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ACHMEA'S LEGACY: THE NECESSITY TO CREATE THE MULTILATERAL INVESTMENT COURT

ACHMEA ÖRÖKSÉGE: A MULTILATERÁLIS BERUHÁZÁSI BÍRÓSÁG LÉTREHOZÁSÁNAK SZÜKSÉGESSÉGE

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This paper examines the European Court of Justice's (ECJ) Achmea judgment and its implications for investment dispute resolution within the EU. The 2018 ruling declared that bilateral investment treaties (BITs) between EU member states infringe on EU legal autonomy, as they grant jurisdiction to arbitral tribunals outside the EU framework. This has led the EU to seek alternatives, such as establishing a Multilateral Investment Court. This proposed court would resolve conflicts with consistent, impartial judgments, unlike ad hoc tribunals, thus safeguarding EU legal principles. Additionally, the essay analyzes how Achmea affects the Energy Charter Treaty (ECT) and discusses the challenges of jurisdiction in intra-EU disputes under the ECT. In conclusion, the paper advocates for the EU's transition towards a permanent Investment Court System with binding precedents and jurisdiction to interpret EU law consistently, ensuring legal coherence across member states.

Keywords: *Achmea judgment, bilateral investment treaties, Multilateral Investment Court, Energy Charter Treaty, Investment Court System*

Ez a tanulmány az Európai Unió Bíróságának (EUB) Achmea-ítéletét és annak hatásait vizsgálja az EU-n belüli beruházási viták rendezésére. A 2018-as ítélet kimondta, hogy az uniós tagállamok közötti kétoldalú beruházási szerződések (BIT-ek) sértik az EU jogi autonómiáját, mivel azokon keresztül az EU keretrendszerén kívüli választott bíróságok kapnak joghatóságot. Ez arra késztette az EU-t, hogy alternatív megoldásokat keressen,

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például egy multilaterális beruházási bíróság létrehozását. Ez az új bíróság következetes és pártatlan ítéletekkel rendezné a konfliktusokat, szemben az eseti választott bíróságokkal, így megőrizve az uniós jogi alapelveket. A tanulmány emellett elemzi, hogy az Achmea-ítélet milyen hatással van az Energia Charta Egyezményre (ECT), és tárgyalja az ECT keretén belüli uniós viták joghatósági kihívásait. Végül a tanulmány amellett érvel, hogy az EU egy állandó beruházási bírósági rendszer felé haladjon, amely kötelező precedenseket és joghatóságot biztosít az uniós jog következetes értelmezéséhez, ezáltal garantálva a jogi koherenciát a tagállamok között.

Kulcsszavak: *Achmea-ítélet, kétoldalú beruházási szerződések, multilaterális beruházási bíróság, Energia Charta Egyezmény, beruházási bírósági rendszer*

Introduction

The Achmea judgment[1] stands out as one of the most contentious rulings in recent years within the European Union (EU) due to its significant implications for the jurisdiction of arbitral tribunals in investment disputes involving EU member states. Specifically, this judgment appears to render any arbitral clause[2] in bilateral investment treaties (BITs) inapplicable when two EU member states are parties to the dispute. However, as it will be explored further, arbitral tribunals may not necessarily decline their authority to adjudicate disputes involving EU parties, particularly when the tribunal is situated outside the EU.

Furthermore, the Achmea judgment has raised concerns regarding the applicability of arbitral clauses in BITs when one of the parties involved is an EU member, regardless of whether the other party is a non-EU member. The interpretation of the applicable law, as discussed in this essay, becomes crucial in determining the extent of this inapplicability.

Another important aspect to consider is that the Achmea judgment does not provide a definitive resolution to the issue of jurisdiction in conflicts arising from the Energy Charter Treaty (ECT) involving EU member states. In fact, the challenges related to jurisdiction and the determination of applicable law have become even more prominent following the issuance of the Achmea judgment.

The central point that Achmea judgment leaves is the necessity for the EU to seek a different alternative to solve the conflicts between foreign investors and member states. This is because the principle of autonomy of the EU legal order is at risk when entities that are neither part of the EU nor its member states are involved. In that context, the proposal to create a multilateral investment court could contribute to solve this problem inside the EU.

This essay aims to tackle the aforementioned issues by dividing its content into five sections, in addition to this introduction. Firstly, an overview of the Achmea judgment is provided. Secondly, an analysis is conducted to explore the problems

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1 Court of Justice of The European Union, Case C-284/16, Achmea. Judgment of 6 March 2018.

2 Ibidem, paragraph 60.

that have arisen as a result of this judgment. Thirdly, considerations pertaining to jurisdiction in investment disputes within the framework of the ECT are examined. Fourthly, the proposal inside the EU to create a multilateral investment court. Finally, a concluding section summarizes the key points and provides noteworthy insights.

1. Achema Judgment

On 6 March 2018, the Court of Justice of the European Union delivered its ruling on Case C-284/16 Achmea, concerning an arbitral clause in a BIT signed in 1991 between the Netherlands and Czechoslovakia. In this landmark case, the Court of Justice of the European Union declared that the BIT in question infringed upon the autonomy of the EU legal order.[3]

The judgment was hailed as a significant triumph for the European Commission, which firmly stated that the inclusion of arbitral clauses within the BITs among EU member states is incompatible with the legal framework of the European Union.[4]

In 2004, Slovakia underwent healthcare insurance market liberalization, prompting the entry of Achmea, a Dutch company, into the market to offer private healthcare insurance[5]. However, two years later, Slovakia partially reversed the liberalization process by imposing restrictions on the distribution of profits generated by healthcare insurance activities[6]. As a result, Achmea initiated an arbitration process against Slovakia, invoking the BIT between the Netherlands and Czechoslovakia and utilizing the United Nations Commission on International Trade Law rules before a German arbitration tribunal.[7] Ultimately, the arbitral tribunal ruled in favor of Achmea, ordering Slovakia to pay approximately 22 million Euros.[8]

During the arbitral proceedings, Slovakia contested the jurisdiction of the tribunal, arguing that after its accession to the EU, only the European courts had the authority to adjudicate the case[9]. However, the tribunal dismissed Slovakia's jurisdictional arguments in its 2010 award.[10]

Slovakia sought to annul the arbitral award on the grounds that it violated public order, but its attempt was unsuccessful in the initial instance[11]. However, the Federal Court of Justice of Germany reviewed the decision of the first instance and

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3 Quentin DECLÈVE: Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements. *European Papers* IV 2019/1, 100. https://doi.org/10.15166/2499-8249/282

4 Ibidem, 100.

5 Achmea. Judgment, paragraph 7.

6 Ibidem, paragraph 8.

7 Ibidem, paragraph 9.

8 Ibidem, paragraph 12.

9 Ibidem, paragraph 11.

10 Ibidem, paragraph 11.

11 Ibidem, paragraph 12.

decided to refer its questions for a preliminary ruling to the Court of Justice of the European Union.[12]

In this case, the Court of Justice of the European Union conducted an analysis of Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) in conjunction with each other, emphasizing that these provisions serve to uphold the principle of autonomy within the EU legal order[13].

The Court employed a three-step process to assess whether the arbitral clause contained in the BIT between the Netherlands and Czechoslovakia undermines the principle of autonomy.[14] Firstly, the Court of Justice of the European Union was tasked with determining whether the tribunal, established under the arbitral clause of the aforementioned BIT, is required to interpret European law. Secondly, the Court had to ascertain whether the arbitral tribunal, established under the arbitral clause, can seek a preliminary ruling from the Court of Justice of the European Union. Lastly, the Court examined whether the judicial review of the arbitral award rendered by the tribunal, established under the BIT, upholds the principle of autonomy within the EU legal order.[15]

To address the first issue, the Court observed that Article 8(6) of the BIT stipulates that the applicable law in arbitral disputes encompasses the domestic law of the member states, as well as other relevant agreements between the parties. Importantly, European law forms a part of the domestic law of the member states, and therefore, it is applicable under the BIT[16]. Consequently, the arbitral tribunal established under BIT is obliged to apply and interpret European law, a factor that has the potential to impact the autonomy of the EU legal order.[17]

Concerning the second issue, the Court determined that the arbitral tribunal is not entitled to request a preliminary ruling since it does not qualify as a court or tribunal of a member state within the EU.[18]

Regarding the third issue, the Court concluded that the award rendered by the arbitral tribunal does not ensure the principle of autonomy of the EU legal order, primarily due to insufficient judicial review that would fully uphold the effectiveness of EU law. Furthermore, in the event of annulment, such proceedings are only possible under the domestic law of the member state and not under European law itself.[19]

Consequently, the Court reached the conclusion that it is not permissible to include an arbitration provision in the BIT in question, due to the provisions outlined

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12 Ibidem, paragraph 23.
13 Ibidem, paragraph 31.
14 DECLÈVE: op. cit. 101.
15 Ibidem, 101.
16 Achmea Judgment, paragraph 40.
17 Ibidem, paragraph 42.
18 Ibidem, paragraph 49.
19 Ibidem, paragraph 53.

in Articles 267 and 344 of the TFEU, which safeguard the principle of autonomy within the EU legal order.[20]

2. Implications of Achmea Judgment

Following the Achmea judgment, the European Commission issued a communication that strongly emphasizes the prohibition of arbitral clauses in BITs between EU member states, in line with the principles established in the Achmea ruling.

"(...) implies that all investor-State arbitration clauses in intra-EU BITS are inapplicable, and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment."[21]

Subsequent to that communication, EU member states reached an agreement to terminate all intra-EU BITs in order to avoid any potential conflicts between EU law and the interpretations rendered by arbitral tribunals within the framework of BITs.[22] Then on 5 May 2020, the Termination Treaty was adopted[23].

One key point of the Termination Treaty is that it declares arbitration clauses in intra-EU BITs as invalid and cannot be used as a legal foundation for resolving disputes. According to Korom[24], through its "transitional provisions", the treaty effectively applies *de facto* this invalidation retroactively.

The Termination Treaty has a complex set of provisions regarding the transition regime in Articles 7 to 10 for pending arbitration proceedings, which sought to terminate intra-EU cases.[25] However, this retroactive application appears to conflict with the principles of the Vienna Convention on the Law of Treaties (VCLT).[26]

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[20] Ibidem, paragraph 56.

[21] *Communication from the Commission to the European Parliament and the Council.* Communication COM(2018) 547 final of 19 July 2018. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547 13 November 2024.

[22] *Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Court of Justice in Achmea and on Investment Protection in the European Union. https://finance.ec.europa.eu/publications/declaration-member-states-15-january-2019-legal-consequences-achmea-judgment-and-investment_en*, 13 November 2024.

[23] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. *Official Journal of the European Union* L 169/1 (2020). https://eur-lex.europa.eu/eli/agree_eums/2020/529/oj/eng 15 April 2025.

[24] KOROM, Veronika: Intra-EU BITs in Light of the Achmea Decision. *Central European Journal of Comparative Law* III, 2022/1, 113. https://doi.org/10.47078/2022.1.97-117

[25] For a deeper explanation on the transition regime, see: SÁNDOR, Lénárd: The Constitutional Dilemmas of Terminating Intra-EU BITs. *Central European Journal of Comparative Law* III, 2022/1., 191. https://doi.org/10.47078/2022.1.177-193

[26] KOROM: op. cit. 113.

In addition, the treaty creates unfair treatment among EU investors based solely on when they initiated arbitration. Those who began proceedings and received final awards before the Achmea ruling are not impacted and can retain the compensation granted to them. In contrast, investors whose arbitration cases were still pending at the time of the Achmea decision or who filed their claims afterward, either because the harmful state actions occurred later, they delayed initiating proceedings, or the tribunal took longer to issue a decision, are now subject to the transitional provisions and will likely struggle to enforce their awards.[27]

This unequal treatment contradicts the treaty's own statement that arbitration clauses are incompatible with EU law from the moment both parties to the BIT became EU members. If applied consistently, this rule should invalidate all intra-EU arbitration cases, whether concluded or still pending.[28]

The Achmea judgment not only poses challenges for intra-EU BITs, but also for agreements entered into with third parties, depending on the clauses regarding applicable law.[29] This is because one of the Court's findings was that under Article 8 of the BIT between the Netherlands and Czechoslovakia, the applicable law for the arbitral tribunal is the EU law, which is considered a part of the domestic law of the parties involved.[30] Therefore, it can be argued that BITs containing clauses where the applicable law is domestic law, including EU law, are contradictory to the principle of autonomy within the EU legal order, as established by the Achmea judgment.[31]

Additionally, some BITs have the provision that the applicable law is the international law, and strictly the EU law is international law. Therefore, BITs with this kind of clause are also contrary to the principle of autonomy of the EU legal order because the tribunal will interpret and apply EU law.[32]

This issue extends beyond BITs explicitly stating that the domestic law is the applicable law, as it also affects agreements with silent clauses on this matter. In the context of investment disputes, it is common for parties to opt for arbitration rules under the International Centre for Settlement of Investment Disputes (ICSID) convention (Article 42.1) or the United Nations Commission on International Trade Law (UNCITRAL) Arbitral Rules (Article 35.1), both of which give the possibility to the use of domestic law as the applicable law.[33]

One important aspect to consider is that the interpretations of EU law made by arbitral tribunals are not legally binding and their effects are limited to the parties

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27 Ibidem, 113.
28 Ibidem, 113.
29 DECLÈVE: op. cit. 103.
30 Ibidem, 103.
31 Ibidem, 104.
32 Ibidem, 106.
33 Ibidem, 105.

involved in the arbitration process. As a result, the principle of autonomy of the EU legal order is not compromised.[34]

Nonetheless, the Court recognized that allowing an external adjudicator to interpret and apply EU law goes against the principle of mutual trust, which forms the basis for the autonomy of the EU legal order. This is due to the fact that the authority for an external adjudicator to apply and interpret EU law lies outside of the EU and is not approved by all member states.[35]

It is also essential to emphasize a key point raised by Cristiani[36]: the European Commission is participating as amicus curiae, a "non-disputing party" under Rule 37(2) of the ICSID Rules of Procedure, to safeguard the European Union's interest in ensuring that EU law is correctly interpreted and applied in ICSID arbitration cases involving a member state. The Commission attempted to intervene in the Iberdrola v. Guatemala case, an ICSID arbitration under the Spain-Guatemala BIT, asserting a "systemic interest" in how investment treaties signed by EU member states are interpreted. However, this request was denied by the ad hoc annulment committee.[37] Similarly, the Commission's attempt to participate as a non-disputing party in AES v. Hungary under ICSID was unsuccessful[38], whereas it was permitted to intervene in Electrabel v. Hungary[39]. The Commission was also successful in taking part in a series of international arbitrations involving the Czech Republic and investors in the photovoltaic (PV) energy sector, which were conducted under UNCITRAL rules.[40]

In addition to its strategy of intervening as amicus curiae in arbitration cases involving EU member states, the European Commission, in previous years, had also sought to prevent the enforcement of the award issued in Micula v. Romania[41]. Acting in its role as amicus curiae, the Commission submitted a petition arguing that the Sweden-Romania BIT should be interpreted in accordance with EU law, particularly in light of EU rules on state aid, asserting that failure to do so would render the award unenforceable within the EU. Following the issuance of the award, the Commission took a further step by sending a letter to Romania on 26 May 2014,

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34 Jens HILLEBRAND: Intra-EU Investment Arbitration after Achmea Case: Legal Autonomy Bounded by Mutual Trust. *European Constitutional Law Review* XIV, 2018/4, 779. https://doi.org//10.1017/S1574019618000366

35 Ibidem, 781.

36 Frederica CRISTIANI: Concluding International Investment-Related Agreements with Non-EU Countries: Roles of the EU and Its Member States. *Central European Journal of Comparative Law* III, 2022/1, 48. https://doi.org/10.47078/2022.1.41-56

37 Ibidem, 48.

38 Ibidem, 48.

39 Electrobel v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, paragraph 1.18 and 4.130.

40 CRISTIANI: op. cit. 49.

41 Ibidem, 49.

announcing its decision to impose a suspension injunction.[42]This measure required Romania to stop any efforts that might lead to enforcement of the outstanding portion of the award. This marked a significant shift, as the Commission moved beyond its traditional amicus curiae role to actively opposing the enforcement of an ICSID award.[43]

Nonetheless, as it is highlighted by Gáspár-Szilágyi,[44] on 19 February 2020, the United Kingdom Supreme Court unanimously ruled that the arbitral award in Micula v. Romania, an intra-EU dispute, could be enforced in the UK. The Court reasoned that since the UK had joined the ICSID Convention before becoming a member of the EU, its obligations under the Convention did not conflict with EU law, as outlined in Article 351 of the TFEU. Additionally, despite EU rules technically preventing payment, Romanian authorities ultimately chose to compensate the investors, largely due to the multiple enforcement actions initiated by them.[45]

In addition, in some cases, respondent states have raised the objection of lack of jurisdiction before arbitral tribunals based on the Achmea judgment and the Termination Treaty, with varying outcomes. For example, in LC Corp B.V.[46] Poland, the argument presented by the respondent state was not accepted. Poland argued that there was no jurisdiction based on the Achmea judgment and the Termination Treaty.[47] As a result, Poland filed a petition before the Amsterdam District Court requesting cooperation in submitting a joint application to the arbitral tribunal seated in London to terminate the arbitration proceedings. This argument was dismissed by the Dutch court, which held that the arbitral tribunal is located outside the EU and therefore EU law, specifically the Achmea judgment and the Termination Treaty, is not binding on it.[48]

Another example where the objection of lack of jurisdiction was not accepted is Adria Group v. Croatia. In that case, the tribunal stated that the position of the Court of Justice of the European Union, which argues that EU law prevails over international legal obligations, is not acceptable.[49] For that reason, the obligations under the BIT between Croatia and the Netherlands must be respected. Regarding

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42 State aid SA.38517 (2014/C) (ex 2014/NN) — Implementation of Arbitral award Micula v Romania of 11 December 2013. *Official Journal of the European Union* C 393/27 (2014). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=planjo:20141027-032. 15 April 2025.

43 CRISTIANI: op. cit. 49.

44 GÁSPÁR-SZILÁGYI, Szilárd: Does Brexit Mean Brexit? The Enforcement of Intra-EU Investment Awards in the Post-Brexit Era. *Central European Journal of Comparative Law* III, 2022/1., 89.

45 Ibidem, 89.

46 A Dutch company.

47 Case C/13/720363 / KG ZA 22-636 EAM/LO, LC Corp B.V. Poland, Amsterdam District Court, Private Law Division, Judgment of 1 September 2022, paragraphs 2.4 to 2.7.

48 Ibidem, paragraph 4.7.

49 Adria group B.V. and Adria Group Holding B.V. v. Republic of Croatia, ICSID Case No. ARB/20/6, Decision on Intra-EU Jurisdictional Objection of 31 October 2023, paragraph 123.

the effects of the Termination Treaty, the tribunal noted that the arbitral proceedings began in February 2020, while the Agreement entered into force on 31 March 2021. Therefore, in the view of the tribunal, it is not possible to apply the Agreement retroactively to this particular case.[50]

Despite the outcomes of these arbitral cases, there are other positive developments concerning the objection of lack of jurisdiction, as explained in the next section.

3. The problem of jurisdiction in investment disputes settlements in the context of ECT

After the Achmea judgment, the European Commission reasserted its stance on the inapplicability of the arbitral clause in intra-EU relations within the ECT. The European Commission has explicitly stated that there is a disconnection clause in the treaty. A "disconnection clause" refers to a provision in a multilateral treaty that allows certain parties to exclude the application of the treaty, in whole or in part, in their mutual relations, while other parties can still fully apply the treaty in their dealings with them[51]. In this context, it implies that the ECT does not apply to intra-EU relations.[52] Nevertheless, it is worth noting that numerous scholars and arbitrators do not share the same viewpoint as the European Commission on this matter.[53]

The position of the European Commission is grounded in Article 32 of the Vienna Convention on the Law of Treaties, which stipulates the need to consider the original intentions of negotiators when interpreting an international agreement. In the context of the ECT, the European Commission asserts that the original intention of the negotiators was to solely regulate extra-EU relations.[54] To substantiate this standpoint, a ministerial declaration in February 1992 emphasized that EU member states would continue to apply EU law in intra-EU relations.[55] However, it is important to note that a disconnection clause was not included in the final text of the ECT.

It appears that the inclusion of a disconnection clause in the ECT was ultimately abandoned due to fragile negotiations and hesitations among the other partners involved. As a result, the EU member states withdrew their proposal for this clause during the negotiations.[56] Therefore, despite the statement made in the ministerial

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50 Ibidem, paragraph 199.

51 *Report On The Consequences Of The So-Called "Disconnection Clause" In International Law In General And For Council Of Europe Conventions, Containing Such A Clause, In Particular*. 8 October 2008. https://rm.coe.int/1680064512, 15 April 2025.

52 *Communication*…. 3–4.

53 Robert BASEDOW: The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration. *Journal of International Economic Law* XXIII, 2019/1, 3. https://doi.org/10.1093/jiel/jgz025

54 Ibidem, 3.

55 Ibidem, 11.

56 Ibidem, 19.

declaration in 1992 by the EU members, it is not possible to assert the existence of a disconnection clause within the ECT. On the contrary, it underwent negotiations and was ultimately dismissed, which implies that dispositions regarding investment disputes by arbitral tribunals are applicable in relations intra-EU.

In addition to the efforts made by the European Commission through its thesis on the disconnection clause, some EU member states have sought to defend themselves in ECT arbitration cases by raising the objection of lack of jurisdiction based on the Achmea judgment and the Termination Treaty. A particularly significant case in this context is Komstroy v. Moldova, in which the Court of Justice of the European Union reaffirmed that arbitral tribunals lack jurisdiction over cases filed after the Achmea Judgment, even under the ECT.[57] It is important to note that this case did not even involve EU member states, as Komstroy is a Ukrainian company. Nevertheless, the Court of Justice of the European Union used the opportunity to reinforce its position regarding intra-EU arbitration under the ECT.

The case originated in the late 1990s, when the Ukrainian company Energoallians entered into contracts to supply electricity from Ukraine to Moldova through an intermediary. After the Moldovan state-owned company Moldtranselectro defaulted on payments, Energoallians acquired the claim and later alleged that Moldova's actions interfered with debt recovery, breaching its obligations under the ECT and a bilateral investment treaty. Arbitration proceedings in Paris resulted in a 2013 award ordering Moldova to pay $46.5 million. The award was later transferred to Komstroy, which had acquired Energoallians, but Moldova challenged the decision before the Paris Court of Appeal, arguing that the tribunal lacked jurisdiction and that the award violated international public policy.[58]

In 2016, the Paris Court of Appeal annulled the arbitral award in Komstroy on the grounds that the tribunal lacked jurisdiction, ruling that the claim, arising from a contract to supply electricity, did not involve a capital contribution and therefore did not qualify as an "investment" under the ECT. However, in 2018, the French Cour de Cassation overturned this decision, stating that the lower court had wrongly imposed an additional requirement not found in the ECT. The case was sent back to the Paris Court of Appeal, which, on September 24, 2019, decided to suspend the proceedings and refer certain legal questions to the Court of Justice of the European Union, though these questions were not directly related to jurisdiction over ECT-based intra-EU arbitrations.[59]

The Court of Justice of the European Union decided that, in order to address one of the questions referred by the Paris Court of Appeal, it was necessary to determine whether an arbitral proceeding based on Article 26(2)(c) of the ECT, involving two EU member states, is valid or not.[60] This was deemed relevant even though the

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[57] Court of Justice of The European Union, Case C-741/19, Komstroy LLC. Judgment of 2 September 2021, paragraph 45.

[58] Ibidem, paragraphs 8 to 14.

[59] Ibidem, paragraph 15 to 20.

[60] Ibidem, paragraph 40.

disputing parties were not EU members. In this judgment, the Achmea ruling was essentially used as a standard to reaffirm that arbitral tribunals are not part of the EU judicial system and, due to the principles of supremacy and autonomy of EU law, all arbitrations based on Article 26 of the ECT lack jurisdiction to interpret EU law.[61]

Despite the Achmea judgment, the Termination Treaty, and the Komstroy judgment, the outcomes of arbitral proceedings based on the ECT have been quite diverse. On one hand, there are cases where the objection of lack of jurisdiction was dismissed. Examples include: Masdar Solar & Wind Cooperatief U.A. v. Spain[62]; Vattenfall AB and others v. Germany[63]; UP and C.D Holding Internationale v. Hungary[64]; Greentech Energy Systems A/S and others v. Italy[65]; Foresight Luxembourg Solar 1 S.à r.l. and others v. Spain[66]; InfraRed Environmental Infrastructure GP Limited and others v. Spain[67]; and Landesbank Baden-Württemberg and others v. Spain.[68]

On the other hand, there are cases where the objection of lack of jurisdiction was accepted. For example, in Green Power v. Spain, the tribunal held that the applicable law to the dispute was EU law, and therefore the requirements of the Achmea judgment and the provisions of the Termination Treaty were applicable.[69] In this sense, the parties were prevented from initiating arbitration proceedings because doing so could compromise the principles of autonomy and supremacy of EU law.[70] This case represents a milestone in ECT-based arbitration, as it was the first time a tribunal accepted a lack of jurisdiction based on the Achmea judgment.[71] The same

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61 Ibidem, paragraph 45.

62 Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1, Award of 16 May 2018, paragraph 679.

63 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on Achmea Issue of 31 August 2018, paragraph 232.

64 UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award of 9 October 2018, paragraph 266.

65 Athena Investments A/S (formerly Greentech Energy Systems A/S), NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic, Stockholm Chamber of Commerce Case No. 2015/095, Final Award of 23 December 2018, paragraph 403.

66 Foresight Luxembourg Solar 1 S. Á.R1. and others v. Kingdom of Spain, Stockholm Chamber of Commerce Case No. 2015/150, Final Award of 14 November 2018, paragraph 220.

67 InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award of 2 August 2019, paragraph 267.

68 Landesbank Baden-Württemberg and others v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection of 25 February 2019, paragraph 202.

69 Green Power K/S and Obton A/S v. Spain, Stockholm Chamber of Commerce Case No. V 2016/135, Award of 16 June 2022, paragraph 422.

70 Ibidem, paragraph 456

71 Anoi WANG: ECT tribunal upholds intra-EU treaty jurisdictional objection for the first time. *Investment Treaty News,* 7 October 2022. https://www.iisd.org/itn/2022/10/07/ect-

outcome occurred in two other cases, where the arbitral tribunals accepted the lack of jurisdiction based on the Achmea judgment: Sapec v. Spain and European Solar Farm v. Spain.[72]

According to these different outcomes, there is no certainty about what may happen in the future, precisely because the awards rendered by arbitral tribunals are not binding on other tribunals.

4. Further steps: towards a Multilateral Investment Court

The Achmea judgment demonstrated that to preserve the principle of autonomy of EU legal order, the arbitral system to resolve the dispute settlement between foreign investors and member states is not appropriate. Therefore, it is necessary to move forward, and this regard the proposal of creating a multilateral investment court might be a possible solution.

The main purpose of the creation of a multilateral investment court is to have coherent decisions in a body of jurisprudence made by impartial and independent judges to reduce the level of uncertainty.[73]

Regarding the background to create the multilateral investment court, the first attempt to change the current arbitral systems was the provisions included which were towards an Investment Court System (ICS). They were included in the Comprehensive Economic and Trade Agreement with Canada (CETA), EU-Vietnam Investment Protection Agreement. In May 2015 EU issued a document called "Investment in TTIP and beyond- the path of the reform", where outlined the creation of a multilateral investment court.[74] The main reasons to justify the creation of this system is to fix some problems of the arbitration system, such as the imposition of limitations to make regulatory measures in public interest; the investors might to file a claim against the host states because of a new regulation which affects their profits; the system is unbalanced towards the protection of the foreign investors, in detriment of the sovereign of host states.[75]

In that document, the main proposal were divided into two parts: firstly, about the ICS; secondly, about the multilateral investment court.

The proposals concerning the ICS are as follows: arbitrators should be appointed from a pre-established list agreed upon by the parties. This method aims to prevent any prior connections between the parties and the arbitrators. The tribunal should

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tribunal-upholds-intra-eu-treaty-jurisdictional-objection-for-the-first-time-green-power-v-spain-anqi-wang/, 15 April 2025.

72 Inés INFANTE – Alejandro MONTANERO –Javier SÁNCHEZ-VILLEGAS: 2024 Arbitration Year in Review-Spain. *Daily Jus* 21 March 2025. https://dailyjus.com/world/2025/03/2024-arbitration-year-in-review-spain, 15 April 2025.

73 Agota ZWOLANKIEWICZ: Multilateral Investment Court- a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements? *Groningen Journal of International Law* IX, 2021/1, 196. https://doi.org/10.21827/GroJIL.9.1.196

74 Ibidem, 198.

75 Ibidem, 199.

also allow the participation of amicus curiae submissions from other experts in international law. An appellate mechanism should be created to ensure the correction of decisions, following the example of the Appellate Body of the World Trade Organization. To preserve the principle of autonomy of the EU legal order, tribunals must not interpret domestic law or EU law, as such matters fall outside their competence.

As for the multilateral investment court, there are two key elements: first, the establishment of a permanent court rather than an ad hoc tribunal; second, the replacement of arbitrators with tenured judges.

Since 2015, the European Commission has been working on the creation of the multilateral investment court. On 18 March 2015, Commissioner Malmström introduced the concept of a "Multilateral Court" during a session of the European Parliament's Committee on International Trade, and reiterated it a week later at an informal Foreign Affairs Council meeting.[76] Later, the Court of Justice of the European Union issued Opinion 1/17, affirming that the ICS included in the CETA does not conflict with the EU Treaties[77]. The Court underlined that international agreements establishing a court to interpret their terms, whose rulings are binding on the EU, are generally compatible with EU law.[78] However, the Court of Justice of the European Union has made it clear that tribunals established outside the EU legal system are not permitted to interpret or apply EU law, except in relation to the specific provisions of the international agreements they are based on[79]. These tribunals cannot issue decisions that would interfere with the functioning of EU institutions within the EU's constitutional structure. As such, EU agreements cannot grant these bodies authority to interpret or apply EU law beyond the scope of the agreement itself, and their rulings must not hinder the proper operation of the EU's legal and institutional order.

Bungenberg and Reinisch[80] argue that from the EU's point of view, the structure of the new system must align with Article 21 of the Treaty on European Union (TEU), which plays a key role. This article emphasizes the EU's commitment to promoting multilateral approaches and highlights the fundamental importance of upholding the rule of law. Based on these principles, the authors stress the need to guarantee a balanced and fair process for all parties involved. They also refer to the G20 Guiding Principles for Global Investment Policymaking, which underline that dispute resolution mechanisms should be transparent, equitable.

In March 2018, the European Council granted a mandate to negotiate the establishment of a multilateral investment court within the UNCITRAL framework,

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[76] Marc BUNGENBERG – August REINISCH: *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court. Options Regarding the Institutionalization of Investor-State Dispute Settlement.* Springer Open, Berlin, 2020, 9.

[77] CJEU Opinion 1/17 of the Court, 30 April 2019, paragraph 245.

[78] Ibidem, paragraph 161.

[79] Ibidem, paragraph 133.

[80] BUNGENBERG – REINISCH: op. cit. 13.

taking into account the points mentioned above and, in particular, the exclusive competence of EU institutions to interpret EU law, in line with the principles of autonomy and supremacy of EU law.[81]

Bungenberg and Reinisch[82] suggest that a multilateral investment court could be structured as an independent international organization, established through a treaty, equipped with its own institutional framework and legal personality. Economically, such a court would only be viable if it had at least 40 member states-meaning, beyond the EU's 27 members, at least 10 additional countries would need to join. This threshold would allow cost savings compared to the current system, where payments are made to arbitrators and judges in bilateral mechanisms like ICS. They also emphasize that the multilateral investment court statute should come into effect only after reaching a sufficient number of ratifications, to avoid merely creating another layer of dispute resolution. In the case of EU perspective, it is important to highlight that this multilateral investment court may not be able to interpret EU law, in accordance with principles of autonomy and supremacy of EU law, as it was presented at the Achmea judgment.

Conclusions

In reality, it is not possible to definitively state that the Achmea judgment has altered the jurisdiction of investment dispute conflicts within the EU. The effects of this judgment are limited, not applicable universally as it is not binding on all arbitral tribunals.[83] However, if the arbitration takes place within the territory of an EU member state and the resulting award is subject to annulment proceedings before a local court, the Achmea judgment becomes binding on that specific court. Additionally, outside the EU, the Achmea judgment started to be considered binding, as shown in Green Power v. Spain.

Based on this understanding, claimants are advised to opt for arbitration outside of Europe. Washington, D.C., often becomes an attractive choice due to the facilities and rules offered by the ICSID. However, the enforcement of awards rendered between an EU member state and a party belonging to one of the member states might be challenging within the EU, as shown in Micula v. Romania.

It seems that, when it comes to disputes settlement under the ECT, the jurisdiction lies with the arbitral tribunals to determine the conflicts. The Achmea judgment's applicability is limited to the parties involved, so it cannot be used to dismiss the

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81 See European Commission: *Multilateral Investment Court- Relevant Documents.* https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en, 13 February 2024.

82 BUNGENBERG – REINISCH: op. cit. 3.

83 See for example the cases: Masdar Solar & Wind Cooperatief U.A. v. Spain; Vattenfall AB and others v. Germany; UP and C.D Holding Internationale v. Hungary; Greentech Energy Systems A/S and others v. Italy; Foresight Luxembourg Solar 1 S.à r.l. and others v. Spain; InfraRed Environmental Infrastructure GP Limited and others v. Spain; and Landesbank Baden-Württemberg and others v. Spain.

jurisdiction of the arbitral tribunal, as stated in Article 26(a) of the ECT. Furthermore, the notion that the ECT includes a disconnection clause for EU member states is not coherent with the historical negotiations of the treaty. If the EU member states intended to exclude intra-EU relations in the field of energy, they should have sought a reservation within the treaty, which was not pursued.

While the Achmea judgment may not eliminate the jurisdiction of arbitral tribunals in investment disputes, it is a significant stride towards achieving uniform interpretation of EU law.

In this regard, it is crucial for the EU to prioritize the establishment of a consistent interpretation of EU law to safeguard the integrity of the rule of law against potentially disruptive interpretations by arbitral tribunals. As a result, member states should further commit to the elimination of the arbitral clauses within the BITs they have signed, particularly in cases involving intra-EU relations, as stated in the declaration issued by the Council of Ministers in 2019, and in the Termination Treaty.

Nevertheless, this does not imply that the arbitral mechanism should be eliminated entirely. Rather, it is crucial to strive for a balance between protecting investments and ensuring uniform interpretation and application of EU law. In this regard, the proposal put forth by the EU to establish an ICS, as seen in treaties signed with countries such as Canada[84], Singapore[85], and Vietnam[86], appears to be a step in the right direction, in my opinion.

The implementation of a permanent ICS should be the next crucial step for the EU in resolving intra-EU investment conflicts. This system should consist of tenured judges who can establish binding precedents, thus preventing disruptive and unpredictable decisions.

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