

WHAT HAPPENS NOW? THE FUTURE OF INTRA-E.U. INVESTOR-STATE DISPUTE SETTLEMENT UNDER THE ENERGY CHARTER TREATY

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I. INTRODUCTION

On March 6, 2018, the Court of Justice of the European Union (CJEU) issued its preliminary ruling declaring that E.U. law precluded the investor-state arbitration in Achmea.1 In its decision, the CJEU ruled that the arbitration conducted under the premise of a bilateral investment treaty (BIT) between the Slovak Republic and the Netherlands (SRN BIT) was incompatible with E.U. law, particularly the Treaty on the Functioning of the European Union (TFEU). The Achmea decision concerned the incompatibility of the SRN BIT with TFEU Articles 18,2 2673 and 3444, and did not address the investment-state

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1. Case C-284/16, Slovak Republic v. Achmea BV, 2018 E.C.R. 158, ¶ 60 [hereinafter Achmea].

2. "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination." Consolidated Version of the Treaty on the Functioning of the European Union, art. 18, 2012 O.J. (C. 326) 47, 56 [hereinafter TFEU].

3. "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties;

dispute settlement (ISDS) mechanism in the Energy Charter Treaty (ECT). However, the *Achmea* decision suggests that the CJEU may decide the issue of the compatibility of the ISDS mechanism of the ECT with E.U. law along the same lines. In fact, commentators⁵ and even some E.U. Member States consider the *Achmea* decision applicable to the ECT.

Today, the continuing effectiveness of the ECT in settling disputes between an E.U. Member State⁶ and an investor-national of another Member State (hereinafter referred to as intra-E.U. disputes) is in part due to its potential conflict with the TFEU. The *Achmea* decision casts much of this doubt. A further threat looms with the Svea Court's impending decision on Spain's set aside action against the arbitral award rendered in the *Novenergia* case.⁷ In that set aside action, Spain relied partly on the *Achmea* decision and its applicability to the ECT to invalidate the jurisdiction of the arbitral tribunal and the resulting award. In the alternative, Spain asked the Svea Court

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay." *Id.* art. 267, at 164.

4. "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." *Id.* art. 344, at 194.

5. See, e.g., CIARAN CROSS & VIVIAN KUBE, MUNICH ENV'T INST., IS THE ARBITRATION CLAUSE OF THE ENERGY CHARTER TREATY COMPATIBLE WITH EU LAW IN ITS APPLICATION BETWEEN EU MEMBER STATES? 23 (2018) (discussing whether an ECT arbitration fits into the E.U. scheme of dispute resolution, and finding little justification for affording remedies to investors outside this scheme when more critical and sensitive matters such as human rights do not get the same treatment).

6. Hereinafter, all references to Member States refer to E.U. Member States unless stated otherwise.

7. *Novenergia v. Spain*, SCC Case No. 063/2015, Final Award, ¶ 449 (Feb. 15, 2018) (italaw 2018), <https://www.italaw.com/cases/6613>.

to refer the matter to the CJEU for a ruling.⁸ In that context, the *Achmea* decision may provide useful insight into how the CJEU will decide the issue.

In the meantime, the fate of intra-E.U. ECT ISDS is unclear. While the European Commission (EC) and a majority of the Member States have opined that the *Achmea* decision extends to and indicates a similar incompatibility of the ECT with E.U. law, the matter is by no means settled. As discussed below, a number of ECT arbitral tribunals have expressed a contrary view. It is equally uncertain whether future ECT tribunals, or other Member States in which enforcement of intra-E.U. awards is sought, will adopt the same position. In this context, this paper discusses and contrasts the *Achmea* decision to the position taken in certain ECT tribunals. Prior thereto, this paper begins by detailing the background of the ECT, the European Union and E.U. law, and the *Achmea* decision. Assuming that the ECT ISDS is indeed incompatible with E.U. law, this paper concludes by discussing its effect on, and the remaining remedies for, intra-E.U. investors, and the way forward for the European Union and its Member States.

II. THE ENERGY CHARTER TREATY

The uncertainty of investor-state arbitration under the ECT is ironic. The ECT was the brainchild of the European Union.⁹ The EC drafted the European Energy Charter, which started the negotiations towards the establishment of the ECT. The EC even referred to itself as the “driving force” behind the ECT negotiations.¹⁰ Now, it appears the EC may destroy the very institution it helped create.

8. Joel Dahlquist, *Spain Challenges Novenergia Arbitral Award in Swedish Court, Relying on the Achmea Judgment*, ACQUIESCENCIA (May 23, 2018), <https://acquiescencia.net/2018/05/23/spain-challenges-novenergia-arbitral-award-in-swedish-court-relying-on-the-achmea-judgment>.

9. Jan Kleinheisterkamp, Stockholm Chamber of Commerce Inst., *The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European Law Perspective* 1 (2011) (conference report reported presented in Stockholm, Sweden, June 9–10, 2011), https://sccinstitute.com/media/61991/jan_kleinheisterkamp_report-ect-eu-law.pdf.

10. European Commission Press Release, *Energy Charter Treaty – Background Note* (Dec. 16, 1994), http://europa.eu/rapid/press-release_MEMO-94-75_en.htm?locale=EN.

The ECT is a multilateral treaty that aims to “catalyse economic growth”¹¹ by liberalizing trade, transit, and investment in energy.¹² It pursues this goal by creating a favorable legal framework among contracting parties that sets down substantive protections¹³ for foreign investors, and a means of resolving disputes arising from a breach of these protections.¹⁴ As of early 2019, the ECT has 56 contracting parties,¹⁵ including Euratom and the European Union as a Regional Economic Integration Organization (REIO).¹⁶ Of these parties, 27 are also members of the European Union.¹⁷

The ECT’s dispute settlement provisions are considered some of its most essential features, as they strengthen and complement its substantive protections.¹⁸ More specifically, Chapter V of the ECT provides for dispute resolution between states under Article 27, and between states and investors under Article 26. Article 26, in particular, is a “very important feature,”¹⁹ as it gives investors the power to file a claim against a

11. Energy Charter Treaty pmb., Apr. 16, 1998, 2080 U.N.T.S. 100, 100 [hereinafter ECT].

12. Cara Dowling, *Discussing the Energy Charter Treaty: Q&A with Dr. Urban Rusnák, Secretary-General, Energy Charter Treaty Secretariat*, 11 INT’L ARB. REP. 2, 2 (2018).

13. These include fair and equitable treatment, constant protection and security, non-discrimination, national treatment, most favored nation, and an umbrella clause that obliges contracting parties to observe all other obligations made to investors of other contracting parties. ECT, *supra* note 11, art. 10, at 109–110.

14. ECT, *supra* note 11, pt. III, at 109–114; *supra* pt. V, at 121–124.

15. Five contracting parties signed but did not ratify the ECT. These are Australia, Belarus, Iceland, Norway, and the Russian Federation. *Energy Charter Treaty: Signatories / Contracting Parties*, INT’L ENERGY CHARTER, <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties> (last updated Feb. 18, 2019).

16. *Members and Observers to the Energy Charter Conference*, INT’L ENERGY CHARTER, <https://energycharter.org/who-we-are/members-observers> (last updated Oct. 17, 2018).

17. *Id.* As of this writing, Italy is the only E.U. Member State that is not a party to the ECT.

18. Thomas W. Walde, *European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects*, 34 INT’L LEGAL MATERIALS 360, 360 (1995).

19. Lucy Reed & Lucy Martinez, *The Energy Charter Treaty: An Overview*, 14 INT’L L. STUDENTS’ ASS’N J. INT’L & COMP. L. 405, 418 [hereinafter Reed & Martinez] (quoting *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID

contracting party²⁰ by arbitration under a) the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), b) the International Centre for Settlement of Investment Disputes (ICSID) Additional Facility, c) the U.N. Commission on International Trade Law (UNCITRAL), or d) the Stockholm Chamber of Commerce (SCC).²¹

The ECT's dispute settlement provision is one of the most frequently invoked mechanisms for ISDS. The U.N. Conference on Trade and Development (UNCTAD) estimates that in 2017 alone, around 20% of investor-state arbitrations worldwide invoked the ECT, totaling 113 arbitrations that did so.²² Since 2014, 76% of all energy-related investor-state disputes were brought under the ECT.²³ The importance of the ECT, to E.U. investors in particular, cannot be overestimated. Of the sixty-three new energy-related investor-state disputes brought since 2014, 78% were against E.U. Member States.²⁴ Of the 121 ECT investor-state disputes to date, about seventy-eight (or 64%) were intra-E.U. disputes.²⁵ It is even estimated that intra-

Case No. ARB/03/24, Decision on Jurisdiction, ¶ 141 (Feb. 8, 2005) 44 I.L.M. 721, 742 (2005)).

20. See ECT, *supra* note 11, art. 1(2), at 101 (defining a contracting party as “a state or Regional Economic Integration Organization which has consented to be bound by this Treaty . . .”).

21. ECT, *supra* note 11, art. 26, at 121–122. For a discussion on the dispute resolution mechanisms under the ECT, see generally Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1 J. INT'L DISP. SETTLEMENT 153 (2010). For a similar discussion, see also Reed & Martinez, *supra* note 19, at 415–27.

22. United Nations Conference on Trade & Dev., *Investor-State Dispute Settlement: Review of Developments in 2017*, in 2 INT'L INV. AGREEMENTS ISSUES NOTE 1, 2 (2018), https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf.

23. Mark Baker, Cara Dowling & Ben Grant, *Investment Disputes in the Energy Sector: A Bipolar World*, 11 INT'L ARB. REP. 8, 9 (2018).

24. *Id.*

25. These include: 1) AES (UK) v. Hungary, 2) Nykomb (Sweden) v. Latvia, 3) Plama (Cyprus) v. Bulgaria, 4) Hrvatska (Croatia) v. Slovenia, 5) Electrabel (Belgium) v. Hungary, 6) AES Summit and AES-Tisza (UK) v. Hungary, 7) Mercuria (Cyprus) v. Poland, 8) Vattenfall AB, et al., (Sweden) v. Germany, 9) EDF (France) v. Hungary, 10) Slovak Gas Holding BV (the Netherlands) v. Slovakia, 11) Vattenfall AB (Sweden) v. Germany, 12) Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain, 13) PV Investors v. Spain, 14) Isolux (the Netherlands) v. Spain, 15) Antin Infrastructure (Luxembourg) v. Spain, 16) MOL Nyrt. (Hungary)

E.U. ECT cases account for 10% of all known investor-state dispute claims worldwide.²⁶

v. Croatia, 17) Eiser (Luxembourg) v. Spain, 18) NextEra (the Netherlands) v. Spain, 19) European Solar Farms (Denmark) v. Spain, 20) Triodos SICAV (Luxembourg) v. Spain, 21) Veolia Propreté (France) v. Italy, 22) LSG Building (Austria) v. Romania, 23) ACF Renewable (Malta) v. Bulgaria, 24) Solarpark Management (Germany) v. Spain, 25) FREIF Eurowind (UK) v. Spain, 26) Greentech Energy, et al. (Denmark) v. Spain, 27) Green Power K/S (Denmark) v. Spain, 28) EDF (France) v. Spain, 29) DCM Energy, et al. (German) v. Spain, 30) Sun Reserve Luxco (Luxembourg) v. Italy, 31) CEF Energia BV (the Netherlands) v. Italy, 32) Novenergia (Luxembourg) v. Spain, 33) Portigon AG (Germany) v. Spain, 34) Rockhopper Mediterranean (UK), et al. v. Italy, 35) VC Holding II S.A.R.L., et al. (Luxembourg) v. Italy, 36) Antaris Solar (Germany) v. Czech Republic, 37) EVN AG (Austria) v. Bulgaria, 38) Amlyn Holding BV (the Netherlands) v. Croatia, 39) Sevilla Beheer BV, et al. (the Netherlands) v. Spain, 40) CEZ, a.s.v. (Czech Republic) v. Bulgaria, 41) Infracapital FI (Luxembourg) and Infracapital Solar BV (Dutch) v. Spain, 42) Sun-flower Olmeda GmbH (Germany) v. Spain, 43) ESPF (Austria) v. Italy, 44) ENGIE SA (France) v. Hungary, 45) Alten Renewable Energy Developments BV (the Netherlands) v. Spain, 46) Eurus Energy Europe BV (the Netherlands) v. Spain, 47) Eskosol S.p.A. (Italy) v. Italy, 48) Landesbank Baden-Württemberg (Germany) v. Spain, 49) Watkins Holdings S.A.R.L. (Luxembourg) v. Spain, 50) Hydro Energy 1 S.A.R.L. (Luxembourg) v. Spain, 51) Belenergia S.A. (Luxembourg) v. Italy, 52) SoIEs Badajoz GmbH (Germany) v. Spain, 53) ENERGO-PRO a.s. (Czech Republic) v. Bulgaria, 54) Silver Ridge Power BV (the Netherlands) v. Italy, 55) OperaFund Eco-Invest SICAV PLC (Malta) v. Spain, 56) Greentech Energy Systems (Denmark) v. Italy, 57) E.ON SE (Germany) v. Spain, 58) Cavalum SGPS, S.A. (Portugal) v. Spain, 59) KS Invest GmbH (Germany) v. Spain, 60) Matthias Kruck (Germany) v. Spain, 61) Cube Infrastructure Fund SICAV (Luxembourg) v. Spain, 62) Baywa r.e. Renewable Energy GmbH (Germany) v. Spain, 63) 9REN Holding S.A.R.L. (Luxembourg) v. Spain, 64) STEAG GmbH (Germany) v. Spain, 65) Stadtwerke München GmbH (Germany) v. Spain, 66) RWE Innogy GmbH (Germany) v. Spain, 67) RENERGY S.A.R.L. (Luxembourg) v. Spain, 68) InfraRed Environmental Infrastructure Gp Ltd., et al. (UK) v. Spain, 69) Blusun SA, et al. (Belgium) v. Italy, 70) Masdar Solar (the Netherlands) v. Spain, 71) WA Investments-Europa Nova Limited (Cyprus) v. Czech Republic, 72) Photovoltaik Knopf Betriebs-GmbH (Germany) v. Czech Republic, 73) ICW Europe Investments Limited (UK) v. Czech Republic, 74) Voltaic Network GmbH (Germany) v. Czech Republic, 75) Natland, et al. (Cyprus) v. Czech Republic, 76) RREEF, et al. (Luxembourg) v. Spain, 77) CSP Equity Investment S.A.R.L. (Luxembourg) v. Spain. This list is based on the list of ECT disputes available at *List of All Investment Dispute Settlement Cases*, INT'L ENERGY CHARTER, <https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases> (last updated June 4, 2018).

26. CROSS & KUBE, *supra* note 5, at 10.

Considering the frequency of intra-E.U. ECT ISDS, the possibility that E.U. Member States may choose to withdraw from or renegotiate the terms of the ECT as a requirement of E.U. law poses a real threat to existing ECT ISDS. On this note, the next section discusses the European Union and its evolving position on ISDS.

III. THE EUROPEAN UNION AND ITS CHANGING STANCE ON ISDS

The European Union is an economic and political union between 28 European countries.²⁷ The powers of E.U. institutions are founded on, and circumscribed by, various treaties. These include the Treaty of Rome, the Lisbon Treaty, the Treaty on the European Union (TEU),²⁸ and the TFEU.²⁹ These treaties enumerate the powers that Member States confer to E.U. institutions. The Lisbon Treaty in particular assigns power over foreign investment regulation to the European Union.³⁰ TFEU Article 3(1)(e) also provides that “the Union shall have exclusive competence in the [area of] . . . common commercial policy.”³¹ This includes foreign direct investment under Article 207. E.U. institutions such as the EC and CJEU may exercise this competence. In this context, it is arguable that Member States must take direction from the EC on how to deal with intra-E.U. ECT disputes³² should the CJEU later find the ECT to be incompatible with the TFEU.

The European Council, under negotiating directives, granted the EC power that it has used to change ISDS involving the European Union and its Member States.³³ This in-

27. European Union, *The EU in Brief*, EUROPA, https://europa.eu/european-union/about-eu/eu-in-brief_en (last updated Apr. 29, 2019).

28. Consolidated Version of the Treaty on the European Union, 2012 O.J. (C. 326) 13.

29. TFEU, *supra* note 2. For a full list and text of the various E.U. treaties, see *Eur-Lex*, EUROPA, <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> (last visited Feb. 25, 2019).

30. Freya Baetens, Gerard Kreijen & Andrea Varga, *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 VAND. J. TRANSNAT'L L. 1203, 1215 (2014).

31. TFEU, *supra* note 2, art. 3(1)(e), at 51.

32. Kleinheisterkamp, *supra* note 9, at 17.

33. Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Dis-*

cludes the EC's proposal for the creation of a multilateral investment court.³⁴ The EC has also been vocal about the incompatibility of ECT ISDS with regard to intra-E.U. disputes.³⁵ This position is broadly outlined in the EC Communication dated July 19, 2018, wherein the EC explicitly stated that the *Achmea* decision extends to the ECT.³⁶

Unlike the EC, the CJEU has not directly opined on the compatibility of the ECT with the TFEU. However, it has upheld the primacy of E.U. law in other areas and expressed a protective jealousy over its jurisdiction in interpreting E.U. law. For instance, in deciding whether to accede to the European Court of Human Rights (ECHR) in Opinion 2/13, the CJEU considered whether accession may endanger the primacy and autonomy of E.U. law and the CJEU's exclusive competence to interpret and apply it.³⁷ In its Opinion 1/09 on the European and Community Patents Courts, on the other hand,

putes, 12981/17 ADD. 1 (Mar. 20, 2018), <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

34. *Id.* ¶ 8. The E.U.-Canada Comprehensive Economic and Trade Agreement (CETA), the Trans-Atlantic Trade and Investment Partnership (TTIP) and Vietnam Trade Agreement are among the recent agreements under negotiation where such a proposal has been incorporated. Ana M. Lopez-Rodriguez, *Investor-State Dispute Settlement in the EU: Certainties and Uncertainties*, 40 HOUS. J. INT'L L. 139, 152–156 (2017).

35. *See, e.g.*, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶4.109 (Nov. 30, 2012) (italaw 2012), <https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf> (noting that the EC, in its position as *amicus curiae*, emphasized that Member States do not apply the “conflict rule” in the ECT due to the “general supremacy rule of EC law”); Commission Decision, *State Aid SA.40348 (2015/NN), Electricity Generation from Renewable Energy Sources, Cogeneration and Waste*, ¶160, C(2017) final 7384, (Nov. 10 2017) (stating that the EC considers provisions providing for intra-E.U. investor-state arbitration to be contrary to E.U. law). For a discussion on how the EC has participated in ISDS, see generally Fernando Dias Simões, *A Guardian and a Friend? The European Commission's Participation in Investment Arbitration*, 25 MICH. ST. INT'L L. REV. 233 (2017).

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

37. Opinion 2/13 of the Court, Opinion Pursuant to Article 218(11) TFEU, 2014 EUR-Lex CELEX LEXIS 2454, ¶ 258 (Dec. 18, 2014). For fuller analyses and summaries of the Opinion, see Daniele Gallo & Fernanda G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, 39 FORDHAM INT'L L.J. 1081, 1121–1124 (2016); CROSS & KUBE, *supra* note 5, at 23.

the CJEU opined that “[t]he judicial system of the European Union is moreover a complete system of legal remedies and procedures.”³⁸ These opinions illustrate the CJEU’s position that the European Union is a self-regulating, complete system. Thus, all intra-E.U. disputes should be resolved *exclusively* through the remedies available under it. These same considerations also surface in the *Achmea* decision, and will likely resurface should the Svea Court refer Spain’s set aside action in *Novenergia* to the CJEU.

In summary, the European Union has been changing the rules of the game for ISDS. The *Achmea* decision is only the latest, though likely not the last, action on the matter. While the European Union’s position on intra-E.U. investor-state arbitration under the ECT is still evolving, the *Achmea* decision provides a good indication of the CJEU’s ultimate position. The next section discusses the *Achmea* decision in contrast to the position taken by arbitral tribunals in deciding the compatibility of intra-E.U. ECT ISDS with E.U. law.

IV. THE *ACHMEA* DECISION AND THE DIFFERENT APPROACH OF ECT ARBITRAL TRIBUNALS

The *Achmea* decision stemmed from a dispute between Achmea, a Dutch investor and insurance company, and the Slovak Republic on the latter’s prohibition of the distribution of profit arising from private sickness insurance.³⁹ Achmea claimed damages from the prohibition and brought arbitration against the Slovak Republic pursuant to Article 8 of the SRN BIT.⁴⁰ The Slovak Republic contested the jurisdiction of the tribunal based on the incompatibility of the BIT arbitration with E.U. law. The tribunal dismissed this objection in an interlocutory award. Later, on December 7, 2012, the tribunal rendered an award in favor of Achmea.⁴¹

Since Germany was the seat of arbitration,⁴² the Slovak Republic then sought to set aside the award before the Oberlandesgericht Frankfurt am Main, the Higher Regional

38. Opinion 1/09 of the Court, Opinion Pursuant to Article 218(11) TFEU, 2011 EUR-Lex CELEX LEXIS 123, ¶ 70 (Mar. 8, 2011).

39. *Achmea*, *supra* note 1 at ¶ 7–8.

40. *Id.* ¶ 8–9.

41. *Id.* ¶ 11–12.

42. *Id.* ¶ 10.

Court.⁴³ When that court dismissed the set aside petition, the Slovak Republic appealed to the Bundesgerichtshof (BGH), the Federal Court of Justice. In turn, the BGH referred the question of compatibility of the BIT with the TFEU to the CJEU for a preliminary ruling.⁴⁴

The CJEU declared that TFEU Articles 267 and 344 preclude arbitration of an intra-E.U. dispute pursuant to a BIT.⁴⁵ The decision has led to disagreements over whether this preclusion extends to arbitration under the ECT. Parsing the words of the *Achmea* decision's dispositive, Csongor István Nagy argues that its operative provisions may be read restrictively to cover only ad hoc arbitrations.⁴⁶ Thus, institutional investor-state arbitrations involving intra-E.U. disputes, such as ICSID and SCC arbitrations under ECT Article 26, remain valid. Not everyone agrees.

A majority of the Member States officially consider the *Achmea* decision to cover investor-state arbitration under the ECT.⁴⁷ The remaining Member States are divided. In their joint declaration, Finland, Luxembourg, Malta, Slovenia, and Sweden stated that they believe the *Achmea* decision affected only intra-E.U. BITs and declined to comment on its effect on the ECT⁴⁸ in view of a pending case on this very question.⁴⁹

43. *Id.* ¶ 12.

44. *Id.* ¶ 13–14.

45. *Id.* ¶ 62.

46. Csongor István Nagy, *Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back,"* 19 GERMAN L.J. 981, 993 (2018).

47. Press Release, European Commission, Declaration of the Representatives of the Government of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on the Investment Protection in the European Union 1 (Jan. 15, 2019), https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

48. Press Release, European Commission, Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union 3 (Jan. 16, 2019), <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf>; Tom Jones, *EU Countries to Cancel BITs Post-Achmea*, GLOBAL ARB. REV. (Jan. 17, 2019), <https://globalarbitrationreview.com/article/1179337/eu-countries-to-cancel-bits-post-achmea>.

49. In the pending case, Spain asked the Svea Court of Appeal to set aside an SCC award against it arising from reforms to its renewable energy

Hungary declared that the *Achmea* decision covered only intra-E.U. BITs, and did not affect the validity of investor-state arbitration under the ECT.⁵⁰

Like its dispositive, the reasoning of the *Achmea* decision is broad and vague. The CJEU approached the issue with an emphasis on the obligations of Member States to uphold the primacy, autonomy, and uniformity of E.U. law. The European Union, the CJEU argued, is based on a set of common values, the enforcement of which rests on mutual trust and cooperation between Member States.⁵¹ These values are embodied and implemented through E.U. law.⁵² E.U. law, in turn, includes mechanisms to uphold these values. First, Member States cannot enter into an international agreement that derogates from E.U. law.⁵³ Second, under TFEU Article 344, Member States are precluded from referring disputes concerning interpretation of E.U. law to courts or tribunals outside the European Union.⁵⁴ Third, under TFEU Article 267, Member States can refer questions on the correct interpretation of E.U. law to the CJEU through a preliminary reference procedure.⁵⁵ As an institution of the European Union, the CJEU is mandated to protect this delicate legal structure. It is from this vantage point that the CJEU finds the SRN BIT incompatible with E.U. law.

On the other hand, the *Achmea* tribunal—or any other tribunal—will necessarily interpret and apply E.U. law as domes-

subsidy regime based on the applicability of the *Achmea* decision to intra-E.U. investor-state arbitration under the ECT. Rättsfall från Hovrätterna (RH) [cases from the Courts of Appeal] 2015 p. 1 T 4658-18 (Swed.). For a brief background on the case, see Laura Roddy, *Spain Asks for ECJ to Rule on ECT* (May 31, 2018) GLOBAL ARB. REV., <https://globalarbitrationreview.com/article/1170107/spain-asks-for-ecj-to-rule-on-ect>.

50. Press Release, European Commission, Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union 1 (Jan. 16, 2019), <http://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf>.

51. *Achmea*, *supra* note 1, ¶ 34.

52. *Id.*

53. *Id.* ¶ 32.

54. *Id.*

55. *Id.* ¶ 37.

tic or international law to resolve the dispute before it.⁵⁶ Pursuant to TFEU Article 344, Member States cannot refer disputes concerning the interpretation of E.U. law outside the methods provided for under E.U. law. The *Achmea* tribunal is *not* a court or tribunal of a Member State.⁵⁷ Consequently, the award cannot be referred to or be reviewed by the CJEU to ensure consistent interpretation of E.U. law. Thus, referral of a dispute to an arbitral tribunal under the BIT is a referral outside the methods provided under E.U. law. Even in instances where review of an award is possible, as in *Achmea*, the scope of review is limited and cannot include the merits.⁵⁸ This constrains the CJEU's power to review and correct the interpretation of E.U. law for uniformity. In light of these findings, the CJEU opined that the SRN BIT's ISDS mechanism threatens the autonomy, effectiveness, and consistency of E.U. law. Therefore, it is precluded by TFEU Articles 267 and 344.

If the CJEU extends the *Achmea* approach to the ECT, it is likely that the ECT ISDS will also be held incompatible with E.U. law. Like the *Achmea* tribunal, a tribunal constituted under ECT Article 26(c) will arguably also apply and interpret E.U. law in resolving the dispute before it. As in *Achmea*, an ECT tribunal is also arguably not a court or tribunal of a Member State. Furthermore, there is no absolute certainty that a court of a Member State would be able to review the award that an ECT tribunal rendered. While there may be instances when such a review is possible,⁵⁹ as in *Achmea*, the uncertainty of such review opens the possibility of inconsistent interpretation of E.U. law. Following the reasoning in the *Achmea* decision, this would be sufficient to make intra-E.U. ECT ISDS incompatible with E.U. law. Thus, the broad reasoning of the *Achmea* decision seems to sound the death knell for intra-E.U. ECT ISDS.

56. *Id.* ¶ 41–42.

57. For a contrary argument holding that the arbitral tribunal constituted under the BIT is a court or tribunal of a Member State, see generally Case C-284/16, *Slovak Republic v. Achmea BV*, 2018 E.C.R. 158, Opinion of AG Wathelet (Sept. 19, 2017).

58. *Achmea*, *supra* note 1 at ¶ 52–53.

59. This include instances where the chosen arbitration is not an ICSID arbitration and is seated in a Member State, and where enforcement of the award is sought in a Member State. *Id.* ¶ 20.

This is not the only perspective. Tribunals formed under the ECT's ISDS such as those that decided *Charanne*,⁶⁰ *Masdar*,⁶¹ and *Vattenfall*⁶² have, so far, upheld their respective jurisdictions under ECT Article 26.⁶³ These tribunals approach the issue of compatibility between the ECT and the TFEU using the rules of interpretation under Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and the conflict of law rule under ECT Article 16. To these tribunals, the absence of language of derogation excluding intra-E.U. disputes from ECT arbitration⁶⁴ means that intra-E.U. disputes may be submitted to arbitration. Moreover, assuming there is a conflict between the ECT and E.U. law, the conflict must be resolved in favor of ECT Article 26(2)(c) over TFEU Articles 267 and 344,⁶⁵ pursuant to ECT Article 16.⁶⁶ Article 16 holds that prior

60. Charanne B.V. & Construction Investments S.A.R.L. v. Spain, SCC Case No. 062/2012, Award, ¶ 433–436 (Jan. 21, 2016) (italaw 2016), <https://www.italaw.com/cases/2082> [hereinafter Charanne v. Spain].

61. Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 313, 322 (May 16, 2018) (italaw 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf> [hereinafter Masdar v. Spain].

62. Vattenfall AB, et al. v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, ¶ 121–133 (Aug. 31, 2018) (italaw 2018), <https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf> [hereinafter Vattenfall v. Germany].

63. Charanne v. Spain, *supra* note 60, ¶ 433–436; Masdar v. Spain, *supra* note 61, ¶ 313, 322; *id.*

64. Charanne v. Spain, *supra* note 60, ¶ 435; Masdar v. Spain, *supra* note 61, ¶ 310–314; Vattenfall v. Germany, *supra* note 62, ¶ 182, 188.

65. This is the case even if the TFEU was the later treaty. The Vattenfall tribunal rejected the argument that E.U. law should prevail based on the *lex posterior* rule under Art. 30(4)(a) of the VCLT. This rule only applied in the absence of a specific rule of interpretation. The ECT had such a specific rule in Art. 16, which is the operative *lex specialis*. Vattenfall v. Germany, *supra* note 62 at ¶ 225–229. Moreover, since some form of Arts. 267 and 344 existed in earlier E.U. agreements, the tribunal opined that it is, at least, arguable that the ECT is not the “later treaty.” *Supra*, ¶ 216–218. For a contrary argument claiming that the TFEU may be that later law, see also Cross & KUBE, *supra* note 5, at 7.

66. “Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or Part V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

and subsequent treaties by contracting parties cannot derogate from either Chapter III (“Investment Promotion and Protection”) or Chapter V (“Dispute Settlement”) of the ECT where these chapters contain more favorable provisions. Referral to arbitration is a mode of ISDS under the ECT. There is no similar remedy under E.U. law. Thus, the right to a direct resort to arbitration with the Member State for intra-E.U. disputes under the ECT Article 26 is more favorable to the investor. In this context, the ECT prevails over the TFEU.

It is arguable that the differences in the respective reasonings and conclusions of the CJEU and the ECT arbitral tribunals stem from a difference in perspective. The CJEU views the issue on the validity of intra-E.U. arbitration as an E.U. institution. As such, it gives more weight to the importance of E.U. law and its autonomy. Thus, if harmonization is not possible, the CJEU will likely decide any conflict between the TFEU and a BIT or the ECT in favor of the TFEU. In contrast, the *Charanne*, *Masdar*, and *Vattenfall* tribunals looked at the dispute as creatures of consent under the ECT and international law. To these tribunals, a conflict between the ECT and the TFEU is not one between a constitutive primary law and a *subordinate or secondary* law. Rather, it is between two treaties of equal weight. Thus, the tribunals rely heavily on rules of interpretation under the VCLT and the conflict rule in the ECT.

The tribunals’ approach may be the most appealing from the perspective of international law, especially because the arguments for incompatibility of intra-E.U. ECT arbitration with E.U. law tend to put a gloss on treaty texts unsupported by their plain meaning or context. Moreover, the tribunals’ approach promotes the object and purpose of the ECT to create a legal framework that encourages and protects investment while avoiding a split of ECT ISDS into extra-E.U. and intra-E.U. categories. In the absence of a worldwide appellate court or a system of precedent, the question of which approach is correct, however, will likely not be definitively resolved. Assum-

(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.” ECT, *supra* note 11, art. 16, at 114.

ing this uncertainty continues, the next section discusses its effect on, and the remedies open to, E.U. investors.⁶⁷

V. INVESTOR REMEDIES POST-ACHMEA

Assuming that the ECT's ISDS mechanisms are incompatible with the TFEU, an aggrieved investor has few remaining alternatives. If TFEU Articles 267 and 344 preclude intra-E.U. arbitration under ECT Article 26(2)(c), then they must also preclude a resort to any other dispute settlement procedure that the Member State and investor agreed upon under ECT Article 26(2)(b). Consequently, only resort to domestic courts remains under ECT Article 26(2)(a).

Ironically, the EC touts this emasculation of the ECT's ISDS provisions as a sufficient and adequate remedy.⁶⁸ To the EC, E.U. law already adequately protects an investor because of each Member State's obligations under TEU Article 19(1) to provide effective legal remedies—including interim relief—and domestic protection.⁶⁹ The EC's position, however, extols the legal fiction of mutual trust between Member States that may not yet exist in reality. Despite huge strides in unification, the European Union is *not* a single nation. It is still composed of discrete states with different nationalities. Investors' fears of bias and discrimination as well as their desire for speedy dispute resolution cannot be willed away. This is particularly important as this fear may be warranted in view of the risk of partiality in certain Member States, such as Hungary and Poland.⁷⁰

67. The question of how an investor may seek to execute awards in its favor is an entire topic altogether, and is beyond the scope of this paper.

68. European Commission Press Release, Commission Provides Guidance on Protection of Cross-Border EU Investments – Questions and Answers (July 19, 2018), http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm [hereinafter EC Fact Sheet].

69. European Commission Press Release, Communication from the Commission to the European Parliament and the Council: Protection of Intra-EU Investment (July 19, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0547&from=EN>.

70. Gallo & Nicola, *supra* note 37, at 1106. This article focuses on possible remedies for disputes with States outside the European Union; however, the same concerns expressed in the article as to each remedy equally apply in an intra-E.U. setting.

Apart from resort to a Member State's judicial system, the EC argues that investor rights are also protected by preliminary rulings,⁷¹ such as that which gave rise to the *Achmea* decision, and by infringement proceedings.⁷² However, both remedies have a similar disadvantage to that of the traditional mode of investor protection by diplomatic espousal, which arbitration largely replaced. In all three remedies, the investor is reliant upon the discretion of the national courts of the Member States and the EC as to whether preliminary reference, infringement proceedings, or diplomatic espousal is pursued.

In regard to diplomatic espousal of investor claims, it is arguable that an expansive reading of TFEU Articles 267 and 344 may have also removed this remedy. Diplomatic espousal is likely to politicize a commercial dispute⁷³ and destroy the principle of mutual trust that the EC and CJEU sought to protect in the *Achmea* decision. There is arguably nothing more destructive of mutual trust than another Member State espousing its investor's claim. Alternatively, diplomatic espousal may still exist within the European Union's legal framework, albeit in another form. Under TFEU Article 259, a Member State may bring an action against another Member State for failure to fulfill an obligation under the E.U. treaties, subject to prior resort to the EC. This may include a complaint for failure to provide adequate protection to an investor of the complaining Member State. Thus, although the process may prove difficult, an aggrieved investor may petition its Member State to bring an action under TFEU Article 259 against a host Member State.

Meanwhile, it appears that ECT arbitration is still available for investors who are *not* nationals of Member States. Nationality, for legal entities, is determined at the time of consent, prior to a dispute under ECT Article 26(7). Thus, existing corporate entities who are nationals of Member States may take advantage of this provision by restructuring *prior* to giving consent to arbitration and the occurrence of a dispute

71. TFEU, *supra* note 2, art. 267, at 164.

72. EC Fact Sheet, *supra* note 68. The EC is empowered to bring infringement proceedings under Arts. 260 and 263 of the TFEU as part of its power to ensure the proper application, implementation and enforcement of E.U. law. *Supra*.

73. Gallo & Nicola, *supra* note 37, at 1092.

with a host Member State. This may be done by involving a corporate entity organized outside the European Union in the corporate structure of the investment.⁷⁴

Thus, assuming that the invalidity of intra-E.U. arbitration declared in the *Achmea* decision extends to intra-E.U. ECT arbitration, several ironies arise. First, the European Union will have destroyed an essential feature of its own brainchild, the ECT, to resolve investor-state disputes. Second, precluding intra-E.U. ECT arbitration creates a form of reverse discrimination wherein intra-E.U. investors are disadvantaged as opposed to investors that can claim extra-E.U. nationality. Third, assuming intra-E.U. investors restructure in response, a sort of location arbitrage occurs wherein investors go outside the European Union so they can arbitrate a claim against a Member State under the ECT. Coinciding with the second point, this leads to the discriminatory, unequal treatment of intra-E.U. investors that the European Union was seeking to avoid when it sought to resolve intra-E.U. disputes within E.U. dispute settlement mechanisms.

VI. NEXT STEPS FOR THE EUROPEAN UNION

As investors rethink their strategies for intra-E.U. investments, the European Union itself cannot remain in this zone of uncertainty for intra-E.U. ECT disputes for long. If the European Union insists on the incompatibility of arbitration for intra-E.U. disputes, then it should craft a clear exit strategy and withdraw from the ECT or renegotiate its terms.⁷⁵

If renegotiation is possible, several options are available. These range from a wholesale carve-out of intra-E.U. disputes from ECT ISDS, to removal of the ICSID from the choices for arbitration coupled with limiting the seat of arbitration for UNCITRAL and SCC arbitration to Member States. Areas for renegotiation may also include the addition of procedural safeguards to maintain the primacy and consistency of E.U. law.

74. Hobér, *supra* note 21, at 182; CROSS & KUBE, *supra* note 5, at 31.

75. Burkhard Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice* 16–17 (Max Planck Inst. Lux. Working Paper No. 3, 2018). Renegotiation of the ECT may be difficult, as it will require three-fourths of the vote of all the contracting parties under Art. 42(4) of the ECT. ECT, *supra* note 11, art. 42(4), at 132.

Advocate General Bot's recent opinion on the validity of the E.U.-Canada Comprehensive Economic and Trade Agreement (CETA) ISDS indicates that the TFEU does not preclude all intra-E.U. ISDS.⁷⁶ The procedural safeguards in the CETA may be adapted for ECT ISDS. These include inserting provisions in the ECT: binding an arbitral tribunal to follow decisions of the CJEU on E.U. law;⁷⁷ instructing a tribunal to take a Member State's domestic law, which includes E.U. law, as fact;⁷⁸ and expressly providing that in cases where no CJEU decision is applicable, the tribunal's decision interpreting E.U. law is only valid between the parties of that particular dispute.⁷⁹ If withdrawal is preferred, transitory provisions must be made for existing intra-E.U. ECT arbitrations and disputes that may be brought during the sunset clauses under ECT Article 47.⁸⁰

As noted, the European Union has put forward proposals for a multilateral investment court for extra-E.U. investors.⁸¹ The same remedy may be provided for intra-E.U. investors through an intra-E.U. court or tribunal, whether as a new entity⁸² or by way of expansion of the CJEU's jurisdiction to include investor-state disputes. Alternatively, Member States may agree with each other that all intra-E.U. ECT disputes be referable only to arbitrations with seats in Member States. This will allow review of the arbitral award for consistency with E.U. law by the Member State where the arbitration is seated⁸³ or by the CJEU, via preliminary reference.

VII. CONCLUSION

Investor-state arbitration arose out of a need for an impartial, independent forum outside of the host state. The *Achmea* decision endangers this mode of ISDS by invalidating arbitra-

76. Opinion 1/17 of Advocate General Bot, EU-Canada CET Agreement, 2019 EUR-Lex CELEX LEXIS 72, ¶ 137 (Jan. 29, 2019).

77. *Id.*

78. *Id.* ¶ 110.

79. *Id.* ¶ 139.

80. Steffen Hindelang, *The Limited Immediate Effects of CJEU's Achmea Judgment*, VERFASSUNGSBLOG (Mar. 9, 2018), <https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement>.

81. *Id.*

82. Hess, *supra* note 75, at 16.

83. *Id.* at 17.

tion of intra-E.U. disputes based on BITs. In light of its prior opinions and the *Achmea* decision, there is a risk that the CJEU may find that TFEU Articles 267 and 344 similarly preclude intra-E.U. ECT arbitration. This conclusion arguably stems from the CJEU's emphasis on the primacy and autonomy of E.U. law and the likelihood of treating the ECT as secondary or subordinate E.U. law that cannot contravene the European Union's constitutive laws.

In contrast, arbitral tribunals faced with examining the validity of intra-E.U. ECT arbitration have upheld the ECT against the TFEU. This is potentially due to the tribunals' treatment of the TFEU and ECT as treaties of equal weight under international law. Under this approach, the tribunals use the conflict of law rules under ECT Article 26 and the rules of interpretation under VCLT Article 31 to decide. Using these rules, the tribunals conclude that intra-E.U. ECT arbitration is valid in the absence of any language of derogation and in light of the ECT's object and purpose.

Outside the respective merits of each approach, however, uncertainty remains over the validity of intra-E.U. ECT arbitration. This requires prompt resolution by the European Union. Thus, this paper presents a brief discussion of the next steps to be taken by the European Union and the remaining remedies open to intra-E.U. investors.

Regardless of what the CJEU eventually decides with regard to the validity of intra-E.U. ECT arbitration, in the interim, the need remains for an impartial, independent means of adjudicating investor-state disputes outside the host Member State. The European Union's proposal for an investment court may be one such solution. However, it need not be the only one. Advocate General Bot's opinion on the validity of the CETA's ISDS indicates that not all investor-settlement disputes outside the E.U. legal system are invalid. The safeguards used in the CETA to ensure the primacy and consistency of E.U. law among Member States may be adopted by amendment into the ECT. Given the importance of ECT ISDS and the relatively large number of intra-E.U. arbitrations brought under it, it may be wise for the EC and the European Union as a whole to review their positions and give intra-E.U. ECT ISDS another shot.

