Encyclopedia of European Private Law* (pp. 979–892), Oxford University Press: 2012, p. 979.

[28] TFEU, Article 267.

[29] This is considered to be enshrined in TEU Article 19.

[30] TFEU, Article 218(11).

[31] TEU, Article 3(5).

regarding the same issue and tried to give a full picture of the different views among scholars. Due to the practical nature of investment arbitration, many of the scholars also appear before investment tribunals as representatives of one of the parties. Their views are treated with extra caution.

Several judgements from different investment tribunals are included. It should be emphasised that these are *ad hoc* cases that do not create binding precedents.[32] Therefore, awards sometimes go in different directions and one should be careful to drawing conclusions from single cases. It is however academically interesting to examine them. Furthermore, as shown by *Fauchald's* empirical research of ICSID tribunals, such investment tribunals often consider earlier awards and have a tendency of developing a homogenous methodology, despite their *ad hoc* nature.[33] Therefore, earlier awards can serve as an indication of how future tribunals will deal with similar issues.

Moreover, this thesis features declarations and resolutions from the United Nations General Assembly. These are not legally binding but provides a good indication of what the state that voted for them considered to be international law at the time. However, in the case of the 'Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States', the circumstances surrounding its adoption show that there was no consensus as to international law at the time actually was.[34]

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[32] Hobér, *The Energy Charter Treaty – A Commentary*, p. 39.

[33] Fauchald, Ole Kristian, 'The Legal Reasoning od ICSID Tribunals – An Empirical Analysis', *The European Journal of International Law* Volume 18 Issue 2 (2008), pages 301–364.

[34] Roe, Thomas and Happold, Mathew, *Settlement of Investment Disputes under the Energy Charter Treaty,* Cambridge: 2011, p. 3

2 Investment treaty arbitration and the ECT

2.1 Introduction to BITs, MITs and the ECT

Investment treaties seek to provide agreed rules concerning a State's conduct against foreign investors which invest in the territory of the State and a neutral forum for solving disputes between that investor and the State. The aim is to facilitate and promote investments, thus creating economic development.

The customary protection of private investors under international law has historically been weak, both with regard to the protection and the possibilities to enforce the protection. To begin with, the traditional view is that only States have a legal personality and the capacity to bring claims to assert their rights.[35] Even if States were under an obligation to treat investors to an 'international minimum standard', that obligation could only be enforced by the investor's home State, not the investor himself. If a State brought action on behalf of an investor, the view was that State was asserting its own rights, not the investor's. As the Permanent Court of International Justice held in the *Mavrommatis Palestine Concessions case* from 1924:

> [b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.[36]

Furthermore, there was no consensus as to what the 'international minimum standard' actually required. In 1974, the United Nations General Assembly adopted the 'Declaration on the Establishment of a New Economic Order and

[35] Roe and Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*, p. 1.

[36] Mavrommatis Palestine Concessions case (Greece v. United Kingdom), 1924 P.C.I.J. (ser. B). No. 3 (Aug. 30), para 12.

the Charter of Economic Rights and Duties of States' (the Declaration)[37]. Among other things, the Declaration laid down that each state had the 'full permanent sovereignty […] over its natural resources and all economic activities […] including the right to nationalization or transfer of ownership to nationals'. In the event of nationalisation or transfer of ownership to its nationals, the Declaration only provided that 'appropriate compensation' needed to be paid, with the amount being determined by the national courts of the expropriating state under its own national law. The Declaration is not legally binding. It does, however, give a good indication of what the states voting for it considered to be international law at the time, although the circumstances surrounding its adoption shows that there was no international consensus on the issue.[38] What is clear is that the protection of foreign investors was weak and difficult to enforce.

However, even at the time of the New Economic Order Declaration, international legal techniques had been developed to achieve protection of foreign investors and investments. This was primarily done through Bilateral Investment Treaties (BITs), with the first one being concluded in 1959 between Germany and Pakistan. All significant BITs contain ISDS mechanisms, which enables investors to directly bring a claim to international arbitration for compensation against the host state for alleged violation of the rights granted to the investor in the BIT. The elevation of the dispute to international arbitration has the effect of de-politicising it, by taking it outside the jurisdiction of the host state. This way, the political and judicial risks associated with investing in foreign jurisdictions are, to some extent, remedied.

In the 1980's several attempts to conclude Multilateral Investment Treaties (MITs) were made, with the more notable examples being the North America

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[37] The Declaration of the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States, GA res. 3201 (S-VI), 1 May 1974 and GA res. 3281 (XXIX), 12 December 1974.

[38] Roe and Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*, p. 3.

Free Trade Agreement (NAFTA) and the (failed) OECD efforts to agree on a multilateral investment agreement.[39] The ECT was also the result of one such initiative, and much of the ECT is a result of the political developments during the 1980's and 1990's. Most MITs, including the ECT, includes similar ISDS mechanisms as BITs.

Of all MIT's in force today, the ECT is the most wide-ranging and most widely ratified, with 54 states and regional organisations having acceded it.[40] The ECT is to a large extent a product of its time. It was negotiated around the time of the fall of the eastern bloc and the liberalisations of the eastern economies after the Cold War. Against the background of the massive political developments of this time, it seemed obvious that both the East and the West would benefit from an international agreement in the energy sector.[41] The Contracting States span from all over the European continent to Asia and the Pacific. It also represent states from vastly different political and economic systems. All signatories except for Australia Russia, Belarus, Norway and Russia have ratified the Treaty.[42] The ECT covers a wide range of issues, including promotion and protection of investments, energy transits, energy trade, environmental aspects as well as the settlement of disputes under the Treaty. In the following sections, the focus will be primarily on the investment chapters of the ECT.

2.2 Protection of investments under the ECT

The substantive protection of investments afforded to investors under the ECT are laid down in Article 10(1). It provides:

> (1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for

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[39] Roe and Happold *Settlement of Investment Disputes under the Energy Charter Treaty*, p. 6.

[40] Data from 2019. See the official webpage of the Energy Charter Treaty: <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/> (Last visited 19 December 2020).

[41] Hobér, *The Energy Charter Treaty – A Commentary*, p. 3–5.

[42] In July 2009, Russia notified that it was withdrawing from the ECT and will thus not continue the ratification process.

> Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[43]

2.3 Relation to other international agreements

Article 16 ECT addresses the situation when the ECT overlaps with other international agreements, or more specifically: when two or more Contracting Parties have entered into a prior or subsequent agreement whose terms are overlapping with the subject matter of the investment protection (part III) or dispute settlement (Part V) provisions of the ECT.[44] In such a case, Article 16 has the effect that any provision that is more favourable for the investor will applied. It provides that:

> (1) 'nothing in Part III or B of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,
>
> Where any such provision is more favourable to the Investor or Investment.[45]

According to *Hobér*, the wording indicates that there is no need to determine whether there is a conflict between two agreements, it is sufficient to determine which agreement is more favourable to the investor or investment.[46]

It should also be noted that the ECT does not have a disconnection clause, i.e. a clause that establishes a hierarchy between the ECT and other international agreements. This was discussed during the negotiations but

[43] ECT, Article 10(1).

[44] ECT, Article 16.

[45] ECT, Article 16.

[46] Hobér, *The Energy Charter Treaty – A Commentary*, p. 319.

subsequently rejected.[47] The force of Article 16 is further emphasised by the fact that no reservations can be done to the ECT.[48]

2.4 Dispute settlement under the ECT

The investor state dispute settlement mechanism in the ECT is, in a fairly detailed fashion, laid down in Article 26. It provides that:

> **(1)** Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
> **(2)** If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article.
> **(3)** (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
> (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).
> **(4)** In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
> (a) (i)The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
> (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the

[47] Draft Ministerial Declaration to the Energy Charter Treaty, version 2–7 (version 7).
[48] ECT, Article 46.

Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or
(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of
Commerce.
(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and
(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.
(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.
(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose
of article 1(6) of the Additional Facility Rules be treated as a "national of another State".
(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a subnational government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.[49]

The foundation of Article 26 is found in section (3), where each Contracting Party gives an unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions laid down in the Article.

[49] ECT, Article 26.

Section (1) and (2) stipulates that parties to an investment dispute must first attempt to solve it amicably. If the parties fail to agree on an amicable solution and three months has elapsed, section (2) offers several alternative methods for an investor to bring a claim against a host State. This includes the national courts or administrative tribunals of the host State to the dispute; other applicable, previously agreed, dispute settlement mechanisms; and international arbitration under the ECT. International arbitration is the most important one and favoured by investors.[50] Section (4) (a)–(c) offers the investor the choice between several sets of arbitration rules:

a. (i) the international Centre for Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) or (ii) the ICSID Additional Facility Rules, if the investor's home state or host State, but not both, are parties to the ICSID Convention.
b. A sole arbitrator or ad hoc arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
c. Arbitration under the rules of the Stockholm Chamber of Commerce (SCC).

When it concerns applicable law on the merits, Article 26(6) of the ECT provides that an arbitral tribunal 'shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'. The sets of arbitration rules referred to in Article 26 (the ICSID convention; ICSID Additional Facility Rules; UNCITRAL; and SCC) all stipulate that the tribunal shall apply the law and/or the rules agreed by the parties.[51] Thus, when establishing an arbitral tribunal under the ECT, the parties are deemed to have agreed on applying the ECT and applicable rules and principles of international law as the applicable law in the dispute.

Deciding the applicable law for issues regarding jurisdiction is more complicated. Article 26(6) of the ECT refers only to than 'an arbitral tribunal

[50] Hobér, *The Energy Charter Treaty – A Commentary*, p. 399.
[51] ICSID Convention, Article 4(1); ICSID Additional Facility Rules, Article 53(1); UNCITRAL Arbitration Rules, Article 33(1); SCC Arbitration Rules, Article 27(1).

shall decide the issues in dispute'. From Article 26(1), the issues in dispute are defined as 'disputes between a Contracting Party and an Investor […] which concern an alleged breach of an obligation of [the Contracting State] under part III'. Part III of the ECT lays down the substantial obligations for protection and treatment of investments. For these reasons, the dominant view is that the 'issues in dispute' under Article 26(1) does not include jurisdictional issues, meaning that Article 26(6) is not applicable for issues related to the jurisdiction of the tribunal.[52]

2.5 Interpreting the ECT

2.5.1 Interpretation under the Vienna Convention

a. Starting points

The starting point when interpreting the ECT is the Vienna Convention on the Law of Treaties (the Vienna Convention)[53]. The ECT meets the definition of a Treaty under the Vienna Convention in the sense that it is an agreement concluded between States in written form which is governed by international law.[54] The Vienna Convention is widely considered to reflect customary international law, meaning that although not all ECT States has codified the Vienna Convention, its provisions apply as a matter of customary international law.[55]

By being a Treaty under international law, the ECT must be interpreted in accordance with the Vienna Convention's rules of Treaty Interpretation in Articles 31 and 32. Article 31(1) provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms

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[52] For a similar argumentation, see *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 Aug 2018, para 113–122; Hobér, *The Energy Charter Treaty – A commentary*, p. 450;

[53] Vienna Convention on the Law of Treaties (with annex) of 23 May 1969 (The Vienna Convention) [1980]. United Nations, Treaty Series, vol. 1155, p. 331.

[54] The Vienna Convention, Article 1(a).

[55] See *inter alia*: Hobér, *The Energy Charter Treaty – A Commentary*, p. 26; Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, 2nd ed, Cambridge University Press: 1984, p. 153.

of the treaty in their context and in the light of its object and purpose'. There are four criteria given:

(1) good faith;

(2) ordinary meaning;

(3) context and

(d) purpose.

No hierarchy is indicated, but as stated by the ICJ in the *Libya v Chad* dispute: '[i]nterpretation must be based above all on upon the text of the Treaty'[56]. This statement reflects the nowadays widely accepted view that the treaty text, interpreted through its ordinary meaning, must be presumed to be the authentic expression of the intentions of the parties.[57] The ICJ, as well as other international courts, privileges a textual interpretation and has accorded little space for the intention of the parties in its previous cases.[58]

Article 31(2) and (3) lays down additional provisions related to the interpretation of the context. Article 31(2) relates to the 'internal context', and stipulates that the context of a treaty does not include only its text, preambles and annexes, but also any agreement made between all the parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the treaty's conclusion.[59] Article 31(3) relates to the 'external context', and provides that account shall also be taken to (a) any subsequent agreement between the parties regarding the interpretation or application of the treaty; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties

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[56] *Territorial Dispute* (Libya v Chad), ICJ Reports (1194), p 22, para 41.

[57] See, inter alia, Reuter, Paul, *Introduction to the Laws of Treaties*, Routledge: 2011 (reprint), p. 96–97; Jennings and Watts (eds), *Oppenheim's International Law, 9th ed,* Oxford University Press: 1992, p. 26; Weeramantry, Romesh J, *Treaty Interpretation in Investment Arbitration*, Oxford University Press: 2012, p. 42–43.

[58] See, *inter alia*: ICJ, *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras), Judgement of 11 September 1992, I.C.J. Reports 1992, p. 584, para 376; ICJ, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgement of 14 June 1993, I.C.J. Reports 1993, p. 38, para 22–28; Corten, Olivier and Klein, Pierre (eds), *The Vienna Convention on the Law of Treaties – A Commentary* Vol 1. Oxford University Press: 2012, p. 828.

[59] Vienna Convention, Article 31(2).

regarding its interpretation and (c) any relevant rules of international law applicable between the parties.[60]

Although the Vienna Convention gives priority to a textual interpretation, Article 31(4) opens up for giving a special meaning to the terms of the treaty, provided that it is established that the parties so intended.[61]

Article 32 of the Vienna Convention lays down supplementary means of interpretation. It provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.[62]

Article 32 only applies when the result of the interpretation according to Article 31 leads to a result which is ambiguous, obscure, manifestly absurd or unreasonable. Considering the strong use of words, it is clear that the bar for applicability is set high.

a. Relation to between Article 26(6) ECT and Article 31(3)(c) of the Vienna Convention

Article 26(6) of the ECT provides that a tribunal established under the ECT shall decide the issues in dispute 'in accordance with this Treaty and applicable rules and principles of international law'. From the outset, the latter part is similar to Article 31(3)(c) in the Vienna Convention, providing that account shall be taken to any relevant rules of international law applicable between the parties. As *Hobér* points out, there is however a significant difference between these two provisions: While Article 26(6) of the ECT deals with the *application* of international law, Article 31(3)(c) of the Vienna Convention deals with the *interpretation* of international law.[63] The practical consequence is that one should assess the applicability of international law

[60] Vienna Convention, Article 31(3).
[61] Vienna Convention, Article 31(4).
[62] Vienna Convention, Article 32.
[63] Hobér, *The Energy Charter Treaty – A Commentary*, p. 451.

under Article 26(6) before, if necessary, interpreting it under Article 31(3)(c) of the Vienna Convention.

To decide whether a specific provision of international law is *applicable* in a dispute under the ECT, it will depend on the facts and the circumstances in the case, together with the legal arguments presented by the parties. The parties in international disputes enjoy autonomy with respect to the rules and principles to be applied in the dispute, except for *jus cogens* norms.[64] Another aspect is whether previous judgements under the ECT is binding under the doctrine of *stare decisis*. From a general international law point of view, the answer is clear. Precedents are not binding under international law.[65] Furthermore, there is nothing in the ECT which suggest that previous awards should be considered. Hence, while arbitral tribunals sometimes refer to or discuss previous awards, they are not 'applicable' or binding.

b. Languages issues

Another difficulty associated with interpreting the ECT is language. Article 50 of the ECT provides that the English, French, German, Italian, Russian and Spanish texts are equally authentic.

Article 33 of the Vienna Convention deals with the issue of interpretation of treaties with more than one authentic language. It provides that that the terms of the treaty are presumed to have the same meaning in each authentic text. Should there be a discrepancy, which the application of articles 31 and 32 fails to remove, Article 33(4) provides that '[…] the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

[64] Hobér, *The Energy Charter Treaty – A Commentary*, p. 454.
[65] Hobér, *The Energy Charter Treaty – A Commentary*, p. 39.

2.5.2 Relation to the domestic law of Contracting States

It is a well-established rule that a State cannot invoke its internal law as justification for failure to comply with an international obligation.[66] This does, however, not entail that the internal law of States is irrelevant in the context of international law. In fact, the internal law of a State is often necessary to take into account for resolving a dispute. But the general accepted view is that the internal law is only taken into account as a matter of fact.[67]

2.6 Enforceability of Awards under the ECT

A final question that should be considered is the enforceability of Awards under the ECT. The different sets of arbitration rules afforded in Article 26 of the ECT (ICSID convention; ICSID Additional Facility Rules; UNCITRAL; and SCC) each contain differences relating to enforceability.

As regards ICSID arbitration under the ICSID Convention, the following can be said. Awards under the ICSID are final, binding and directly enforceable.[68] Also, they cannot be challenged before a national court.[69] If a party fails to comply with the Award, the other party can seek enforcement in any State which is a party to the ICSID Convention, as though it were a final judgement of the first State's courts.[70]

Regarding arbitration under the ICSID Additional Facility Rules, the ICSID Convention does not apply.[71] This inter alia entails that arbitral Awards can be tried by a competent national court, and that enforcement will be based on the 1958 New York Convention.[72]

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[66] See the Vienna Convention, Article 27; The ILC Articles On Responsibility of States for Internationally Wrongful Acts, Article 32.
[67] Hobér, *The Energy Charter Treaty – A Commentary*, p. 407; Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration*: Iustus: 2001, p. 377.
[68] The ICSID Convention, Artickle 53(1).
[69] The ICSID Convention, Article 52.
[70] The ICSID Convention, Article 54(1).
[71] The ICSID Additional Facility Rules, Article 3.
[72] The ICSID Additional Facility Rules, Article 52(4) and Article 19.

Arbitration under the UNCITRAL or SCC rules are more similar to traditional commercial arbitration. This inter alia entails that the seat of arbitration will determine which court will hear challenges of awards, and awards are enforceable under the 1958 New York Convention.[73]

[73] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention) [1959]. United Nations Treaty Series, vol. 330, p. 3, Articles 1–3

3 Investment Treaty Arbitration and EU law

3.1 Introduction

To understand the relationship between international investment law in general and EU law, it is prudent to first distinguish it from the field of international trade.

Since the beginning of the EU, the Member States has conferred considerable competence to the EU in the field of trade, both intra-EU and in the EU's external relations. Investments, on the other hand, has historically been considered to fall within the competence of the Member States.[74] Hence, while the Union has entered several international agreements in the field of trade, investment agreements has largely been concluded bilaterally by the Member States.[75] However, the international development has been towards increasingly regulating the regimes of trade and investments in the same instruments. In the EU, that development has mainly taken place under the common commercial policy.[76] One needs to keep in mind that the Netherlands – Slovakia BIT in dispute in the first case below, *Achmea,* represents the 'old' solution, where Member States bilaterally concluded investment agreements. The CETA, conversely, represents the 'new' solution where the EU concludes such agreements. This is important to bear in mind when analysing *Achmea* and *Opinion 1/17*.

Furthermore, it should be kept in mind that in the case of CETA and other EU 'new generation' free trade agreements with investment chapters, they have been concluded as mixed agreements. The reason is that the scope of the

[74] Chaisse, Julien, 'Promises and pitfalls of the European Union Policy on Foreign Investment – How will the new EU Competence on FDI Affect the Emerging World Regime', *Journal of International Economic Law,* Volume 15 Issue 1 (2012), pages 51–84, p. 56.
[75] Eeckhout, *EU External Relations Law*, p. 63.
[76] See TFEU Article 207 and 3(1)(e).

common commercial policy is not considered to cover all aspect of the investment chapters, including the dispute settlement mechanisms.[77]

3.2 Case C-284/16 *Achmea*

3.2.1 Background

On March 6, 2018, the CJEU delivered its judgement in the *Achmea* case. The judgement concerned an underlying investment dispute between the Dutch insurance company *Achmea BV* and the Slovak Republic, which was brought before an *ad hoc* tribunal under the Netherlands–Slovakia BIT (NE-SL BIT) from 1991.

The background of that dispute dates back to 2006, when Slovakia reversed the liberalisation of its health insurance market and prohibited the distribution of profits generated in Slovakia. Achmea had offered health insurances on the Slovak market since 2004 and was due to the decision hindered from redistributing their profits. In 2008, Achmea instituted arbitration proceedings against Slovakia pursuant to the NE-SL BIT, arguing that the prohibition had breached standards of treatment in the BIT and caused financial damages to the company. An *ad hoc* arbitral tribunal was established, sitting under the UNCITRAL procedural rules with the legal seat of the arbitration being Germany. In 2012, the arbitral tribunal found that Slovakia had breached the BIT and ordered Slovakia to pay compensation to Achmea of approximately 22.1 million EUR.

Slovakia challenged the Award before the Higher Regional Court of Frankfurt (Oberlandesgericht Frankfurt), arguing that the arbitral tribunal lacked jurisdiction to hear the claim due to incompatibility with EU law, specifically Articles 18, 267 and 344 TFEU.[78] The Frankfurt Oberlandes-

[77] See Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* EU:C:2017:376.

[78] Article 18 provides that discrimination on the grounds of nationality shall be prohibited; Article 267 lays down the mechanism of preliminary rulings; and Article 344 prohibits Member States from solving disputes related to the interpretation of the Treaties in any other method than those provided for in the Treaties.

gericht rejected the arguments from Slovakia and upheld the Award. The Case was then appealed to the German Supreme Court (Bundesgerichtshof), which referred the question of compatibility to the CJEU for a preliminary ruling according to Article 267 TFEU. In the requires for a preliminary ruling, the Court asked:

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

If Question 1 is to be answered in the negative:

(2) Does Article 267 TFEU preclude the application of such a provision under the circumstances described in Question 1?

If Questions 1 and 2 are to be answered in the negative:

(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?[79]

3.2.2 Advocate General Wathelet's Opinion

In his Opinion[80], Advocate General Wathelet arrived at the conclusion that neither intra-EU BITs nor the ISDS clauses contained therein were in breach of EU law. Wathelet started by observing that the fear expressed by the Commission's and certain Member States' of a systematic risk created by intra-EU BITs with respect to the uniformity and the effectiveness of EU law is greatly exaggerated. This since arbitral tribunals very rarely are required to review the validity of acts of the EU or the compatibility of the acts of the Member States with EU law.[81] He then went on to address the questions asked by Belgium, but in a reversed order.

a. The prohibition of discrimination

[79] *Achmea*, para 23.

[80] Opinion of Advocate General Wathelet, Case C-284:16 *Slowakische Republik v Achmea BV* EU:C:2017:699.

[81] AG Wathelet in *Achmea*, para. 44–45.

AG Wathelet started by observing there is a difference in treatment for the EU Member States not benefitting from an ISDS mechanism under a BIT with Slovakia. However, he found that there is no comparable or similar situation. With reference to the *D v. Netherlands*[82] case concerning a double taxation avoidance treaty, he found that the reciprocal rights and obligations created by a BIT is a consequence inherent of the nature of such agreements.[83] The scope of BITs is limited to the natural or legal persons referred to in it, meaning that non-Dutch investors is not in the same situation as Dutch investors regarding investments in Slovakia.[84] Hence, he found no prohibited discrimination under EU law.

b. Compatibility with Article 267 TFEU and the autonomy of EU law

In this part, Wathelet started by assessing whether the BIT was compatible with the preliminary ruling mechanism and the autonomy of EU law. Wathelet considered that an arbitral tribunal established under a BIT between two Member States constitutes a 'court or tribunal of a Member State' under Article 267 TFEU, meaning that it is permitted to request preliminary rulings from the CJEU.

c. Compatibility with Article 344 and the autonomy of EU law

Lastly, Wathelet addressed the compatibility between the NE-SL BIT and the exclusive jurisdiction of the CJEU of the definitive interpretation of EU law, enshrined in Article 344 TFEU. He observed that Article 344 only covers disputes between Member States, while disputes under the NE-SL BIT are between an individual and a Member State. Thus, he considered that disputes under the NE-SL BIT does not even come under Article 344 TFEU. Furthermore, the NE-SL BIT mentions only that arbitral tribunals shall take account of *inter alia* the laws of the Contracting State. However, since the EU is not a party to the BIT, it will not form part of EU law. Also, while EU law

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[82] Case 376/03 *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* EU:C:2005:424.
[83] *Achmea*, para 59–83.
[84] *Achmea*, para 75.

sometimes may be applicable in disputes under the BIT, Wathelet argued that this does not mean that those disputes concern the interpretation and application of the EU Treaties under Article 344 TFEU.[85] For this, he gave two reasons. First that the jurisdiction of the arbitral tribunal is confined to ruling on breaches of the BIT, it does not have jurisdiction to rule on alleged breaches of EU law as such. In the awards at hand, EU law had no impact on the substance, meaning that the awards could not have any impact on questions of EU law in a manner forbidden by Article 344 TFEU. The second reason is that the scope of the BIT is not the same as those of the EU treaties. The BIT at issue 'establish rights and obligations which neither reproduce nor contradict the guarantees of the protection of cross-border investments afforded by EU law'[86] The scope of the BIT is wider, some provisions of the BIT does not have an equivalent in EU law, others overlap without achieving results that are incompatible with EU law.[87]

For these reasons, Wathelet arrived at the Articles 18, 267 and 344 TFEU does not preclude the application of an ISDS mechanism such as the one in the NE-SL BIT.

3.2.3 Judgement by the Court

In its judgement delivered on 6 March 2018, the CJEU drastically departed from Wathelet's opinion by ruling that Articles 267 and 344 precludes ISDS mechanisms in intra-EU situations.

The Court addressed the first two questions together, under the umbrella of autonomy of EU law. [88] It began by recalling that the principle of autonomy is enshrined particularly in Article 344 TFEU, which prohibits Member States from submitting a dispute concerning the interpretation of EU law to any other method of settlement than those provided for in the Treaties. The Court justified the autonomy with the essential characteristics of EU law, relating

[85] *Achmea*, para 173.
[86] *Achmea*, para 180.
[87] Ibid.
[88] *Achmea*, para 32–37.

in particular to the constitutional structure of the EU and the nature of EU law.[89] These characteristics are *inter alia* the independence, primacy and direct effect of EU law.[90] In this context, Article 267 TFEU has the object of securing uniform interpretation of EU law, thereby ensuring its consistency, effect, special nature and autonomy.[91]

After recalling the autonomy of EU law, the Court went on to assess whether an arbitral tribunal established under the NE-SL BIT may have to apply or interpret EU law. The Court held in this part that even if the tribunal only rules on infringements of the BIT, EU law could still be considered.[92] In order to rule on infringements of the BIT, the tribunal may, according to Article 8(6) of the BIT, take into account the law of the Contracting Party as well as other relevant international agreements between the Contracting Parties. The Court considered that EU law forms part both as the law of the Contracting Party and as an international agreement between the Member States.[93] Accordingly, tribunals may be called to apply or interpret EU law.

Next, the Court assessed whether an arbitral tribunal under an intra-EU BIT can constitute a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, meaning that the arbitral tribunal can ask the Court for preliminary rulings. The Court recalled its judgement in the *Auto Estradas* case[94] and held that the status as a 'court or tribunal of a Member State' derives from whether the tribunal as a whole is part of the judicial system of the Member States.[95] In the case at hand, the Court held that an arbitral tribunal established under the NE-SL BIT is not part of the judicial system of Slovakia or the Netherland, which is '[…] precisely the exceptional nature of the tribunal's jurisdiction compared with that of the Courts of those two Member States'[96]. For these reasons, the Court arrived at the conclusion that

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[89] *Achmea*, para 33.
[90] Ibid.
[91] *Achmea*., para 37.
[92] *Achmea*, para 40.
[93] *Achmea*., para 41.
[94] Case 377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* (Auto Estradas) EU:C:2014:1754.
[95] *Auto Estradas*, paras 25 and 26.
[96] *Achmea*, para 45.

such an arbitral tribunal constitute a 'court of tribunal' within the meaning of Article 267 TFEU.[97]

Lastly, the Court assessed whether an arbitral award made by tribunals under such BITs are subject to review by a court of a Member State, entailing that questions of EU law can be submitted to the CJEU. The Court noted that the decision an arbitral tribunal is final, and that judicial review can only be exercised to the extent that national law permits and is often limited. Furthermore, the tribunal choses its seat and consequently the law applicable for judicial review. The Court then continued and compared investment arbitration under a BIT to commercial arbitration. For commercial arbitration, the Court has previously held that the need for efficient arbitration proceedings justifies the review from Member State's courts to be limited in scope.[98] However, the Court considered that Commercial arbitration is different. This in the sense that it 'originates in the freely expressed wishes of the parties'[99], while investment arbitration derives from 'a treaty by which Member States agree to remove jurisdiction from their own courts'[100]. This, according to the Court, entails that the case law allowing commercial arbitration is not applicable to proceedings under a BIT. Consequently, the Court found that the BIT establishes a mechanism for settling disputes which could present those disputes from being resolved in a manner that ensures the full effectiveness of EU law.[101]

Due to this conclusion, the Court did not address the issue of discrimination.

3.2.4 Analysis

The Court's findings in *Achmea* has implications far beyond the topic for this thesis, and this should by no means be seen as a full commentary. Instead, it

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[97] *Achmea*., para 49.

[98] *Achmea*., para 54, with references to Case C-126/97 *Eco Swiss* EU:C:1999:269; and Case C-168/05 *Mostaza Claro* EU:C:2006:675.

[99] *Achmea*, para 55

[100] Ibid.

[101] Ibid.

aims only to highlight certain aspects relevant for understanding the possible implications of *Achmea* for the ECT. Firstly, the political and judicial landscape leading up to *Achmea* will briefly be discussed, as it is a key to understanding the rationale behind the judgement. Followed by this, some of the main divergences between Wathelet's and the Court's views will be examined closer, as some of these reappear in *Opinion 1/17*.

a. The political and judicial landscape leading up to Achmea

To understand the ruling in *Achmea*, it is helpful to understand the political context at the time it was decided. Not only related to the general tendency towards increasingly regulating investments on an EU level, but also related to the Commission's longstanding issues with intra-EU BITs.

Intra-EU BITs are mainly a product of the accession of Central and Eastern European states to the EU in 2004 and 2007.[102] In the accession negotiations, the existence of BITs was not properly addressed.[103] Many of these agreements thus became intra-EU BITs after the point of accession.

In 2006, the EU Economic and Financial Committee recommended that Member States review the need for BITs by the end of 2007.[104] Since then, the Commission has consistently pointed out to Member States that BITs are incompatible with EU law.[105] However, the Member States did not initiate any termination of their intra-EU BITs. Therefore, in June 2015, the

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[102] Dahlquist, Joel, Lenk, Hannes and Rönnelid, Love, 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', *European Policy Analysis*, SIEPS, issue 2016:4, p. 1.

[103] In fact, the conclusion of BITs was even encouraged through-out the pre-accession period: see Söderlund, Christer, 'Intra-EU BIT Investment Protection and the EC Treaty', *Journal of International Arbitration* Volume 24 Issue 5 (2007), pages 455–456; Art. 76(2) of the Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the One Part, and Romania, of the Other Part, signed on 21.12.1993, OJ L 178/76, 12.7.1994.

[104] ECFIN/CEFCPE (2006)REP/56882, Economic and Financial Committee, Annual EFC Report to the Commission and the Council on the Movement of Caoital and the Freedom of Payments (2006), p. 7.

[105] European Commission, Press Release, 18 June 2015, *Commission asks Member States to terminate their intra-EU bilateral investment treaties,* https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198 (last visited on 19 december 2020).

Commission initiated 'pilot' infringement proceedings against five Member States[106] over the non-termination of such BITs.[107]

The best example to understand the Commission's standpoint on intra-EU BITs is the *Micula case(s)*, which first started in 2005 as an ICSID arbitration under the Sweden-Romania BIT. The background is that Romania introduced a series of economic incentives for investors in 1998. The Micula brothers, who possessed Swedish citizenship, grasped the opportunity and created several companies for investment-related purposes. The incentives were later repealed by Romania due to the EU-accession, since they could be considered state aid under EU law. This made the Micula brothers to commence ICSID arbitration, where they argued for breaches of the Sweden-Romania BIT. In January 2013, after Romania's EU accession, the ICSID tribunal delivered its Award in favour of the Micula brothers.[108] An ICSID *ad hoc* committee later upheld the Award.[109] Although the ICSID Convention is clear regarding enforcement – that all ICSID Contracting States must recognize them as such and ensure their enforcement upon request – the EU took action. In 2015, the Commission decided that any payment to the Micula brothers under the Award constitutes illegal state aid, and that Romania was prohibited from making any payments.[110] The Micula brothers responded by both appealing the State Aid case to the General Court of the European Union and seek enforcement in other ICSID Contracting States, including Belgium, France, Luxembourg, Sweden, the UK and the US. This entailed that several courts of EU Member States were confronted with the choice of either living up to the international obligations under the ICSID Convention or follow EU law. The enforcement issue ended up *inter alia* in the English Supreme Court,

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[106] These are Sweden, Austria, the Netherlands, Romania and Slovakia.

[107] European Commission, Press Release, 18 June 2015, *Commission asks Member States to terminate their intra-EU bilateral investment treaties*.

[108] *Ioan Micula, Viorel Micula and Others v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 Dec 2013.

[109] *Ioan Micula, Viorel Micula and Others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 Feb 2016.

[110] Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania, Arbitral award Micula v Romania of 11 December 2013.

which in its judgment from February 2020 favoured the UK's international obligations.[111] At the roughly the same time, the Swedish Nacka District Court favoured the EU obligations, justifying it with the EU principle of sincere cooperation.[112] The State Aid case is now pending before the CJEU, after an appeal of the judgement of the General Court.[113]

The *Micula case(s)* highlights the potential conflicts when tribunals outside the EU system apply or interpret EU law. There are good reasons to read *Achmea* as an attempt to solve the discrepancies between EU law and ISDS arbitration under intra-EU BITs. By its ruling in *Achmea* that Article 267 and 344 TFEU precludes the application of ISDS mechanisms under intra-EU BITs, the CJEU is shifting intra-EU investors to the normal channels of EU law, i.e. making them to seek justice before EU courts instead. By having those disputes before EU Courts, the CJEU is in control over the questions of EU law that may emerge. Against this background, the Court's reasoning in *Achmea* appears less surprising.

b. The parallel universes of AG Wathelet and the CJEU

Wathelet suggested a completely different judgement than the Court. Firstly, he argued that the arbitral tribunal under the NE-SL BIT should be seen as a 'court or tribunal of a Member State' under Article 344 TFEU, meaning that they can refer questions of EU law to the CJEU. This solution would solve the concerns of the Commission and the CJEU related to the 'control' of EU law. Even if the disputes take place outside the regular courts of Member States, the CJEU would be able to ensure a consistent interpretation of EU law. Such a move would, however, would constitute a significant departure

[111] The UK Supreme Court, *Micula and others v Romania,* judgement given on 19 February 2020, Hilary Term [2020] UKSC 5, On appeals from: [2018] EWCA Civ 1801 and [2019] EWHC 2401.

[112] Nacka District Court (Nacka Tingsrätt), Ärende nr Ä 2550-17, protokoll 2019-01-23.

[113] Appeal brought on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 18 June 2019 in Case T-624/15: *European Food e.a. v Commission*.

from earlier case law and the consequences would be difficult to foresee.[114] Therefore, the Court's position that arbitral tribunals under intra-EU BITs falls outside the definition 'court or tribunal of a Member State' in Article 267 TFEU is not very surprising.

Secondly, Wathelet argued that while EU law may sometimes be relevant in disputes under the NE-SL BIT, this does not mean that such disputes concern the interpretation or application of EU law within the meaning of Article 344 TFEU. This since the jurisdiction of the arbitral tribunal is confined to ruling on breaches of the BIT, not breaches of EU law as such. This argument was left completely uncommented by the CJEU. Instead, the CJEU held that even if the tribunal only ruled on infringements of the BIT, EU law could still be considered. Due to this, the Court found that such arbitral tribunals may be called upon to apply or interpret EU law within the meaning of Article 344.

Thirdly, Wathelet argued that the scope of the BIT is not the same as those of the EU Treaties. The scope of the BIT is wider, some provisions of the BIT does not have an equivalent in EU law and others overlap without achieving results that are incompatible with EU law.[115] This argument was also left completely uncommented by the CJEU.

Altogether, one can conclude that Wathelet and the Court tried to achieve completely different things. Wathelet tried to integrate investment arbitration into Union law while, at the same time, preserving the possibility to investment arbitration. This was all done in a pro-arbitration direction. This by allowing arbitral tribunals under intra-EU BITs to refer questions of EU law to the CJEU when necessary, but otherwise maintain the special protection to foreign investors afforded by such BITs. The CJEU, on the other hand, tried to maintain the distance between international arbitration and EU law, while relocating investment disputes involving Member States to the

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[114] See Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern and Reederei Friedrich Busse Hochseefischerei Nordstern* EU:C:1982:107, para 10; and Basendow, Jürgen, "EU Law in International Arbitration: 'Referrals to the European Court of Justice', *Journal of International Arbitration*, Volume 32 Issue 4 (2015) pages 367–386.

[115] AG Wathelet in *Achmea*, para 181.

'normal' channels of EU law. This way, EU investors can no longer expect to get a better legal position than it would get before EU courts.

3.3 Opinion 1/17 *CETA*

3.3.1 Background

At the time when *Achmea* was decided, another significant case was pending before the CJEU: the preliminary ruling on the compatibility of CETA with EU law.

CETA – The Comprehensive Economic Trade Agreement – is the 1598 pages long 'New Generation' free trade agreement concluded between the EU and Canada. It provisionally entered into force on 21 September 2017 and ratifications are ongoing.[116] The agreement covers a wide range of areas, primarily focusing on free trade, public procurement, investments, intellectual property and sustainable development. The objective is to increase trade and investment flows between the EU and Canada and contribute to economic growth.[117]

One more polarising aspect of CETA is the introduction of the new Investment Court System (ICS), which enables investors to bring claims to an institutionalised court beyond the jurisdiction of the Contracting Parties of CETA. The ICS mechanism differs from international arbitration under BITs or the ECT in the sense that it is a permanent and institutionalised court, where the members are appointed in advance and whose decisions are subject to an appellate body. However, the ICS system is still a mechanism which allows foreign investors to sue states over breaches of the investor's rights. This was one of the main sources of opposition from the Belgian region of Wallonia, which led it to demand the federal Belgian government to consult the CJEU

[116] CETA Article 30.7(3); European Commission, *CETA Overview*, CETA factsheet 1/7, September 2017.
[117] European Commission, 'CETA – Summary of the Negotiating Results', <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> (last visited on 19 December 2020).

on the legal merits of CETA.[118] The Belgian government's subsequent question to the CJEU was:

> Is section F ("Resolution of investment disputes between investors and states") […] of chapter Eight ("investment") of the [CETA] compatible with the Treaties, including with fundamental rights?[119]

3.3.2 Judgement by the Court

As opposed from the striking difference between AG Wathelet's views and the views of the Court in *Achmea*, the CJEU followed the AG Opinion closely in *Opinion 1/17*.[120] Therefore, only the judgement by the Court will be addressed.

a. The Principle of autonomy

Regarding autonomy, the Court started by underscoring that the mere fact that the ICS system stands outside the EU judicial system does not, by itself, breach the autonomy of EU law.[121] It held that it follows from the reciprocal nature of international agreements that an international tribunal may have jurisdiction to interpret that agreement, without it being subject to the interpretation of the national courts of the parties to that agreement.[122] Accordingly, EU law does not preclude the establishment of the CETA tribunal or the conferring of powers to the CETA tribunal to interpret and apply the provisions of CETA. The Court laid down two requirements for this: (1) that the tribunal does not have any power to interpret or apply EU law and (2) that the powers of those tribunals are not structured in such a way that, while not themselves engaging in the interpretation of EU law, may issue

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[118] See the Resolution from Wallon Parliament, Résolution sur l'Accord économique et commercial global (AECG), 212 (2014-2015) — N° 4 , 25 Avril 2016.
[119] *Opinion 1/17*, para 1.
[120] Opinion of Advocate General Bot, Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, EU:C:2019:72; And Opinion 1/17.
[121] *Opinion 1/17*, para 114–115.
[122] *Opinion 1/17*, para 117.

awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.

As regards the first requirement, the Court considered the relevant provisions of CETA as opposed to the NE-SL BIT in *Achmea*. Article 8.38 of CETA provides that a tribunal under CETA shall apply 'this Agreement as interpreted in accordance with the [Vienna Convention], and other rules and principles of international law applicable between the parties […]' and that 'For greater certainty, in determining the consistency of a measure with [CETA], the tribunal may consider, as appropriate, the domestic law of a party as a matter of fact […]'. This differs from the NE-SL BIT, where an arbitral tribunal might be called upon to give rulings on disputes that might concern the interpretation or application of EU law.[123] The Court further distinguished CETA from intra-EU BITs by highlighting the principle of mutual trust. The principle obliges the Member States to consider, other than in exceptional situations, that all other Member States comply with EU law, including fundamental rights such as the right to an effective remedy.[124] However, the principle of mutual trust is only applicable between Member States, not between Member States and third countries. Since intra-EU disputes are not possible under CETA, the principle of mutual trust is not applicable.

The stipulation that the CETA tribunals can take EU law into account as a matter of fact did not change the views of the Court. Instead, it held that such an examination cannot be classified as equivalent to an interpretation. It further observed that the CETA tribunals is obliged to follow the prevailing interpretation given to domestic law by national courts or authorities, and that those national courts or authorities are not bound by the interpretation of domestic law given by the CETA tribunals.[125]

For these reasons, the Court considered it consistent that the CETA tribunals has the power to give a definitive ruling on investor-state disputes

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[123] *Opinion 1/17*, para 126 and 127.
[124] See *inter alia*: Opinion 2/13 *Accession of the European Union to ECHR* EU:C:2014:2454, para 191; Case C-34/17 *Eamonn Donnellan v The Revenue Commissioners* EU:C:2018:282, para 40 and 45; *Opinion 1/17*, para 128.
[125] *Opinion 1/17*, para 130–133.

under CETA, without any procedure for the re-examination of the award by a court of a Member State or the CJEU. Additionally, the Court considered it consistent that CETA tribunals cannot make references for preliminary rulings to the CJEU. Altogether, the first requirement was considered fulfilled.

As regards the second requirement, that tribunals shall not have any effect on the operation of EU institutions in accordance with the EU constitutional framework, the Court started by observing that the CETA tribunals will make findings as to the effect of EU law. For example, it may be called upon to decide whether an EU measure is 'fair and equitable' within the meaning of Article 8.10 CETA. Despite this, the Court considered that CETA provides enough guarantees in this respect, as it contains a number of provisions guaranteeing public interest and the Parties' right to regulate.[126] Thus, the second requirement was also considered fulfilled.

b. The principle of equal treatment

While the Court in *Achmea* did not assess the principle of equal treatment, the Court did so briefly in *Opinion 1/17*. The principle requires comparable situations from being treated differently and different situations from being treated in the same way.[127] The Court identified a difference in treatment in the sense that '[…] it will be impossible for enterprises and natural persons of [EU] Member States that invest within the Union and are subject EU law to challenge EU measures before [CETA tribunals], whereas Canadian enterprises and natural persons that invest within the same commercial or industrial sector of the EU internal market will be able to challenge those measures before those tribunals.'[128] However, in the views of the Court, the situation of Canadian investors in the EU are only comparable to EU investors

[126] *Opinion 1/17*, para 137–161.
[127] See *inter alia*: Case C-101/12 *Herbert Schaible v Land Baden-Württemberg* EU:C:2013:661, para 76; C-540/16 *Spika and Others* EU:C:2018:565, para 35; Opinion 1/17, para 176.
[128] *Opinion 1/17*, para 179.

in Canada, not EU investors in the EU. For this reason, the general principle of equal treatment was considered respected.[129]

c. The principle of effectiveness

The Court briefly assessed the principle of effectiveness, by finding that CETA tribunals may issue awards that has consequences for the effectiveness of EU competition law, for example by awarding damages equivalent to fines imposed by the Commission or natural competition authorities. However, since CETA acknowledges that the Parties may take appropriate measures against anti-competitive behaviours and guarantees the Parties' right to regulate in order to achieve legitimate objects in the public interest, the safeguards in CETA was considered sufficient.[130]

d. The right of access to an independent tribunal

As regards the right of access to an independent tribunal, the Court divided its assessment in two parts: (1) access and (2) independence. Regarding the access, the Court held that is is apparent that the aim of CETA is to ensure that CETA tribunals are accessible to any Canadian investor in the EU or EU investor in Canada. Furthermore, there are efforts by the CETA Joint Committee to ensure that CETA tribunals are financially accessible. Concerning the independence, the Court was satisfied with the safeguards as regards the members of the tribunal, the renumeration schemes, the appointment and removal of members as well as the rules of ethics the members has to follow. [131]

Altogether, the Court found that the CETA ICS is compatible with EU law.[132]

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[129] *Opinion 1/17*, para 179–186.
[130] *Opinion 1/17*, para 187–188.
[131] *Opinion 1/17*, para 189–244.
[132] *Opinion 1/17*, para 245.

3.3.3 Analysis and distinction to *Achmea*

Before *Opinion 1/17* was released, many commentators suggested that the outcome was pre-determined by the Courts' ruling in *Achmea*. These authors viewed the reasons that motivates incompatibility of intra-EU BIT arbitration with EU law as also implying that extra-EU MIT arbitration is contrary to EU law.[133] Others read the case in a more restricted manner, arguing that the findings in *Achmea* are were motivated only by the specific characteristics of intra-EU BIT arbitration.[134] When *Opinion 1/17* subsequently was released, it became clear the *Achmea* was not indented to be a precedent for the compatibility of EU law with the CETA ICS system and similar mechanisms in EU agreements with third countries.

This section will analyse *Opinion 1/17* and the reasons why the Court ruled it so differently than *Achmea*. Three aspects of *Opinion 1/17* will be analysed closer: the question of applicable law, the significance of mutual trust and lastly the balancing of autonomy versus the level of international integration.

a. The law as a fact – does it make all the difference?

In both *Achmea* and *Opinion 1/17*, the Court assessed whether the respective tribunals may apply or interpret EU law. In the former case, the Court arrived at the conclusion that the tribunal may be called upon to interpret EU law, while in the latter this was not considered to be the case. What are the distinguishing factors?

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[133] See *inter alia*: Eckes, Christina, *Don't Lean your Chin! If Member States Continue with the Ratification of CETA, They Violate European Union Law*, European Law Blog, 13 March 2018, <https://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law/> (last visited on 19 Dec 2020); Gáspár-Szilágyi, Szilárd, 'It's Not Just About Investor-State Arbitration: A Look at Case C-284/17 Achmea BV', *European Papers*, Volume 3 Issue 1 (2018), pages 357–370.

[134] See *inter alia*: Luca, Pantaleo, *The Participation of the EU in International Dispute Settlement – Lessons from EU Investment Agreements*, Berlin, Heidelberg: Springer 2018, p. 62; Jens Hillebrand, Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust? ECJ 6 March 2018, Case C-284/16, Slovak Republic v Achmea', *European Constitutional Law Review*, Volume 14 Issue 4 (2018), pages 767–791.

In *Achmea*, the NE-SL BIT expressively affirmed that the arbitral tribunal decides on the basis of the law, taking into account, *inter alia*, the domestic law of the Contracting Parties as well as other relevant international agreements between the Contracting Parties.[135] The Court held that EU law forms part both as the domestic law of the Contracting Parties and as an international agreement between the Contracting Parties.[136] It was not necessary that the arbitral tribunal actually interpreted EU law, the potential risk that it could were considered sufficient.

In *Opinion 1/17*, the situation was more complex. As a starting point, Article 8.31(1) CETA provides that the CETA tribunal shall apply the CETA agreement as interpreted under the Vienna Convention, and other rules and principles of international law applicable between the Parties. In addition, Article 8.31.2 provides that the tribunal may consider the domestic law of a Party as a matter of fact.[137] A few points should be made. First, as *Gatti* observes, an international body should as a matter of principle already interpret domestic laws only as a matter of fact.[138] While there may be a difference in nuance between 'interpret' and 'consider', it is considerably difficult to make any practical difference between the two. In *Opinion 1/17*, the Court seems to be satisfied with the intention to not interpret rather than effect. It held that:

> That examination may, on occasion require the domestic law of the party to be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to interpretation by the CETA tribunal.[139]

One can question what happens if the CETA tribunal should 'consider' EU law wrongly. In *Opinion 1/*09, regarding the establishment of an EU patent

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[135] Article 8 of the NE-SL BIT.

[136] *Achmea*, para 39.

[137] The Article provides a few additional safeguards, such as that the tribunal shall not have jurisdiction to determine the legality of a measure under national law, and that the tribunal shall follow the prevailing interpretation given to domestic law by the domestic courts.

[138] Gatti, Mauro, 'Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?', *European Papers*, Volume 4 Issue 1 (2019), pages 109–121, p. 117; with reference to PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, judgement of 25 May 1926, p. 19.

[139] *Opinion 1/17*, para 131.

court, this was exactly the problem. If the patent court interpreted EU law wrongly, the CJEU could not do anything. The Court addressed this scenario in an interesting way in *Opinion 1/17*, stating that national courts and tribunals are at least not bound by the meaning given to domestic law by the CETA tribunal.[140] In other words: should the CETA tribunal get it wrong when 'considering' EU law, it does not create case law. However, both Member States and the EU are bound *in casu* by the tribunal's decisions, meaning that Member States may be obliged to pay considerable sums to investors in case that the CETA tribunal makes a mistake when 'considering' the law as a fact. Also, the effect of such a mistake is in practice equivalent to that of a misinterpretation or misapplication of the law.

Altogether, there are good reasons to question if the statement in CETA that the law should be considered as a matter of fact leads to any difference. Despite these risks, the CJEU did not see any incompatibility between the CETA ICS mechanism and EU law. This is an inconsistent move not only with regard to *Achmea*, but with several other cases concerning outside mechanisms interpreting EU law.[141]

b. ISDS as a compensation for lack of mutual trust?

In *Opinion 1/17*, the Court distinguished the CETA tribunals from the tribunal under the NE-SL BIT in *Achmea* by referring to the non-applicability of mutual trust in relations between the EU and a third state.[142] Likewise, in Achmea, the Court put a lot of emphasis on the principle.[143] It stressed that the characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent relations binding the Member States to each other and to the EU. This has given rise to a set of common

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[140] *Opinion 1/17*, para 131.

[141] See *inter* alia Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* EU:C:1991:490; Opinion 1/09 *Creation of a unified patent litigation system - European and Community Patents Court* EU:C:2011:123; Opinion 2/13 *Accession of the European Union to ECHR* EU:C:2014:2454.

[142] *Opinion 1/17*, para 129.

[143] *Achmea*, para 31-38.

values, justifying the principle of mutual trust.[144] The Court ended its opening remarks in *Achmea* by stating that the questions 'must be answered in light of those considerations'. The Court's emphasis on the principle of mutual trust in *Achmea* and the *Opinion 1/17* is indicative that the *ratio decidendi*, of *Achmea* primarily covers intra-EU situations where mutual trust is applicable.

As *Damjanovic* and *De Sadeleer* suggests, the CJEU seems to emphasise that the EU judicial system and the principle of mutual trust is likely to ensure intra-EU investors an equal level of justice across the EU.[145] Assuming that EU investors would not be equally protected in third countries, due to the lack of mutual trust in external relations, the Court instead endorses the existence of an ISDS mechanism such as the CETA ICS mechanism. This way, the lack of mutual trust is remedied.

[144] *Achmea*, para 33.

[145] Damjanovic, Ivana and De Sadeleer, Nicolas, 'Values and objectives of the EU in light of Opinion 1/17: "State for all" above all', *Europe and the World: a Law Review*, Volume 4 Issue 1 (2020), p. 12.

4 The bigger picture: implications of Achmea and Opinion 1/17 to the ECT

4.1 Introduction

In foregoing chapter, *Achmea* and *Opinion 1/17* have been walked through and analysed in order to understand each ruling more in-depth. This chapter will bring these wisdoms and apply them to the ECT, in order to understand what implications each ruling has for the compatibility of Article 26 ECT with EU law.

To begin with, one must bear in mind that *Achmea* and *Opinion 1/17* represents parallel but interconnected lines of case law under the big umbrella of autonomy of EU law. The former represents cases where the Member States have established or allowed arbitration procedures between them and their nationals against other states and nationals of other jurisdictions. The second represents cases where the EU, sometimes together with the Member States in mixed agreements and sometimes alone, has tried to establish or join other international tribunals or dispute settlement mechanisms aside from the CJEU. The ISDS mechanism in ECT Article 26 is best placed somewhere in between. It has the characteristics of traditional investment arbitration, with a high degree of flexibility for the parties relating to seat of arbitration, which arbitration rules to apply and with relation to the rules applicable for review. At the same time, it is a mixed agreement, where both the EU itself and all Member States are parties. Moreover, unlike CETA, it does not include any special reservations or special rules regarding intra-EU application, entailing that intra-EU disputes have been common.

This chapter will analyse the compatibility of Article 26 ECT with EU law from two perspectives: (1) an EU law perspective and (2) a public international law perspective. Finally, the results will be discussed with relation to the EU law relationship to international law.

4.2 The compatibility of Article 26 ECT and EU law from an EU law perspective

4.2.1 Course of action: assessing compatibility

This section will follow the general structure of the CJEU's analysis in *Achmea* and *Opinion 1/17*. Focus will be on the compatibility of Article 26 ECT with the autonomy of EU law.

The examination will be divided in two parts. First, the relationship to EU law of ECT tribunals will be assessed. In that part, it will be examined whether ECT tribunals could be called upon to interpret or apply EU law, and whether ECT tribunals in any other way prevents the EU institutions from operating in accordance with the EU constitutional framework. This also includes the principles of mutual trust and sincere cooperation as regards intra-EU ECT disputes. The implications of this assessment are that if ECT tribunals does not interpret or apply EU law, or in any other way prevent the EU institutions from operating in accordance with the EU constitutional framework, then the autonomy of EU law is not at stake. If they do, however, one must proceed to the next part of the assessment.[146]

Secondly, the distance to EU law till be assessed. This includes whether ECT tribunals may be considered as courts or tribunals of Member States within the meaning of Article 267 TFEU and whether the rewards are subject to review by a court or tribunal of a Member State. In the views of the CJEU, the autonomy of EU law requires that bodies interpreting or applying EU law have to be within 'reach' of EU courts or tribunals.[147] The implications are that if ECT tribunals interpret or apply EU law and are outside the 'reach' of EU courts or tribunals, they are incompatible with the autonomy of EU law.

[146] Compare *Achmea,* para 40–43 and *Opinion 1/17,* para 106–119.

[147] Compare *Achmea,* para 43–59 and *Opinion 1/17*, para 118.

This would entail that Article 26 ECT, which allows for the establishment of such tribunals, would be precluded by EU law.[148]

4.2.2 Relationship to EU law

a. Interpretation or application of EU law

There are no provisions in the ECT directly addressing the application of EU law. Instead, Article 26(6) provides that a tribunal established under Article 26 shall decide the issues (1) in accordance with the ECT and (2) in accordance with applicable rules and principles from international law. There is nothing in the ECT expressively indicating that EU law may be applicable. Instead, the principal rule is that ECT tribunals only rule on breaches of the ECT itself. This does, however, not entail that the domestic law of the parties is irrelevant. The starting point the widely accepted view in public international law generally that international courts do not apply domestic law, but merely take it to account as a matter of facts.[149] For example, it is often necessary for a tribunal to interpret domestic law to determine whether a respondent state has breached its obligations under the ECT, such as an interpretation of domestic property laws to determine whether an expropriation has taken place. Furthermore, if a provision of domestic law is more favourable than the protection in the ECT, that provision may be applied in accordance with Article 16 of the ECT.

In practice, the relevance of domestic law is similar to that of the CETA tribunal, although the ECT lacks the explicit statement of the CETA that ECT tribunals can only take domestic law (including EU law) into account as a

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[148] Compare the operative part of *Achmea* in para 62 thereof: '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 [NE-SL BIT], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.'

[149] See *inter* alia: PCIJ, German Interests in Polish Upper Silesia *(Germany v. Poland)*, 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25), para. 19; Hobér, *Extentive Prescription and Applicable Law in Interstate Arbitration,* p. 377; Gatti, '*Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold*?', p. 117.

matter of fact. However, as is stated above, doing so is a well-established practise in the field of investment arbitration.[150]

There are a few earlier ECT arbitrations where the questions of applicability of EU law on the merits came up. The first time was in *AES v. Hungary* from 23 September 2010.[151] In that case, the parties agreed during the hearing that EU law was relevant on the basis of Article 26(6) ECT, but only as a fact.[152] In another ECT arbitration, *Electrabel S.A. v. Hungary* from 30 November 2012, the question of applicability of EU competition law came up.[153] The case concerned long-term power purchasing agreements, which the EU Commission held was constituting illegal state aid. The claimant argued that Hungary had breached the substantive protection to investors in Articles 10(1) and 13 of the ECT. The Tribunal found that EU law could be taken into account both as international law and domestic law of the parties.[154] However, in its view, there was no conflict between EU law and the ECT in this case and therefore no need to decide which trumps over the other.[155] These awards serve as good example of how EU law is dealt with under the ECT: it may be considered, but then only as a matter of fact. Thus, considering how the CJEU dealt with the criteria in *Opinion 1/17*, there are good reasons to argue that ECT tribunals does not have any power interpret or apply EU as such. Although ECT tribunals can make findings of EU law, such findings are probably not equivalent to those of an interpretation or application.

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[150] See footnote 125.

[151] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (AES v. Hungary), ICSID Case No. ARB/07/22, Award, 23 Sep 2010, para 7.5.2.

[152] *AES v. Hungary*, para 7.6.6.

[153] *Electrabel v. Hungary*, ICSID Case No. ARB/07/19*,* 'Decision on jurisdiction, Applicable Law and Liability', 30 November 2012, para 4.102.

[154] *Electrabel v. Hungary*, para 4.126.

[155] *Electrabel v. Hungary*, para 4.75. In addition, the Tribunal held in an *obiter dictum* statement that in the case of any material inconsistencies, EU law would prevail. Other Tribunals have reached other results on the hierarchy, see *Vattenfall v. Germany*, para 229.

b. Prevention of EU institutions to act in accordance with the EU constitutional framework

The next question is whether ECT tribunals may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. In *Opinion 1/17*, the Court found that the CETA provides enough guarantees in this respect, as it contains a number of provisions guaranteeing public interest and the Parties' right to regulate.[156]

Generally, the public interest and the Parties' right to regulate refers to the extent which the Parties to the agreement can change their laws without running the risk of breaching the investment agreement and having to pay damages.[157]

With regard to explicit statements on public interests or the right to regulate, the ECT represents an 'older' generation of investment agreements, meaning that there are no such explicit statements. There are, however, a number of provisions in the ECT that serve as safeguards.[158] Furthermore, as exemplified by the arbitrations below, a right to regulate in the public interest has been assumed to exist by under the ECT by ECT tribunals.[159]

In *AES v. Hunagry*, the question of the Parties' right to regulate was addressed.[160] In the case, the claimant argued that Hungary had breached the 'standard of constant protection' under Article 10 of the ECT when implementing new pricing mechanisms. The ECT arbitral tribunal did not accept this argument and held that the standard 'certainly does not protect

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[156] *Electrabel v. Hungary*, para 137–161.

[157] Kommerskollegium, *"The Right to Regulate" in the Trade Agreement between the EU and Canada – and its implications for the Agreement with the USA*, 2015-08-18 Dnr 3.4.2-2015/00532-5, p. 9 and 10.

[158] See *inter alia*: Article 18 regarding sovereignty over energy resources; Article 19 regarding environmental aspects; Article 21 regarding taxation; and Article 6 regarding competition.

[159] In addition: See *inter alia*: *Isolux Netherlands, BV v. Kingdom of Spain,* SCC Case V2013/153, Award, 17 July 2016*; Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain,* ICSID Case No. ARB/13/36, Final Award, 4 May 2017*; Novenergia v. Spain; Antin v. Spain; Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Spain*, SCC Case No. 2015/150, Award, 14 July 2018; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* ICSID Case No. ARB/14/3, Final Award, 21 February.

[160] *AES v. Hungary* 13.3.2. – 13.3.5.

against a State's right to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the State acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals'.[161]

In *Charanne v. Spain*[162], the claimants argued that changes in the regulatory framework had violated the 'fair and equitable treatment' standard since it changes the legal and regulatory regime which they had relied upon when they made their investment. The tribunal initially noted that the principle of good faith under public international law entails that a State cannot induce an investor to make investments by providing special commitments and later ignore those commitments.[163] However, in the case at hand, the tribunal did not find any such special commitment. In the absence of a special commitment, it held that an investor could not have a legitimate expectation that the legal framework at the time of the investment would remain completely unmodified.[164] However, it also found that when such modifications does indeed take place, the investor has a legitimate expectation that the changes are not contrary to the public interest or disproportionate.[165] One arbitrator dissented and held that the such legitimate expectations were in fact created by the legal framework.[166]

In *Eiser v. Spain*[167], the tribunal began by noting that investment treaties do not eliminate a State's right to modify its regimes to meet evolving circumstances and public needs.[168] However, it does protect investors from fundamental changes to the regulatory regimes that do not take into account the circumstances of existing investments made in reliance of the previous regime.[169] In the view of the tribunal, the change of the Spanish regulatory

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[161] *AES v. Hungary*, para 13.3.2.
[162] *Charanne v. Spain,* SCC Case No. V 062/2012, Award, 21 January 2016.
[163] *Charanne v. Spain*, para 486.
[164] *Charanne v. Spain*, para 505.
[165] *Charanne v. Spain* , paras 513–14.
[166] *Charanne v. Spain*, Dissenting Opinion, para 5.
[167] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (Eiser v Spain), ICSID Case No. ARB/13/36, Final Award, 4 May 2017.
[168] *Eiser v Spain*, para 362.
[169] *Eiser v Spain*, para 363.

framework was such a fundamental change, meaning that it violated standard in Article 10(1) of the ECT.

In *Foresight Luxembourg v. Spain*[170], the tribunal assessed the scope of the 'free and equitable treatment' standard in the ECT. It held that a State 'has space to reasonably modify the legal or regulatory framework without breaching an investor's legitimate expectations of stability'.[171] I.e., that the investor cannot expect the legal or regulatory framework at the time of the investment to be frozen once the investment is made.

These arbitrations serve as good indications of how ECT tribunals typically assess the right to regulate and the significance of public interest. As one can see, it is far from irrelevant despite the lack of explicit statements in the ECT. It is, however, possible that the explicit mentions in CETA will lead to a stronger protection of the public interest and the right to regulate. Altogether, the answer is not black or white. The lack of explicit mentions does not entail that there is no protection of the right to regulate in the ECT. This makes sense. It is only natural that states cannot be expected to freeze there laws completely to protect investors. At the same time, an unconditional right to regulate without paying compensation to investors would completely remove the protection of investments, and thus be contrary to the aims of investment agreements. Both the ECT (in practise) and the CETA seeks to provide a balance between investment protection and the right to regulate. It is possible that the balance is slightly more towards the interests of the investor in ECT and the State in CETA, thanks to the various explicit safeguards in CETA, but one can question it really is sufficient to be make the former incompatible with EU law when the latter is compatible.

c. Relevancy of the principles of mutual trust and sincere cooperation

The research questions in this thesis specifically regards intra-EU disputes under the ECT. As regards intra-EU nature disputes, the Court gives special

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[170] *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Spain* (Foresight v. Spain) SCC Case No. 2015/150, Final Award, 14 Nov 2018.
[171] *Foresight v. Spain*, para 356.

consideration to the principles of mutual trust and sincere cooperation. In *Achmea*, the Court stressed that the questions would be answered in the light of the applicability of the principle of mutual trust and the principle of sincere cooperation.[172] In *Opinion 1/17*, the Court distinguished the CETA tribunals from the tribunal under the NE-SL BIT in *Achmea* by referring to the non-applicability of mutual trust in relations between the EU and a third state.[173] The CJEU seems to assume that EU investors, thanks to the special relationship between Member States, characterised by mutual trust and sincere cooperation, are sufficiently protected within the EU but not necessarily in third countries.[174] To remedy the lack of mutual trust in third countries, the Court endorses the establishment of an ISDS mechanism, such as CETA. Thus, there are good arguments for seeing the applicability of the principles of mutual trust and sincere cooperation in intra-EU disputes under the ECT as precluding compatibility with EU law.

4.2.3 Distance to EU law

a. Courts or tribunals of Member States within the meaning of Article 267 TFEU

In the context of arbitration, the CJEU has been quite clear when it comes to who can refer questions of EU law to it for preliminary rulings. The main rule is that arbitral tribunals cannot refer questions to the CJEU.[175] In the *Auto Estrada* case, it held that the status of a 'court or tribunal of a Member State' derives from whether the tribunal as a whole forms part of the judicial system of the Member State.[176] In *Achmea*, the Court found that the tribunal is not part of the judicial system of a Member State. It also that that is exactly the

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[172] *Achmea*, para 33.
[173] *Opinion 1/17*, para 129.
[174] See Damjanovic, Ivana and De Sadeleer, Nicolas, 'Values and objectives of the EU in light of Opinion 1/17: "State for all" above all', p. 12.
[175] See Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern and Reederei Friedrich Busse Hochseefischerei Nordstern* EU:C:1982:107, para 10; and Basendow, Jürgen, 'EU Law in International Arbitration: Referrals to the European Court of Justice'.
[176] With reference to Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* EU:C:2014:1754.

nature of the tribunal's jurisdiction. In *Opinion 1/17*, the Court reached the same conclusion as regards the CETA.[177] In the light of these judgements, there are no indications that the Court would rule that an arbitral tribunal under the ECT constitutes a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, entailing that questions of EU law can be referred to the Court for a preliminary ruling. ECT tribunals stand outside the judicial systems of the Member States in the exact same ways as the tribunals in *Achmea* and *Opinion 1/17*.

b. Subject to review by a court or tribunal of a Member State

In *Achmea*, the Court found that Awards by tribunals under the NE-SL BIT are not necessarily subject to necessarily subject to review by a Court or tribunal of a Member State. This partly because the tribunal does not have to sit in a court or tribunal of a Member State and partly due to the fact that the review is limited.

Under the ECT, the legal seat of the tribunal is determined in accordance with the different arbitration rules applicable for the dispute. There is nothing in the ECT or in the different sets of arbitration rules which requires the seat to be in the EU and thus within the reach of EU law. Even if the arbitration has its legal seat in the EU and a court or tribunal of a Member State does a review, that review can take place only to the extent that national law permits.[178]

Altogether, following the conclusions *Achmea*, there are strong indications that the CJEU would consider that ECT tribunals are not necessarily subject to review by a court of tribunal of a Member State.

4.2.4 Conclusions

When it comes to relationship with EU law, there are strong arguments for stating that ECT tribunals in practice only considers EU law in the same manner as the CETA tribunal will. I.e. that EU law may be relevant, but only

[177] Compare *Opinion 1/17*, para 113.
[178] Compare *Achmea*, para 50–55.

as a matter of fact. However, it was almost as difficult to find any meaningful practical difference between how an arbitral tribunal under the NE-SL BIT considers EU law versus how the CETA tribunal will, yet the Court reached different conclusions. Whether that depends on the fact BITs represents the 'old' and CETA represents the 'new' will remain unsaid. What is clear is that it becomes considerably difficult to assess whether ECT tribunals apply or interpret EU law within the meaning of Article 344 TFEU.

Should one reach the conclusion that ECT tribunals apply or interpret EU law in such a manner, then the question of distance from EU law arises. Regarding distance, everything points to that ECT tribunals completely outside the jurisdiction of EU law, just in the same way as the NE-SL Tribunal and the CETA tribunal. Hence, if ECT tribunals do interpret or apply EU law, the CJEU would not be guaranteed 'control' of its interpretation of EU law or the Awards issued. This points towards incompatibility.

As regards intra-EU disputes under the ECT, incompatibility probably also arises from the applicability of the principles of mutual trust and sincere cooperation.

Altogether, from an EU law perspective, Article 26 ECT is probably not compatible with EU law. This entails that Article 26 ECT is probably precluded by EU law. Next, we will analyse what implications such incompatibility may entail from an international law perspective.

4.3 Implications from a public international law perspective

4.3.1 Introduction

If Article 26 of the ECT is incompatible with EU law from an EU law perspective, the question remains what consequences such incompatibility entails for ECT tribunals under public international law. In other words, can ECT tribunals can uphold their jurisdiction despite that Article 26 ECT is probably precluded by EU law?

4.3.2 Implications for the jurisdiction of ECT tribunals

a. Is EU law relevant for the jurisdiction of ECT tribunals?

The starting point under public international law is that ECT tribunals derive their jurisdiction from the ECT itself, starting with the terms to arbitrate in Article 26 ECT. The cornerstone of the jurisdiction is Article 26(3), where the Parties give unconditional consent to the submission of a dispute to international arbitration under the terms of Article 26. The unconditional consent entails that as long as the issues in dispute are covered by the consent of the Contracting Parties, a tribunal under the ECT will have jurisdiction to hear the dispute.

The only paragraph that may imply relevancy of EU law in is paragraph (6). It provides that ECT tribunals shall 'decide the issues in dispute in accordance with [the ECT] and applicable rules and principles of international law'.[179] The relevancy of this provision is, however, disputed. To begin with, the criterion 'issues in dispute' should probably be interpreted as entailing that paragraph (6) is only relevant to the merits of the dispute. This since Article 26(1) refers to disputes as 'Disputes between [State and investor], which concern an alleged breach of the former under Part III'. As a consequence, paragraph (6) is probably only relevant for the merits, i.e. the breaches alleged breaches of Part III of the ECT, not the jurisdiction of ECT tribunals.[180]

b. Should ECT Article 26 be interpreted as excluding jurisdiction for intra-EU application?

Another possibility for EU law to become relevant is when interpreting the ECT under the Vienna Conventions rules on treaty interpretation in Articles 31–32 thereof. The starting point is Article 31(1), which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning in the light of its object and purpose. Article 31(3)(c) provides that any relevant

[179] The author's emphasis.

[180] See *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 Aug 2018; Hobér, Kaj, *The Energy Charter Treaty – A Commentary*, p. 450.

rules of international law applicable between the parties should be taken into account when assessing the context and objective. Thus, in intra-EU disputes, one can argue that EU law should be taken into account as a matter of international law applicable between the Parties. Under Article 38(1)(a) of the Statute of the International Court of Justice, the definition of international law covers any kind of international convention, whether general or particular.[181] Thus, albeit the particular nature of the EU treaties, which has created an independent legal system of its own, EU law probably fulfils the definition international law. Since the CJEU has exclusive jurisdiction over the definitive interpretation of EU law, including the EU treaties, its judgments probably also constitute international law.[182] However, even if one ends up with the conclusion that *Achmea* and *Opinion 1/17* are directly relevant when assessing the jurisdiction of ECT tribunals in line with Article 31(3)(c) of the Vienna Convention, it far from clear that it will lead to a lack of jurisdiction. This since the Vienna Convention gives priority to a textual interpretation through the ordinary meaning.[183] Allowing the EU law, interpreted through Article 31(3)(c) to take precedence over the ordinary meaning would be contrary to the method of treaty interpretation under the Vienna Convention.[184] For these reasons, EU law invoked through Article 31(3)(c) of the Vienna Convention will probably not remove jurisdiction for ECT tribunals in intra-EU situations.[185]

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[181] See discussion in chapter 1.4.1.b).

[182] See TEU, article 19; TFEU Article 267.

[183] See *inter* alia: Draft Articles on the Laws of Treaties with Commentaries 187, 220 (art. 27 cmt. 11), in International Law Commission [ILC], Report of the International Law Commission on the Work of its Eighteenth Session, UN Doc. A/CN.4/191 (1966); Humphrey Waldock, Special Rapporteur, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167, Yearbook of the International Law commission (1964) Vol II, at 56 para 14.

[184] Humphrey Waldock, Special Rapporteur, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167, Yearbook of the International Law commission (1964) Vol II, at 56 para 14.

[185] The Commission has, however, argued for the opposite solution. See *inter alia*: United States District Court for the Southern District of New York, *Foresight Luxembourg Solar 1 S.A.R.L, et al., v. The Kingdom of Spain*, Civil Action No 19-cv-3171-ER, document 27: 'Brief of the European Union on behalf of the European Union as *Amicus Curiae* in Support of Spain'.

4.3.3 Implications for enforcement of Awards

The starting point is the rules on enforcement of awards in each set of arbitration rules referred to in Article 26 ECT: The ICSID Convention, the ICSID Additional Facility Rules, UNCITRAL or the SCC rules. Each set of rules contains different rules regarding enforceability.[186]

The ICSID Convention is special in the way that the Awards are final, binding, directly enforceable and cannot be challenged before a national court.[187] If a party fails to enforce it, the investor can seek enforcement in another Contracting ICSID state. This since each Contracting Party to the ICSID has undertaken to enforce the Awards as if it were a final judgement of a Court in that State.[188] This entails that, as a matter of principle, the Contracting Parties shall not do any kind of review. In practise, as shown by the *Micula Case(s)*, courts have been forced to choose between favouring international obligations or EU obligations, with different outcomes.[189] Enforcement of intra-EU ECT Awards under the ICSID rules will probably face a similar conflict of laws, where compliance with one obligation leads to a breach of the other.

The other sets of rules are subject to the enforcement under the 1958 New York Convention, meaning that the enforcement issue may end up in a Court of a Member State and a limited review can be done.[190] In such a case, the reviewing Court is confronted with a conflict of laws: whether to favour EU obligations or international obligations. How to solve this conflict of laws will be discussed in the next section.

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[186] See chapter 2.6.
[187] The ICSID Convention, Article 52–54.
[188]The ICSID Convention, Article 54.
[189] See chapter 2.6.
[190] The New York Convention, Articles 1–3

4.4 Interplay between EU law and international law in case of conflict

As shown in the previous section, the development of the CJEU's case law in the field of intra-EU ISDS has led to increasing tensions between public international law and EU law. Assuming that Article 26 ETC is actually incompatible with EU law, a conflict of laws has emerged where Courts have to choose between favouring their international obligations under the ECT or EU obligations. As will be shown in this section, the solution of this conflict also differs depending on whether one has an EU law perspective or a public international law perspective.

a. Solving the incompatibility from an EU law perspective

Under EU law, it is clear that EU law has primacy over the Member States' other international obligations *inter se*.[191] Hence, for the intra EU BITs, which are entered into by Member States, one can conclude that they are subject to the primacy of EU law. One example is the original arbitral award leading to the *Achmea* case, which was set aside by the German Supreme Court following the judgement in the CJEU.[192] In the views of the German Supreme Court, the primacy of EU law entailed that there was no valid arbitration agreement, since the mere existence of Article 8 of the NE-SL BIT was precluded by EU law. Since there was no valid agreement, the tribunal lacked jurisdiction and the award could be set aside.[193]

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[191] See *inter alia*: Case C-478/07 *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* EU:C:2009:521, paras 97–99; Case C-121/85 *Conegate Limited v HM Customs & Excise* EU:C:1986:14, para 25; Case C-235/87 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* EU:C:1988:460, para 22; Case C-3/91 *Exportur SA v LOR SA and Confiserie du Tech SA* EU:C:1992:420, para 18.

[192] German Supreme Court (Bundesgerichtshof), Decision of 3 March 2016, I ZB 2/15.

[193] Bundesgerichtshof, Decision of 3 March 2016, I ZB 2/15, paras 83–85.

The ECT, on the other hand, is an international agreement concluded by the Member States and the EU together as a mixed agreement. This entails that the agreement not only forms part of the domestic law of Member States, but also EU law. Despite this, the principle of primacy of EU law probably applies and trumps the international obligations of the Member State.[194] This *inter alia* due to the judgements in *Commission v. Italy*[195] *Mox Plant*[196] . In the former case, the CJEU found that multilateral treaties do not apply within the EU if they are contrary to EU law, unless they affect the rights of third countries.[197] In the latter case, it found that inter-state arbitration mechanism provided by the UNCLOS treaty could not be applied intra-EU given that such an application would violate Article 344 TFEU. These views can probably be extended also to the ECT and the ICSID Convention.[198] Thus, as long as the rights of third countries are unaffected, EU law will probably prevail the ECT in the case of inconsistency. As we will see in the below, the answer is, however, quite the opposite when solving the incompatibility from an ECT point of view.

b. Solving the incompatibility from an ECT point of view

As earlier noted, the ECT is a treaty under public international law which should be interpreted in accordance with the Vienna Convention, which does not necessarily include EU law.[199]

When solving inconsistencies under the ECT, one has to keep in mind that the ECT is a legally binding treaty. Both the EU and the Member States are

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[194] This is the *inter alia* the view of the Commission. See: United States District Court for the District of Columbia, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. the Kingdom of Spain*, Civil Action No 1:18-cv-1686, document 33: Amicus Brief on behalf of the Commission in Support of Spain.

[195] Case C-10/61 *Commission v Italy* EU:C:1962:2.

[196] Case C-459/03 *Commission v. Ireland* (Mox Plant) EU:C:2006:345.

[197] Case C-10/61 *Commission v Italy* EU:C:1962:2.

[198] See Amicus Curiae by the Commission in: United States District Court for the District of Columbia, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. the Kingdom of Spain*, Civil Action No 1:18-cv-1686, document 33: Amicus Brief on behalf of the Commission in Support of Spain.

[199] See chapter 4.3.2.

bound by it. This inter alia entails that the ECT is subject to the principle of *pacta sunt servanda* in Article 26 of the Vienna Convention.

When the ECT was concluded, it was so without any disconnection clause or any explicit indication that it does not apply intra-EU. Interpreted in accordance with the Vienna Convention, the starting point should therefore be that intra-EU disputes are possible.

The ECT regulates the situation of incompatibilities with any prior or subsequent international agreements covering the same subject matters in Article 16 of the ECT. Paragraph 2 thereof provides that:

> 'nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of [the ECT] or from any right to dispute resolution with respect thereto under this Treaty.'[200] '

Regardless of whether one views the EU as a prior or subsequent treaty (depending on when the Member State in question joined the EU), the wording clearly states safeguards the right to dispute resolution under the ECT. Therefore, from an ECT point of view, incompatibility of Article 26 ECT with EU law should lead to Article 26 not being applicable within the EU.

c. EU law precedency over public international law?

As we can see, both EU law and the ECT contains rules on how to solve a conflict of norms with respect to other international agreements. These rules, however, seem to lead to both agreements favouring themselves in case of any inconsistencies with the other agreement.

In the end, considering the intra-EU aspect, the question boils down to supremacy of EU law. When EU law claims supremacy over both international law and Member State law, EU law will dictate the Member States' relationship to international law. This was the case in *Achmea*, where the incompatibility of Article 8 of the NE-SL under EU law led to inapplicably of it under EU law.[201] This despite the fact that the BIT was still

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[200] The author's emphasis.

[201] It is, however, not clear from Achmea that the inapplicability will prohibit Member States and investors from submitting a question to commercial arbitration, see *PL Holdings v. Poland* SCC Case No. V 2014/163, Decision of Swedish Supreme Court on Referral to the ECJ, 12 Dec 2019.

in force and applicable under public international law. For the CJEU, the validity under international law did not matter. It examined the compatibility from an EU perspective only. As Advocate General Maduro held in *Kadi*:

> 'The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Union.'[202]

In the ECT, the CJEU would probably view it in a similar way. The autonomy of EU law trumps the international obligations under the ECT.

That would, however, result in further fragmentation of public international law as well as reducing the trust of the EU as an actor in international relations. To begin with, such it would be contrary to the whole purpose of international agreements if we allow EU law to erase the terms of an international agreement by removing the intra-EU applicability, and thus removing the protection afforded to intra-EU investors. The effect would be identical to allowing the domestic law of the parties to influence the interpretation of international agreements. Furthermore, it is far from clear that ECT tribunals will actually agree as regards the non-application of Article 26 intra-EU. Those disparities and legal insecurities would not only be bad for investors and the Member States, but also the EU itself.

A far better solution would be a political one. When the EU enters a legally binding agreement which affords rights to investors and allow for intra-EU application, this agreement should be respected. If the terms no longer suit the EU, the agreement should be renegotiated or withdrawn from in accordance with the procedure provided for in that agreement.

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[202] Opinion of Advocate General Maduro, Case C-402/05 *Kadi v. Council and Commission* EU:C:2008:11, para 22.

5 Final conclusions

The compatibility between Article 26 of the ECT and EU law in intra-EU situations has been a topic of intense discussion in both the EU and the investment arbitration fields. There is a large number of good arguments in favour of EU law and public international law respectively, but quite few contributions that aims to give a fair picture of both. When considering both, the results point towards increased tensions between EU law and public international law. Furthermore, from an EU law perspective, inconsistencies can be found between the Court's own case law in *Achmea* and *Opinion 1/17*.

The Courts ruling in *Achmea* suggests that intra-EU application of Article 26 ECT is incompatible with the autonomy of EU law. The incompatibility primarily arises due to the special considerations in intra-EU situations, such as the applicability of the principles of mutual trust and sincere cooperation.

While *Opinion 1/17* opens the door to compatibility between EU law and ISDS mechanisms that consider EU law, the considerations are probably not applicable to ECT tribunals in intra-EU situations. In *Opinion 1/17*, Court seems to adopt a binary view, where ISDS mechanisms can only be compatible with the autonomy of EU law in relations to third countries but not in relations between Member States. This due to the special relationship between Member States under EU law.

For extra-EU situations, it is more difficult to say due to the inconsistencies in the Court's case law between *Achmea* and *Opinion 1/17*. The Court's findings that the NE-SL tribunal in *Achmea* may be called upon to interpret or apply EU law, whereas the CETA tribunal in *Opinion 1/17* will not, seems to have little support in practice. This makes it difficult to make any meaningful findings as regards an ECT tribunal's relationship with EU law. For intra-EU disputes, however, the incompatibility probably arises already from the applicable of mutual trust and sincere cooperation in intra-EU ECT disputes.

From an EU perspective, the incompatibility between Article 26 ECT and the autonomy of EU law should lead to the non-applicability of Article 26 in

intra-EU disputes. From an ECT and public international law perspective, conversely, ECT tribunals can probably validly uphold their jurisdiction and deliver Awards in intra-EU disputes.

There is no simple answer as regards how to solve this clash between EU law and public international law. According to EU law, EU law prevails meaning that Article 26 should not be applied intra-EU. According to the ECT, however, there are no indications that Article 26 should not apply intra-EU and the right to dispute resolution should probably not be removed due to inapplicability under EU law. The fact that the EU is also bound by the ECT entails that the question boils down to how much supremacy EU law claim from public international law and the ECT. In this respect, the CJEU would probably rule that the autonomy of EU law trumps the international obligations under the ECT. This would, however, lead to undesirable consequences.

The best solution is instead to solve the non-compatibility by political means. Either by withdrawing from the ECT or by renegotiating it. Until a new version of the ECT is negotiated, the EU should live up to its international commitments and allow for intra-EU disputes.

Bibliography

EU Treaties
Consolidated version of the Treaty on the Functioning of the European Union [2012], OJ C 326, 26.10.2012, p. 47–390.

Consolidated version of the Treaty on European Union [2012], OJ C 326, 26.10.2012, p. 13–390.

The Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the One Part, and Romania, of the Other Part, signed on 21.12.1993, OJ L 178/76, 12.7.1994.

Multilateral treaties
Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p. 23–1079.

The Energy Charter Treaty of December 1994 [1998].

Vienna Convention on the Law of Treaties (with annex) of 23 May 1969 [1980]. United Nations, Treaty Series, vol. 1155, p. 331.

Convention on the settlement of investment disputes between States and nationals of other States (ICSID Convention) of 18 March 1965 [1966].

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention) [1959]. United Nations Treaty Series, vol. 330, p. 3.

Bilateral treaties
Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, 1991.

UN Resolutions
The Declaration of the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States, GA res. 3201 (S-VI), 1 May 1974 and GA res. 3281 (XXIX), 12 December 1974.

Litterature
Basedow, Jürgen. Zimmermann, Reinhard (eds.). *The Max Planck Encyclopedia of European Private Law* (pp. 979–892), Oxford University Press: 2012, p. 979.

Corten, Olivier and Klein, Pierre (eds), *The Vienna Convention on the Law of Treaties – A Commentary* Vol 1. Oxford University Press: 2012.

Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: 2006 (reprint).

Eeckhout, Piet, *EU External Relations Law*, 2nd ed, Oxford University Press: 2011.

Hober, Kaj, *The Energy Charter Treaty – A commentary,* Oxford University Press: 2020.

Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration*: Iustus: 2001.

Jennings and Watts (eds), *Oppenheim's International Law, 9th ed,* Oxford University Press: 1992.

Luca, Pantaleo, *The Participation of the EU in International Dispute Settlement – Lessons from EU Investment Agreements*, Berlin, Heidelberg: Springer 2018

Orakhelashvili, Alexander, *Akehurt's Modern Introduction to International Law*, 8th ed, Routledge: 2019.

Roe, Thomas and Happold, Mathew, *Settlement of Investment Disputes under the Energy Charter Treaty,* Cambridge: 2011.

Reuter, Paul, *Introduction to the Laws of Treaties*, Routledge: 2011 (reprint).

Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, 2nd ed, Cambridge University Press: 1984.

Weeramantry, Romesh J, *Treaty Interpretation in Investment Arbitration*, Oxford University Press: 2012.

Articles

Basendow, Jürgen, 'The *Achmea* Judgement and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration', *Journal of International Economic Law,* Volume 23 Issue 1 (2020), pages 271–292.

Basendow, Jürgen, "EU Law in International Arbitration: 'Referrals to the European Court of Justice', *Journal of International Arbitration*, Volume 32 Issue 4 (2015) pages 367–386.

Chaisse, Julien, 'Promises and pitfalls of the European Union Policy on Foreign Investment – How will the new EU Competence on FDI Affect the Emerging World Regime', *Journal of International Economic Law,* Volume 15 Issue 1 (2012), pages 51–84.

Damjanovic, Ivana and De Sadeleer, Nicolas, 'Values and objectives of the EU in light of Opinion 1/17: "State for all" above all', *Europe and the World: a Law Review*, Volume 4 Issue 1 (2020).

Dahlquist, Joel, Lenk, Hannes and Rönnelid, Love, 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', *European Policy Analysis*, SIEPS, issue 2016:4.

Fauchald, Ole Kristian, 'The Legal Reasoning od ICSID Tribunals – An Empirical Analysis', *The European Journal of International Law* Volume 18 Issue 2 (2008), pages 301–364.

Gáspár-Szilágyi, Szilárd, 'It's Not Just About Investor-State Arbitration: A Look at Case C-284/17 Achmea BV', *European Papers*, Volume 3 Issue 1 (2018), pages 357–370.

Gatti, Mauro, 'Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?', *European Papers*, Volume 4 Issue 1 (2019), pages 109–121.

Jens Hillebrand, Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust? ECJ 6 March 2018, Case C-284/16, Slovak Republic v Achmea', *European Constitutional Law Review*, Volume 14 Issue 4 (2018), pages 767–791.

Söderlund, Christer, 'Intra-EU BIT Investment Protection and the EC Treaty', *Journal of International Arbitration* Volume 24 Issue 5 (2007), pages 455–456.

Blog posts

Eckes, Christina, *Don't Lean your Chin! If Member States Continue with the Ratification of CETA, They Violate European Union Law*, European Law Blog, 13 March 2018, <https://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law/> (last visited: 19 Dec 2020).

International Law Commission

Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission (2001) vol. II (Part Two).

Draft Articles on the Laws of Treaties with Commentaries 187, 220 (art. 27 cmt. 11), in International Law Commission [ILC], Report of the International Law Commission on the Work of its Eighteenth Session, UN Doc. A/CN.4/191 (1966).

Humphrey Waldock, Special Rapporteur, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/167, Yearbook of the International Law commission (1964) Vol II, at 56.

Institute of International Law
Institute of International Law, 44 *Annuaire de l'Institut de droit international* (1944-1).

Electronic Sources
Communication from the Commission to the European Parliament and the Council, COM(2018) 547 final, 19.7.2018. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0547&from=EN> (last visited 21 December 2020).

'Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection'. <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> (last visited 22 December 2020).

'Declaration of the Representatives of the Governments of the Member States of 16 January on the Enforcement of the Judgements of the Court of Justice in *Achmea* and on Investment Protection in the European Union', <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> (last visited 22 December 2020).

'Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union', <https://2015-2019.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf#!DocumentBrowse> (Last visited 22 December 2020).

'Negotiations on Modernisation of the ECT', 7 November 2019, Official Webpage of the Energy Charter Treaty, <https://www.energycharter.org/media/news/article/energy-charter-conference-gives-green-light-for-negotiations-on-modernisation-of-the-ect/> (last visited 22 December 2020).

'Public Communication on the First Negotiation Round on the Modernisation of the ECT', 10 July 2020, <https://www.energycharter.org/media/news/article/public-communication-on-the-first-negotiation-round-on-the-modernisation-of-the-ect-publichn/> (last visited 22 December 2020).

Resolution from Wallon Parliament, 'Résolution sur l'Accord économique et commercial global' (AECG), 212 (2014-2015) — N° 4 , 25 Avril 2016. http://nautilus.parlement-wallon.be/Archives/2015_2016/RES/212_4.pdf (last visited 19 December 2020).

'Draft Ministerial Declaration to the Energy Charter Treaty', version 2–7. Official Webpage of the Energy Charter Treaty, https://www.energycharter.org/what-we-do/dispute-settlement/access-to-

travaux-preparatoires/energy-charter-treaty-drafts/ (last visited 19 December 2020).

European Commission, 'CETA – Summary of the Negotiating Results' <https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> (last visited 19 December 2020).

Other Material

ECFIN/CEFCPE (2006)REP/56882, Economic and Financial Committee, Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments (2006).

Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania, Arbitral award Micula v Romania of 11 December 2013.

Kommerskollegium, *"The Right to Regulate" in the Trade Agreement between the EU and Canada – and its implications for the Agreement with the USA*, 2015-08-18, Dnr 3.4.2-2015/00532-5.

Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJ L 169, 29.5.2020, p. 1–41.

Table of Cases

Judgements from the Court of Justice of the European Union

Case C-34/17 *Eamonn Donnellan v The Revenue Commissioners* EU:C:2018:282.

Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158.

C-540/16 *Spika and Others* EU:C:2018:565.

Case 377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* EU:C:2014:1754.

Case C-101/12 *Herbert Schaible v Land Baden-Württemberg* EU:C:2013:661.

Case C-478/07 *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* EU:C:2009:521.

Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* EU:C:2006:675.

Case 376/03 *Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* EU:C:2005:424.

Case C-459/03 *Commission v. Ireland* (Mox Plant) EU:C:2006:345.

Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV.* EU:C:1999:269.

Case C-3/91 *Exportur SA v LOR SA and Confiserie du Tech SA* EU:C:1992:420.

Case C-235/87 *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium* EU:C:1988:460.

Case C-121/85 *Conegate Limited v HM Customs & Excise* EU:C:1986:14.

Case C-102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern and Reederei Friedrich Busse Hochseefischerei Nordstern* EU:C:1982:107.

Case C-10/61 *Commission v Italy* EU:C:1962:2.

Case C-26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1.

Case C-6/64 *Costa v. E.N.E.L* EU:C:1964:66.

Opinions from the Court of Justice of the European Union
Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part,* EU:C:2019:341.

Opinion 2/15 Free Trade Agreement between the European Union and the Republic of Singapore EU:C:2017:376.

Opinion 2/13 *Accession of the European Union to ECHR* EU:C:2014:2454.

Opinion 1/09 *Creation of a unified patent litigation system - European and Community Patents Court* EU:C:2011:123.

Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* EU:C:1991:490.

Opinions from Advocate Generals of the Court of Justice of the European Union
Opinion of Advocate General Wathelet, Case C-284:16 *Slowakische Republik v Achmea BV* EU:C:2017:699.

Opinion of Advocate General Bot, Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, EU:C:2019:72.

Opinion of Advocate General Maduro, Case C-402/05 *Kadi v. Council and Commission* EU:C:2008:11.

Permanent Court of International Justice
Mavrommatis Palestine Concessions case (Greece v. United Kingdom), 1924 P.C.I.J. (ser. B). No. 3 (Aug. 30).

German Interests in Polish Upper Silesia *(Germany v. Poland)*, 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).

International Court of Justice
Territorial Dispute (Libya v Chad), Judgement of 3 February 1994, ICJ Reports (1994), p. 22.

Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Judgement of 11 September 1992, I.C.J. Reports 1992, p. 584.

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgement of 14 June 1993, I.C.J. Reports 1993,p. 38.

German Courts
German Supreme Court (Bundesgerichtshof), Decision of 3 March 2016, I ZB 2/15.

Swedish Courts
Nacka District Court (Nacka Tingsrätt), Ärende nr Ä 2550-17, protokoll 2019-01-23.

UK Courts
The UK Supreme Court, *Micula and others v Romania,* judgement given on 19 February 2020, Hilary Term [2020] UKSC 5, On appeals from: [2018] EWCA Civ 1801 and [2019] EWHC 2401.

US Courts
United States District Court for the Southern District of New York, *Foresight Luxembourg Solar 1 S.A.R.L, et al., v. The Kingdom of Spain*, Civil Action No 19-cv-3171-ER, document 27: Brief of the European Union on behalf of the European Union as *Amicus Curiae* in Support of Spain.

United States District Court for the District of Columbia, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. v. the Kingdom of Spain*, Civil Action No 1:18-cv-1686, document 33: Brief of the European Union on behalf of the European Union as *Amicus Curiae* in Support of Spain.

Arbitral Awards and associated documents
PL Holdings v. Poland SCC Case No. V 2014/163, Decision of Swedish Supreme Court on Referral to the ECJ, 12 Dec 2019.

Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 Aug 2018.

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award, 4 May 2017.

Antin v. Spain; Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Spain, SCC Case No. 2015/150, Award, 14 July 2018.

Novenergia v. Spain;, Antin v. Spain; Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Spain, SCC Case No. 2015/150, Award, 14 July 2018.

Isolux Netherlands, BV v. Kingdom of Spain, SCC Case V2013/153, Award, 17 July 2016.

Charanne v. Spain, SCC Case No. V 062/2012, Award, 21 January 2016.

Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Spain, SCC Case No. 2015/150.

Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic ICSID Case No. ARB/14/3, Final Award, 21 February 2014.

Ioan Micula, Viorel Micula and Others v. Romania, ICSID Case No. ARB/05/20, Final Award, 11 Dec 2013.

Electrabel v. Hungary, ICSID Case No. ARB/07/19*,* 'Decision on jurisdiction, Applicable Law and Liability', 30 November 2012.

AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 Sep 2010.

Other documents

Appeal brought on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 18 June 2019 in Case T-624/15: *European Food e.a. v Commission*.