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Achmea jacta est … The European Court of Justice Ends Energy Charter Treaty-based Arbitration Among EU Member States

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The Komstroy decision rendered on 2 September 2021 seals the fate of intra-European investment arbitration. The decision of the European Court of Justice (ECJ) ends a 20-year dispute and is the finishing touch to the European Commission and ECJ's long-standing efforts directed against intra-EU Investor-State Dispute Settlement (ISDS) mechanisms.

However, by considering that the reasoning of the 2018 *Achmea* decision applies equally to Energy Charter Treaty (ECT)-based intra-EU investment arbitrations, the ECJ decision falls again into the same theoretical pitfalls. Most notably, the ECJ turned a blind eye to all critics and counterarguments – grounded in public international law – put forward by arbitral tribunal's faced with the 'Achmea' jurisdictional objection in the context of an ECT-based intra-EU arbitration. These flaws will likely cause similar legal consequences than those following *Achmea*, namely a rather modest impact on arbitral tribunals' jurisdiction and a rush to enforcement in 'safe harbors', i.e. free from the ECJ's oversight, for worldwide intra-EU award creditors.

From a political perspective, it remains to be seen whether this landmark decision will fuel ongoing negotiations on the reform of the ECT and related discussions as to the implementation of a Multilateral Investment Court or, on the contrary, initiate a massive and coordinated withdrawal of EU member States from the ECT to the detriment of the protection of European investors.

Introduction

On 2 September 2021, the ECJ issued its long-awaited decision in the *Moldova v. Komstroy* case.[1] Well-known in France, this case had already led to decisions of the Paris Court of Appeal and the French Supreme Court.[2]

The dispute arose in the context of a series of contracts concluded in the late 1990s between Ukrainian company 'Energoalians' and a Moldovan state-owned entity 'Moldtranselectro', which operated the Moldovan electricity network through Derimen, a British Virgin Islands-registered company. The contract provided that Energoalians would purchase electricity from Ukrenergo, the Ukrainian state-owned electricity company, and resell it to Moldtranselectro via Derimen. However, Moldtranselectro defaulted. Derimen then assigned its rights to the debt to Energoalians. Following unsuccessful proceedings before Ukrainian and Moldovan national courts, Energoalians decided to commence an *ad hoc* arbitration, conducted under the UNCITRAL Arbitration Rules, pursuant to Article 26 of the ECT.

On 25 October 2013, the arbitral tribunal upheld its jurisdiction and ordered the Republic of Moldova to pay LEI 592.8 million (USD 34 million) in damages and interest to Energoalians for the breach of the ECT's fair and equitable treatment standard. It is worth noting that, in a very unusual move, the chair of the tribunal Dominic Pellew dissented arguing that a debt arising out of a supply of electricity contract did not constitute a protected investment under the ECT.

Shortly after, Moldova applied to set aside the award at the seat, before the Paris Court of Appeal, while Komstroy purchased Energoalians. The Paris Court of Appeal eventually set aside the award, upholding Moldova's jurisdictional objection that a debt arising out of a contract for the supply of energy did not constitute an investment within the meaning of the ECT. However, the French Supreme Court reinstated the award, arguing that the Court of Appeal had imposed a jurisdictional requirement that was not contained in the ECT. On remand, the Paris Court of Appeal stayed the proceedings and referred three questions relating to the definition of an investment under the ECT to the ECJ for preliminary ruling.

Although the dispute giving rise to the proceedings was otherwise extra-EU – i.e. involving a non-EU investor and a non-EU respondent State – the Luxembourg-based court seized this opportunity to address the issue of compatibility of ECT-based ISDS between EU member States and EU investors with EU law. The ECJ's position in this regard was indeed eagerly awaited since the ECJ issued its landmark *Achmea* decision.[3]

In *Komstroy*, the ECJ finally concluded that the reasoning in *Achmea* was equally applicable to the ISDS mechanism found in Article 26 of the ECT. In other words, arbitration under the ECT between EU investors and EU member States is now considered by the ECJ to be incompatible with EU law. This decision might be perceived as one ending the long-standing debate related to the complex interaction between ISDS and EU law. Indeed, and as the ECJ Advocate General Maciej Szpunar put it, EU law and international investment law have maintained a 'conflictual relationship' for a long time.[4]

The entry into force of the Lisbon Treaty in 2009 signaled the transfer of exclusive competence from member States to the EU with regards to foreign direct investments policy and regulation.[5] However,

1 *Republic of Moldova v. Komstroy* (the successor in law to the company Energoalians), CJEU, Case No. C-741/19, 2 Sept. 2021, https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-741/19.

2 CA Paris, Case No. 13/22531, 12 Apr. 2016; Cass. 1re civ., Case No. 16-16.568, 28 Mar. 2018.

3 *Slowakische Republik v. Achmea B.V.*, CJEU, Case No. C-284/16, Request for a preliminary ruling from the Bundesgerichtshof, 6 Mar. 2018. In this groundbreaking decision, the ECJ held that investor-state arbitration based on a BIT between two EU member States was incompatible with EU law. This judgment has been widely commented by scholars and practitioners alike. In particular, the arbitration community kept evaluating the scope of *Achmea*, and whether this ruling would also bar intra-EU investment disputes brought under Article 26 of the ECT. See e.g., J. Scheu, P. Nikolov, 'The Incompatibility of Intra-EU Investment treaty Arbitration with European Union Law – Assessing the Scope of the ECJ's Achmea Judgement', *German Yearbook of International Law*, vol. 62, 28 Feb. 2020; C. Baltag, A. Stanic (eds.), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer Law International, 2020); O. Quiricio, *Investment Governance Between the Energy Charter Treaty and the European Union: Resolving Regulatory Conflicts* (Brill, 2021). It was only a matter of time before this highly divisive issue would reach the ECJ, with the European Commission (EC) and several EU member States pushing the ECJ to rule on this question (notably France, Germany, Spain, Italy, the Netherlands and Poland).

4 *European Commission v. European Food SA, Starmill SRL, Multipack SRL, Scandic Distilleries SA, Ioan Micula, Viorel Micula, European Drinks SA, Rieni Drinks SA, Transilvania General Import-Export SRL, West Leasing SRL, formerly West Leasing International SRL*, CJEU, Case No. C-638/19, Opinion of AG. Szpunar, 1 July 2021.

5 Art. 207(1) of the Treaty on the Functioning of the European Union ('TFEU') provides that: 'The common commercial policy shall be based on uniform principles, particularly about changes in tariff rates, the conclusion of tariff and trade agreements relating to ... foreign direct investment'. Pursuant to Art. 2(1) of the TFEU, in the area of its exclusive competence, 'only the Union may legislate and adopt legally binding acts, the member states being able to do so themselves only if so, empowered by the Union or for the

first signs of tension between EU law and investment law appeared well beforehand. As soon as the early 2000s, the European Commission ('EC') realized that existing BITs concluded by EU candidates with third countries could jeopardize the EU enlargement process. To that extent, in 2003, the EC approached the U.S. government in order to seek clarifications that U.S. investors could not rely on existing BITs concluded between the U.S. and Eastern European countries candidates to the Union membership to seek remedies for the consequences of the implementation of the European *acquis communautaire* as part of their accession.[6]

Similarly, in 2004, the EC requested Austria, Denmark, Finland, and Sweden – which had accessed the EU in 1995 – to renegotiate certain pre-accession BITs concluded with third States in order to bring them in line with EU law relating to transfer of capital.[7] Yet, these States refused to renegotiate or terminate their extra-EU BITs, leading the Commission to initiate infringement proceedings before the ECJ. The ECJ finally sided with the Commission and condemned Austria, Sweden and Finland for failing to take appropriate steps to eliminate incompatibilities with the EU treaties.[8]

However, at that time, it was rather intra-EU BITs that raised a great deal of concern for EU policy makers. Indeed, after the fall of the Berlin wall and the progressive adoption of market economy, many Western European States concluded BITs with Eastern European States, which became intra-EU treaties after the later acceded the Union. Many arbitration requests – from EU-based investors against EU States – arose from these intra-EU treaties, and in many cases Eastern European countries were held liable for breaches of the investor protection standards.

The European Commission has, since the very first case based on such intra-EU BITs, consistently claimed that an intra-EU ISDS mechanism would contravene EU law and tried to halt the application of such treaties. Indeed, in the 2007 *Eastern Sugar v. Czech Republic* award,[9] the Czech Republic provided two letters from the European Commission arguing that in case of conflict, EU law should supersede intra-EU BITs, and thus prevent the tribunal from hearing the claim. The first letter (January 2006) stressed the following:

> EC law prevails in a Community context as of accession ... therefore, where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions – or should the EU adopt such rules in the future – Community law will automatically prevail over the non-conforming BIT provisions.
>
> [...]
>
> [T]he application of intra-EU BITs could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among member states as a possible outcome ...

And concludes that:

> [T]he Commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence.[10]

The second letter (November 2006) provided that:

> [It] is strongly recommended that member states exchange notes to the effect that such BITs are no longer applicable, and also formally rescind such agreements.[11]

However, the arbitral tribunal ruled in favor of the Dutch investor and dismissed the Czech Republic's defense.

implementation of Union acts'. For further description of the EU's investment policy see the European Commission website available at https://ec.europa.eu/trade/policy/accessing-markets/investment/.

6 Dr. J. Kleinheisterkamp, 'The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European law perspective', Report for the SCC/ECT/ICSID Conference on 10 Years of Energy Charter Treaty Arbitration, 9-10 June 2011, pp. 2-3.

7 The European Commission was concerned that these pre-accession extra-EU BITS may be in conflict with certain powers reserved to the EU Council of Ministers, allowing it, in exceptional circumstances, to take certain restrictive measures in relation to movements of capital to or from non-EU countries.

8 *Commission of the European Communities v. Austria*, CJEU, Case No. C-205/06, 3 Mar. 2009; *Commission of the European Communities v. Sweden*, CJEU, Case No. C-249/06, 3 Mar. 2009; *Commission of the European Communities v. Finland*, Case No. C-118/07, 3 Mar. 2009, cited in Dr. Jan Kleinheisterkamp, *op. cit.*, p. 3; NB: the European Commission case against Denmark was closed following Denmark's notification that it would terminate the BIT in question.

9 *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Award, 12 Apr. 2007 – the first ECT-based intra-EU arbitration to our knowledge.

10 These quotes are cited in *Eastern Sugar B.V. v. The Czech Republic*, *op. cit.*, Partial Award, 27 Mar. 2007, paras 119 *et seq.*

11 *Id.* para. 126.

A greater 'conflict of systems' – in the words of the late Emmanuel Gaillard[12] – came to light with the iconic and ongoing *Micula* case.[13] In 1998, Romania introduced a set of economic incentives to attract investment in the country's disfavored regions. Swedish Ioan and Viorel Micula brothers seized the opportunity to incorporate several companies in the country. However, amid its EU accession process, Romania revoked these incentives to avoid any violation of the *acquis communautaire*, and in particular the EU state aid regime.[14] The Micula brothers therefore initiated an ICSID arbitration under the Sweden-Romania BIT and were ultimately awarded EUR 178 million in damages.

Once again, the European Commission went against intra-EU arbitration and consistently fought alongside Romania to have the award annulled – or at least deprived of any effect. While the arbitration was still pending, the Commission filed a first *amicus curiae* brief to the arbitral tribunal. It stressed that the incentives were 'incompatible with the Community rules on regional aid', and observed in particular that 'the incentives did not respect the requirements of Community law as regards eligible costs and aid intensities'.[15] It therefore concluded that any compensation awarded to the Micula brothers for the loss of these incentives would 'lead to the granting of new aid which would not be compatible with the EC Treaty'.[16]

Following Romania's first partial payment, the Commission issued a suspension injunction against the State ordering it to recover the amounts already paid and rendering the award unenforceable.[17] The EC also joined Romania's efforts in fighting enforcement of the award in the US, filing a second *amicus curiae* brief, arguing that enforcement of the award in the US would – to say the least – '*vex the peace of nations*'.[18]

Despite the Commission's repeated attempts to have the award annulled, the General Court of Justice (GC) of the EU later quashed the 2015 injunction, ruling that the Commission had exercised its powers retroactively.[19] The Commission has since appealed that decision before the ECJ, whose decision is still pending. Unsurprisingly, Advocate General Szpunar – who also acted in the recent *Komstroy* case – opined in July 2021 that the GC had erred in law and thus advised the ECJ to set aside the GC's ruling.[20]

In light of the above, it is clear that *Achmea* has not come out of the blue. On the contrary, it resulted from the EC's long-running efforts to ensure that EU law always prevails over concurring sets of international norms.

In the *Achmea* dispute, which dates back to the mid-1990s when Slovakia initiated the privatization of the country's health insurance market, Slovakia had argued the intra-EU jurisdictional objection before the arbitral tribunal, considering that the ISDS mechanism contained in the BIT would be in breach of Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).[21] However, the tribunal dismissed that objection and awarded Achmea EUR 22 million in damages. Slovakia unsuccessfully tried to set aside the award twice before German Courts.[22] Although the Federal Court expressed doubts as to the relevance of Slovakia's jurisdictional objections, it referred to the ECJ the question of whether the ISDS mechanism in the 1991 Netherlands-Slovakia Bilateral Investment Treaty ('the Netherlands-Slovakia BIT') contradicts EU law. Contrary to Advocate General Wathelet's opinion, the CJEU ruled that the ISDS

12 E. Gaillard, 'L'affaire Achmea, où les conflits de logique', *Revue critique de droit international privé*, July-Sept. 2018, p. 616.

13 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID, Case No. ARB/05/20, Award, 11 Dec. 2013.

14 Art. 107(1) of the TFEU provides that: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

15 EU Commission Decision No. 2015/1470 on state aid SA. 38517 (2014/C), 30 Mar. 2015, para. 24.

16 *Id*. para. 25.

17 EU Commission Decision No. 2015/1470, supra note 15.

18 *Ioan Micula et al., v. the Government of Romania*, US District Court for the Southern District of New York, Case No. 1:15-mc-00107-P1, Exhibit A, Proposed *Amicus Curiae* Brief of the Commission of the European Union, 26 June 2015, para. 32.

19 The General Court considered that 'new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule' (para. 83) and that, contrary to the Commission's contention, 'it cannot be considered that the effects of the award constitute the future effects of a situation arising prior to accession ... since that award retroactively produced definitively acquired effects which it merely 'stated' for the past, that is to say, effects which, in part, were already established before accession' (para. 84), *Ioan Micula, Viorel Micula, et al. v. European Commission,* the General Court, 18 June 2019, Cases No. T624/15, T694/15 and T704/15.

20 *European Commission v. Ioan Micula, Viorel Micula, et al.*, CJEU, Case No. C-638/19, Opinion of AG. Szpunar *op. cit.*; AG Szpunar argued that the aid at issue was not granted at the time of Romania's violation of the BIT, but rather when the State was required to pay that compensation or implemented the award – which was after it had acceded to the EU. Therefore, the EC was competent to examine the compensation in light of state aid law.

21 *Achmea B.V. v. The Slovak Republic* (formerly *Eureko B.V. v. The Slovak Republic*), UNCITRAL, PCA Case No. 2008-13, Award, 7 Dec. 2012.

22 Higher Regional Court Frankfurt (Oberlandesgericht Frankfurt am Main Beschl), Case No. 26 SchH 11/10, 18 Dec. 2014; German Federal Court of Justice (Bundesgerichtshof), Case No. I ZB 2/15, 3 Mar. 2016.

provision within the Netherlands-Slovakia BIT would undermine the principle of autonomy of the EU legal order, primarily enshrined in Article 344 TFEU, and be thus contrary to EU law. The ECJ came to that conclusion following a four-step analysis.[23]

1. The preliminary reference procedure is the 'keystone mechanism' that guarantees the 'consistency and uniformity in the interpretation of EU law', and thus ensures the autonomy of EU legal order.[24]
2. An arbitral tribunal 'may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital'.[25]
3. Intra-EU arbitral tribunals are excluded from the preliminary reference procedure while their decisions directly bind the respondent member State.[26]
4. Since an arbitral tribunal is – in essence – placed outside the domestic court system of a member State, and the review of arbitral award is thus rather limited, the member States have in fact created a forum that circumvents the preliminary ruling system, therefore endangering the principle of autonomy of EU law.[27]

Shortly after *Achmea*, 23 EU member States – all but Austria, Finland, Ireland (which is not party to any active BITs), Sweden as well as the UK – signed the 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' ('Termination Agreement').[28] As the title suggests, the Termination Agreement provides for the termination of all intra-EU BITs and states that said treaties cannot serve as basis for any pending or new intra-EU arbitration proceedings.[29] To this end, the Termination Agreement also includes transitional provisions aimed at guiding parties to pending intra-EU arbitration through a 'structured dialogue'.[30]

23 *Slowakische Republik v. Achmea B.V.*, supra note 3.

24 *Id.* para. 35.

25 *Id.* para. 42.

26 *Id.* paras 42-48.

27 *Id.* para. 56.

28 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' ('Termination Agreement'), signed on 5 May 2020 and entered into force on 29 Aug. 2020, SN/4656/2019/INIT.

29 *Id.* Arts. 4 and 5.

30 *Id.* Art. 9.

As of October 2021, the Termination Agreement is in force in 17 member States, and 8 member States signed it but are yet to ratify it (including Belgium, Luxembourg and Portugal). Several States – namely Lithuania, Luxembourg, and The Netherlands – issued a separate declaration expressing concerns over the potential negative impact the Termination Agreement may have on investors' rights.[31] Portugal even called for the establishment of new or better tools under EU law to settle investment disputes.[32]

What is noteworthy is that the Termination Agreement explicitly excluded ECT-based disputes from its scope of application and further noted that '[t]he European Union and its member States will deal with this matter at a later stage',[33] paving the way for further heated debates as to whether *Achmea* extends to intra-EU arbitration under the ECT. It is against that background that the *Komstroy* decision came to light on 2 September 2021, a few weeks earlier than expected. This article aims to analyse and discuss the far-reaching consequences of this landmark decision, following a threefold approach: (I) What was the pre-*Komstroy* legal landscape? (II) What does the *Komstroy* ruling say? What does it not say? (III) What's next?

I. What was the pre-*Komstroy* legal landscape?

I.1 ECT-based arbitration

The Energy Charter Treaty is a multilateral trade and investment agreement, signed in December of 1994 in Lisbon, which entered into force in April of 1998. The history of the ECT is intimately linked to the end of the Cold War. As noted by the former ECT Deputy Secretary General:

> Russia and many of the neighbor-states of the Former Soviet Union were rich in energy resources but needed major investments to ensure their development, while the states of Western Europe had a strategic interest in diversifying their sources of energy supplies to diminish their dependence on the Middle East.[34]

31 Termination Agreement, supra note 28. See Declaration/Reservation by Luxembourg and the Netherlands.

32 *Id.* See Declaration/Reservation by Portugal, Declaration/Reservation.

33 *Id.* Preamble, para. 10.

34 A. Konoplyanik, T. Wäld, 'Energy Charter Treaty and its Role in International Energy', *Journal of Energy & Natural Resources Law*, 4 Nov. 2006, p. 524.

Therefore, the energy sector provided a natural platform for East-West cooperation after the collapse of the Soviet Union.

However, and as duly emphasized by the respondent in the *Electrabel* ICSID case, the ECT is first and foremost a 'brainchild of the European Union'.[35] In a June 1990 meeting of the European Council in Dublin, the Dutch Prime Minister, Ruud Lubbers, proposed the idea of a 'European Energy Community' to promote cooperation in the energy sector. The European Council of the European Communities then undertook a study of how to implement this idea, proposing a 'European Energy Charter' in February of 1991.[36]

Article 26 of the ECT is key as it contains the treaty's dispute resolution mechanism. Pursuant to Article 26(2), when parties are unable to reach an amicable settlement, they may initiate an arbitration before either of three different *fora* and pursuant to one of three different set of rules, namely: (1) the International Centre for Settlement of Investment Disputes (ICSID); (2) *ad hoc* arbitration conducted under UNCITRAL Arbitration Rules; or (3) arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce.

The definition of a protected 'investment' is enshrined in Article 1(6), whose terms have often led to inconsistent interpretations by arbitral tribunals.[37] Article 1(7) uses a broad definition of the term investor.[38] Substantively speaking, Article 10 contains most of the investment protection standards, such as the Fair and Equitable Treatment (FET), the Full Protection and Security (FPS), and what is commonly referred to as the Umbrella Clause. Finally, Article 13 of the ECT also contains standard protections against unlawful expropriations or nationalizations.

35 *Electrabel S.A. v. Republic of Hungary*, ICSID, Case No. ARB/07/19, Award, 25 Nov. 2015, para. 4.131.

36 E. Gaillard, M. McNeill, 'The Energy Charter Treaty' (Ch. 2), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, K. Yannaca-Small (ed.) (OUP, 2010).

37 For instance, in the *Komstroy* decision, the CJEU adopted a rather narrow interpretation of Art. 1(6) of the ECT – thus excluding a debt owed under an electricity supply contract from it – contrary to many previous decisions of investment tribunals, e.g. in *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, p. 68 et seq.

38 In the infamous *Yukos* decision, the tribunal ruled that Art. 1(7) ECT contains no requirement other than that the claimant company being duly incorporated in accordance with the law applicable in a Contracting Party; see *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009, para. 431; Likewise, in Plama, the ECT tribunal held that it was 'irrelevant who owns or controls the Claimant at any material time'; see *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, paras 124 and 128.

With 53 signatories and contracting parties as of October 2021, located primarily in Europe and Asia, the ECT is one of the largest international investment agreements in existence in terms of geographical coverage. The ECT is also the most often invoked international investment agreement in investor-state disputes: since its inception and as of 3 August 2021, the ECT was invoked in 142 known cases in total, with seven cases in 2020 alone, and six cases in 2021 so far.[39] More strikingly, 20 % of the 697 known ISDS cases initiated between 2011 and 2020 invoked the ECT.[40]

To that extent, some prominent authors once considered that 'the ECT arguably is the most successful achievement to date of the long-standing international efforts to establish a comprehensive investment protection regime'.[41] However, it seems that the creature is now backfiring at its creators, and the European Union and its member States are now advocating for an in-depth reform of the ECT. One of the core reasons for this reversal is certainly the seemingly limitless development of ECT-based intra-EU arbitration.

I.2 ECT-based arbitration: Intra-EU specificities

Over the past ten years, ECT-based arbitration among EU member States has grown exponentially, with some EU respondent States being highly exposed. Of the 57 ECT cases pending at ICSID, 37 concern intra-EU arbitrations in the energy sector. Moreover, recent statistics show that Spain and Italy are the two most frequent respondent States facing ECT arbitrations with 50 and 13 cases, respectively. This led Italy to withdraw from the treaty on 1 January 2016.[42] Noteworthily, the Netherlands is also facing a massive EUR 1.4 billion claim from German energy group RWE.[43] The *RWE* case comes as one of many intra-EU investment arbitrations initiated under the ECT that dealt with the EU law compliance objection, both before (I.2.1.) and after *Achmea* (I.2.2.). While this paper does not purport to undertake a detailed analysis of the tribunals' reasoning in each of these cases, it is relevant to report

39 See data on ECT cases on the Energy Charter Treaty website https://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/. For further data, see also the list of investment arbitration cases instituted under the ECT at https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/Chart_ECT_cases_-_3_August_2021.pdf and UNCTAD, 'Investor–State dispute settlement cases: Facts and figures 2020', *IIA Issues Notes*, Issue 4, Sept. 2021.

40 See UNCTAD, supra note 39.

41 E. Gaillard, M. McNeill, supra note 36.

42 See the list of investment arbitration cases instituted under the ECT, supra note 39.

43 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Pending.

some of the main counterarguments put forward by arbitral panels sitting in ECT proceedings when faced with a jurisdictional objection based on EU law.

I.2.1. ECT ISDS mechanism incompatibility with EU law: pre-*Achmea* dismissals

AES Sumnit Generation Ltd and AES-Tisza Erömü Kft v. Hungary.[44] Following a decision from the European Commission on state aid,[45] Hungary changed its electricity pricing regime and terminated a long-term power purchase agreement entered into with a UK-based energy provider 'AES'. AES initiated an ECT-based arbitration before the ICSID. What is noteworthy is that Hungary alleged *inter alia* that it was compelled to do so in order to comply with EU state aid regime. The European Commission – true to itself – supported Hungary's defense, filing the first *amicus curiae* brief in an intra-EU ECT arbitration. However, the panel dismissed Hungary's state aid objection.

Electrabel v. Hungary.[46] In the same context as above, Belgium-registered company 'Electrabel' filed a claim against Hungary following the electricity price regulation reform. Once again, the Commission filed an *amicus curiae* brief, alleging explicitly that intra-EU disputes fell within the exclusive jurisdiction of the EU courts and that Hungary had not violated its treaty obligations as it was compelled to comply with EU law. However, the arbitral tribunal upheld jurisdiction, tackling the Commission's objections, this time in depth. The arbitral tribunal, chaired by the late Johnny V. Veeder, upheld its jurisdiction on the basis of the following:

- There were no inconsistencies between EU law and the ECT since it could not identify any legal provision or principle prohibiting intra-EU arbitration initiated under the ECT.
- EU member States enjoy some discretion when deciding to refer a question of interpretation to the ECJ.
- Foreign courts and arbitral tribunals cannot refer to the ECJ even when interpreting EU law matters – this would otherwise leave open the 'possibility, if not even probability' of diverging interpretation of EU Law by national courts and arbitral tribunal in the context of similar disputes, both inside and outside the EU.[47]
- No rules under EU law expressly or impliedly prohibited mixed disputes settlement mechanisms such as investor-state arbitration,[48] even more so if the dispute was about a violation of the ECT and not the interpretation of EU law.[49]
- The tribunal in *Electrabel* emphasized 'the important legal fact' that the European Union accepted to submit itself to international arbitration, by signing the ECT, both for intra-EU and extra-EU disputes, and both ICSID and non-ICSID arbitration, without any distinction or reservation.[50]

Although arbitral tribunals are not bound by precedent, most pre-*Achmea* tribunals followed that line of reasoning and interpreted the ECT and EU law to be reconcilable. They all pointed to the fact that no explicit EU law rules prevented a member State from resolving disputes with an investor of another member State, thus denying any contrariety between EU law and ECT-based intra-EU arbitration.

Charanne v. Spain.[51] In this first case arising out of the Spanish renewable energy reform, Spain challenged the tribunal's jurisdiction raising the intra-EU objection. The tribunal upheld its jurisdiction considering *inter alia* that:

> [T]here is no rule of EU law which prevents EU member states to resolve through arbitration their disputes with investors from other member states through arbitration. Nor is there any EU law rule that prevents an arbitral tribunal to apply EU law to resolve such a dispute [...][52]

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

45 European Commission Decision on the State Aid C41/05 awarded by Hungary through Power Purchase Agreements, 4 June 2008.

46 *Electrabel S.A. v. The Republic of Hungary*, ICSID, Case No. ARB/07/19, *op. cit.*

47 *Id*. para 4.148.

48 *Id*. para. 4.153.

49 *Id*. para. 4.157.

50 *Id*. para. 4.163.

51 *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 Jan. 2016.

52 *Id*. para. 438.

RREEF Infrastructure (G.P.) Limited and others v. Spain.[53] The tribunal chaired by Alain Pellet also upheld its jurisdiction and interpreted the ECT and EU law in a reconcilable way. Respondent alleged that Article 344 of the TFEU[54] established an 'interpretative monopoly' in favor of the ECJ to interpret EU law. The tribunal stressed that Article 344 of the TFEU only concerns the submission of disputes concerning the interpretation of the founding treaties, therefore relating to a different subject-matter than Article 26 of the ECT. It also stressed that the ECT binds non-EU States, which could not have accepted the prevalence of EU law, and ECJ's 'interpretative monopoly' on issues of EU law.[55] Interestingly, the tribunal further noted that, given that it derived its jurisdiction from the ECT, in case of inconsistency with EU law, the ECT should prevail.[56] It also held that 'EU law does not and cannot 'trump' public international law'.[57]

Additionally, all tribunals formed pre-*Achmea* also rejected the 'implicit disconnection clause' argument when raised. This argument, raised by respondent member States, consisted in alleging that the aim of the ECT could only be to set up a special regime for the protection of investments in the energy sector *outside* the frontiers of the EU. However, in *Charanne*, the tribunal stressed that no agreement to derogate, nor any reservation, exists between member States with regard to the ECT, and that the letter of the ECT is sufficiently clear to exclude any implicit derogation.[58] In *RREEF Infrastructure*, the tribunal ruled that the 'attempt to construe an implicit clause into Article 26 of the ECT is untenable, given that that article already contains express exceptions ... that had been agreed amongst State parties'[59] and no such explicit reservation could be found for member States' relations *inter se*. This 'consistent pattern'[60] of dismissing the intra-EU jurisdictional objection was not halted by the ECJ's *Achmea* ruling.

53 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award on Jurisdiction, 6 June 2016.

54 Art. 344 (ex-Art. 292 TEC) provides: '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'.

55 *RREEF Infrastructure*, supra note 53, para. 74.

56 *Id*. para. 75.

57 *Id*. para. 87.

58 *Charanne*, supra note 51.

59 *RREEF Infrastructure*, supra note 53, para. 85.

60 *Id*. para. 89.

I.2. ECT ISDS mechanism incompatibility with EU law: post-*Achmea* dismissals

According to available data, all international investment tribunals considered that *Achmea* does not create any obstacle to their jurisdiction.[61] Most tribunals circumscribed this ruling to investor-state arbitration based on an intra-EU BIT and argued that the decision is silent as to the compatibility of EU law with ECT-based arbitration.

Masdar Solar v. Spain.[62] In this first ECT award rendered post-*Achmea*, the tribunal ruled that 'the Achmea Judgment ha[d] no bearing upon the present case' since it pertained only to the Netherlands and the Czech and Slovak Federal Republic BIT, and more generally to BITs concluded between EU member States.[63] The tribunal noted that the ECT 'is not such a treaty'[64] therefore finding it irrelevant to investor-state disputes under the ECT. ECT tribunals in ***Eisner Infrastructure v. Spain***[65] and ***Greentech Energy Systems & Novenergia v. Italy***[66] took a similar view.

It is also noteworthy that post-*Achmea* tribunals also sided with the ruling in *REEF Infrastructure*, considering that in case of contradiction (*quod non*), the ECT should still prevail over EU law.

In ***Vattenfall v. Germany***,[67] the tribunal argued that, in case of contradiction between EU law and the ECT, the ECT could even be considered a subsequent treaty (*lex posterior*) or a special regime (*lex specialis*) and would therefore supersede EU law.[68] In ***Landesbank Baden-Württemberg and others v. Kingdom of Spain***,[69] the tribunal emphasized that neither the Vienna Convention on the Law of Treaties nor the ECT required EU law to prevail over any concurring public international law norms.

61 Vinson and Elkins LLP, 'Intra-EU Disputes Under the ECT, What Next?', *JDSUPRA*, 9 Sept. 2021, https://www.jdsupra.com/legalnews/intra-eu-disputes-under-the-ect-what-2149487/.

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

63 *Id*. para. 399.

64 *Id*. paras 678 et seq.

65 *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras 179-207.

66 *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Award, 23 Dec. 2018, para. 39.

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

68 *Id*. paras 216-218, paras 222-229.

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

In conclusion, it is clear that the *Achmea* ruling did not prevent arbitral tribunals established under the ECT to uphold jurisdiction over intra-EU arbitrations and to award damages when a breach of the treaty was characterized. To some extent, this may have pushed the ECJ to address this specific ECT issue in *Komstroy*.

II. What does the *Komstroy* ruling say? What does it not say?

While the European Commission has consistently advocated that EU law precludes intra-EU investment arbitration and that *Achmea* also extends to multilateral agreements such as the ECT,[70] member States had difficulty to reach a common position.

In fact, while 22 EU member States (including France, Germany, Italy, Spain, and the United Kingdom) took the view that *Achmea* did apply to ECT arbitration, Finland, Luxembourg, Malta, Slovenia, and Sweden issued a joint separate statement considering that it would be inappropriate to express any views on the compatibility of the ECT with EU law.[71] Hungary went further, asserting that *Achmea* did not affect pending or prospective arbitration proceedings initiated under the ECT.[72]

Eager to finally get a clear-cut answer on this issue, France, Germany, Italy, Spain, the Netherlands, and the Commission all pushed the ECJ – despite the extra-EU nature of the dispute of the *Komstroy* case – to rule on whether the *Achmea* decision equally applied to ECT arbitration in the context of a preliminary ruling referred by Moldova as part of the *award* setting aside proceedings. The answer of the ECJ in this respect was not self-evident, as the ECT-based arbitration at stake was a proceeding opposing a non-EU investor from Ukraine against a non-EU State, Moldova. Moreover, none of the preliminary questions referred by the Paris Court of Appeal to the ECJ directly addressed the issue of intra-EU ECT-based arbitration.

Nonetheless, the ECJ seized the opportunity to fill in the gap left after the *Achmea* ruling on intra-EU ECT-based arbitration. On 2 September 2021, the ECJ ruled that the ISDS mechanism provided for by the ECT was *not* applicable to intra-EU disputes,[73] siding with Advocate General Szpunar's opinion delivered on 3 March 2021.[74]

The reasoning is very similar with the one grounding the 2018 *Achmea* judgment, except for the specific ECT issue, from which stems the whole reasoning. In the *Achmea* judgment, the ECJ noted that Article 8(6) of the Netherlands-Czechoslovakia BIT listed the sources of law to be applied by the arbitral tribunal, among which respondent's domestic law (an EU member State). As the domestic law of an EU member State necessarily encompasses EU law, the ECJ concluded that an intra-EU BIT-based arbitral tribunal would likely apply EU law, leaving the ECJ in a position in which it could not overview – and eventually overrule – the application of EU law. This has been seen has a core contradiction with Article 344 of the TFUE, which specifies that member States are prohibited from submitting 'a dispute concerning the interpretation or application of the treaties' to any forum other than the ECJ. It is this exclusive ECJ jurisdiction over EU law application and interpretation that grounded the intra-EU BIT-based prohibition of arbitration in the *Achmea* ruling.

However, the reasoning above was not as strong as it intended to be. First because most BITs – intra or extra-EU – do not list respondent state's domestic law as one of the laws applicable to the proceedings. Secondly, even when it is the case, arbitral tribunals in treaty-based arbitrations tend to rule pursuant to public international laws, and often avoid grounding their reasoning in any domestic law. Therefore, in practice, it is unlikely for an arbitral tribunal to address EU law issues and bypass ECJ's exclusive jurisdiction on the interpretation of EU law.

In *Komstroy*, the Luxembourg-based ECJ avoids such pitfall by stating abruptly that 'ECT itself is an act of EU law'.[75] This means that the ECT judges are no longer overseeing an arbitral tribunal likely to apply EU law – like in the *Achmea* ruling – but exercising their control over an arbitral tribunal, whose constitution and jurisdiction is based on EU law.

The difference is essential: once the ECT is interpreted as EU law, it can much more easily fall within the scope of the ECJ's exclusive jurisdiction. However, this stance raises important objections that the ECJ manages to

70 Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, 19 July 2018, COM (2018) 547 final.

71 Declaration of the Representatives of the Member States on the Legal Consequences of the Achmea judgement on investment protection, Commitments of Finland, Luxembourg, Malta, Slovenia, and Sweden, 15 Jan. 2019.

72 Declaration of the Representatives of the Member States on the Legal Consequences of the Achmea judgement on investment protection, Commitments of Hungary, 15 Jan. 2019.

73 *Republic of Moldova v. Komstroy*, supra note 1.

74 *Republic of Moldova v. Komstroy*, Opinion of AG Szpunar, 3 Mar. 2021, https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-741/19.

75 *Republic of Moldova v. Komstroy*, supra note 1, para. 49.

avoid. First, the ECT was indeed signed by the EU, but also by the member States themselves. However, for the ECJ, this is not an issue. It stresses that:

> [T]he fact that the agreement concerned is a mixed agreement, concluded by the European Union and by a large number of Member States, cannot, as such, exclude the jurisdiction of the Court to give a ruling in the present case.[76]

Second, the ECT was indeed concluded by the EU, by the member States but also by non-member States. The question is then how could a treaty involving third States be considered as 'an act of EU law'?[77] While the ECJ admits that its jurisdiction can be source of debate – especially as it does not 'in principle' have jurisdiction over disputes not covered by EU law between an investor of a non-member State and another non-member State –[78] the ECJ stressed that:

- Ensuring uniform interpretation of the provisions that can apply to disputes (i) falling within the scope of EU law and (ii) not covered by EU law, such as Article 1(6) and Article 26(1) of the ECT,[79] is in the interest of the European Union.
- In any event, the fact that the seat of the arbitration was Paris, France called for the application of EU law by the French courts, and the subsequent obligation to ensure compliance with EU law under the supervision of the ECJ.[80]

This debatable perspective illustrates the ECJ's decision to replicate the *Achmea* ruling to ECT-based intra-EU arbitration. While the legal basis for *Achmea* and *Komstroy* are different (respectively, the Netherlands-Slovakia BIT and ECT), the overall rationale is the same:

- Arbitral tribunals constituted under Article 26(6) of the ECT cannot be characterised as a court or tribunal of a member State within the meaning of Article 267 of the TFEU – precisely because it is the *raison d'être* of arbitration to be situated outside a state's judicial system.[81]
- Therefore, awards rendered pursuant to Article 26 of the ECT can only be referred to the ECJ in certain limited conditions, and only insofar as the member States' law so permit. There is thus no guarantee that questions of EU law can, if necessary, be submitted to the ECJ for a preliminary ruling.

In *Komstroy*, the ECJ concluded that:

> [Article] 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[82]

For the sake of completeness, it should be noted that on the initial question referred to it by the Paris Court of Appeal on the interpretation of an 'investment' under the ECT, the ECJ acknowledged that a debt arising out of a contract for the supply of electricity could, in principle, fall within the scope of both Articles 1(6)(c) and 1(6)(f) of the ECT. However, according to the ECJ, the claim at stake did not fall within the scope of one or the other. First, the ECJ agreed with the Advocate General's opinion and held that this debt in essence has not been granted with the aim of undertaking an 'economic activity in the energy sector' pursuant to Article 1(6)(f) of the ECT.[83] Second, the ECJ found that the debt did not either arise out of a contract connected with an investment as, according to the ECJ, the contract was a 'mere supply contract' which cannot, *in itself*, constitute an investment, irrespective of whether an economic contribution is necessary for a given transaction to constitute an investment.[84] This narrow interpretation of the notion of investment is of course important for the development of investment arbitration in the future.[85]

However, if the *Komstroy* decision is without any doubt a landmark ruling, it is because the ECJ's willingness to completely ban investment arbitration within the EU. This is precisely the issue that calls for discussions as regards to the potential next steps.

76 *Id*. para. 24.
77 *Id*. para. 49.
78 *Id*. para. 28.
79 *Id*. para. 29.
80 *Id*. para. 34.
81 *Id*. para. 53. The ECJ states that '[T]he characteristic of such an arbitral tribunal means that it cannot, in any event, be classified as a court or a tribunal 'of a Member State'.
82 *Id*. para. 66.
83 *Id*. para. 72.
84 *Id*. para. 79.
85 *Id*. para. 85: 'Article 1(6) and Article 26(1) ECT must be interpreted as meaning that the acquisition ... of a claim arising from a contract for the supply of electricity, which is not connected with an investment ..., does not constitute an 'investment' within the meaning of those provisions.'

III. What's next?

It is always easier – and safer – to analyse the past than to predict the future. This being said, a few scenarios can be imagined.

III.1 Likelihood of having arbitral tribunals implementing the *Komstroy* rationale

Drawing a parallel with *Achmea*'s aftermath, we believe that *Komstroy* will not significantly impact the jurisdiction of arbitral tribunals constituted under the ECT sitting in intra-EU arbitrations for the following reasons:

- The European Commission and the ECJ's efforts to halt intra-EU arbitration based on BITs between EU member States and on the ECT have not stopped new ISDS cases from arising. According to the UNCTAD database, about 15% (nine cases) of the 68 known cases filed in 2020 were intra-EU disputes; of these, five were brought on the basis of intra-EU bilateral investment treaties; the remaining four cases invoked the ECT (6%).[86]
- As mentioned above,[87] in all ECT cases known to date, tribunals have rejected the *Achmea* objections. In the *Antin v. Spain* case,[88] the *ad hoc* annulment committee pointed to 35 other tribunals that had already dismissed the *Achmea* jurisdictional objection in the context of the ECT (albeit before the *Komstroy* ruling).[89]

In our view, this is unlikely to change, as illustrated by the most recent decision *Infracapital et al v. Kingdom of Spain*.[90] In this post-*Komstroy* award – certainly drafted before the publication of the *Komstroy* decision – it is noteworthy that the tribunal did not consider that it was necessary to wait for the ruling. The likely very modest impact of *Komstroy* on arbitral tribunals can be explained by the fact that the ECJ did not the address public international law objections put forward by arbitral tribunals, nor did it provide counterarguments concerning the interpretation of the Vienna Convention on the Law of Treaties,[91] which governs the ECT.

Indeed, most tribunals concluded that their jurisdiction stems from the ECT, which prevails over EU law should any contradictions between the two sets of norms exist.

Going beyond the mere intra-EU issue, the combined effect of both *Achmea* and *Komstroy* rulings may, however, impact the 1,200 BITs and Free Trade Agreements in force between EU member States and non-EU member States.[92] Respondents to extra-EU arbitrations have already tried to challenge the tribunals' jurisdiction based on *Achmea* or the Agreement for the Termination of BITs between the member States of the European Union.[93] Noteworthily, in *CMC Muratori Cementisti CMC and others v. Republic of Mozambique*,[94] the respondent State argued that *Achmea* should also apply to BITs between EU member States and non-member States, and that it precluded the tribunal from hearing the Italian investor's claim. The tribunal rejected that argument but dismissed the claim on the merits.

III.2 The race for enforcement in 'safe harbor' jurisdictions?

As far as national courts are concerned, greater differences may come to light between EU seated arbitrations and non-EU seated arbitrations. Indeed, in *Komstroy*, it is the fact that the seat was in an EU member State (France) that called for the application of EU law and triggered the ensuing competence of the ECJ to interpret the ECT.

It is also interesting to note that *Achmea* already led to differentiated decisions from EU and non-EU courts in the context of enforcement proceedings.

86 See UNCTAD, supra note 39, p. 2.

87 See supra I.2.2.

88 *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on annulment, 30 July 2021.

89 *Id*. para. 154.

90 *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on *Quantum*, 13 Sept. 2021.

91 Vienna Convention on the Law of Treaties, 23 May 1969, with entry in force on 27 Jan. 1980, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

92 As of 2010, there were 1,200 BITS in existence. See International Institute for Sustainable Development, European Union institutions consider the EU's future international investment policy, https://www.iisd.org/itn/fr/2010/12/16/news-in-brief-2/; This figure is also used by Prof. Dr. N. Lavranos in his speech on the impact of Achmea, see 'The impact of the Achmea Decision' keynote speech transcripts, p. 5, https://www.energy-community.org/dam/jcr:731e8feb-6c44-4cfc-a879-ca08f6cd57a6/DRF_Keynote_Lavranos_092018.pdf.

93 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union', supra note 28.

94 *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique*, ICSID Case No. ARB/17/23, Award, 24 Oct. 2019.

On the one hand, intra-EU award creditors were forced to seek enforcement in 'safe harbors' – shielded from the ECJ's extensive scope of competence – such as Singapore, Switzerland, the US, and following Brexit, the United Kingdom. For instance, on 19 February 2020, in the aftermath of Brexit,[95] the UK Supreme Court lifted the stay on enforcement of the *Micula* award, arguing, in substance, that the ICSID Convention could not be affected by the EU's duty of sincere cooperation.[96] The UK Supreme Court therefore sent a clear message that both BIT-based and ECT-based intra-EU ICSID awards will now be enforced in the United Kingdom, killing two birds with one stone: it emancipated from the ECJ's oversight and boosted the attractivity of the United Kingdom and London in the eyes of worldwide award creditors.

Shortly afterwards, in May 2020, the US Court of Appeals for the D.C. Circuit also upheld the enforcement of the *Micula* award. Indeed, the US had become the 'default venue'[97] for a lot of investors seeking to enforce their intra-EU awards. The D.C. Circuit upheld its jurisdiction relying on the specifics of the *Micula* case and did not address the broader question of whether intra-EU ISDS is valid under a BIT or the ECT. It is therefore still uncertain whether the *Micula* decision will serve as a basis for further enforcement of intra-EU awards in the future. The D.C. Circuit is currently reviewing several applications for enforcement of intra-EU awards against Spain. The Court's reasoning will thus have to be scrutinized in the near future.[98]

On the other hand, on 11 February 2021, the Higher Regional Court of Frankfurt am Main upheld Croatia's argument that the investor-state arbitration clause in the Austria-Croatia BIT was incompatible with EU law on the basis of *Achmea*. Although this decision was not rendered in the context of set aside proceedings – German arbitration law allows parties to ask the national courts to rule on the admissibility of claims filed in Germany-seated arbitration – it is the first decision in which an EU national court extended *Achmea* to BIT other than the Netherlands-Slovakia BIT.

The foregoing illustrates one of the major divide we may observe in the coming months as to the reception of both *Komstroy* and *Achmea*.

III.3 Towards a deeper reform of the ECT and ISDS?

Even before *Komstroy*, renowned arbitrator and counsel R. Volterra opined that the EU will keep extending the scope of its oversight.[99] To that extent, the decision rendered 26 October 2021 in *Republic of Poland v. PL Holdings* is hardly surprising.[100] In *PL Holdings*, the ECJ completed what it had achieved through *Achmea*, considering that *ad hoc* arbitration agreements identical to those found in intra-EU BITs were also in breach of EU law. This decision will certainly be the subject of further commentaries. Nevertheless, it is odds-on that the EU will keep opposing intra-EU ISDS to ensure consistency of case law, whenever it can. What remains uncertain is whether this decision will fuel, or on the contrary impede, the ongoing negotiations to reform the ECT and, to a broader extent, ISDS mechanisms.

Recently, many States have expressed their dissatisfaction with the ECT. France, for instance, sent a letter to the EC in February 2021 leaving open a possible coordinated withdrawal.[101] The European Parliament's trade committee chair, B. Lange, has also called for coordinated withdrawal 'with all countries that want to withdraw to no longer allow trials between them'.[102]

95 The European Union Withdrawal Agreement Act 2020 entered into force on 23 Jan. 2020.

96 *Micula and others v. Romania* [2020] UKSC 5. For further comments on this decision, see G. Croissant, 'Micula Case: The UK Supreme Court Rules that the EU Duty of Sincere Co-operation Does Not Affect the UK's International Obligations under the ICSID Convention', (Kluwer Arbitration Blog, 20 Feb. 2020); A. Stanic, 'Enforcement of Intra-EU BITs and ECT Awards in the UK Post Micula' (Kluwer Arbitration Blog, 25 Apr. 2020).

97 P. Pérez-Salido, 'Enforceability of Intra-EU Awards at the U.S. District Court for the District of Columbia: The Spanish Cases' (Kluwer Arbitration Blog, 21 Jun. 2020).

98 P. Pérez-Salido (supra note 97) argues that it is unlikely that *Micula* will serve as future guidance in the enforcement actions of intra-EU awards against Spain, since the facts and the basis for jurisdiction in those cases are substantially different from those in Micula, and rather, the D.C. Circuit will conduct a case-by-case analysis.

99 T. Jones, 'EU will interfere with commercial arbitration, Volterra warns', GAR, 26 Feb. 2021.

100 *Republic of Poland v. PL Holdings Sarl*, CJEU, Case No. C 109/20, 26 Oct. 2021.

101 The letter was signed by French Ministers B. Le Maire (Economy and Finance), B. Pompili (Ecological Transition), F. Riester (Foreign Trade) and C. Beaune (European Affairs). See 'France puts EU withdrawal from Energy Charter Treaty on the table' (Euractiv, 3 Feb. 2021).

102 Declaration from April 2021: 'It is high time that Germany once again sides with progressive countries like Spain or France. These countries demand an honest assessment of the possibilities for reform and withdrawal if reform is not possible. We should seek a common agreement with all countries that want to withdraw to no longer allow trials between them', cited from https://www.endfossilprotection.org/en/latest-news.

However, not all States are necessary in favor of a collective termination along the lines of the Agreement for the termination of BITs between the EU member States.[103] It must be kept in mind that Germany is the country whose nationals have most frequently acted as claimants in ECT-based arbitrations,[104] a fact that could influence these States' positions regarding the future of the ECT.

Komstroy will certainly fuel the EU's ongoing efforts to reform the ECT. The Commission has been acting on behalf of member States to renegotiate the ECT since November 2018.[105] In May 2020, the Commission published its proposal for a 'modernization' of the ECT.[106]

The Commission advocates *inter alia* for reforms aimed at ensuring the contracting States' right to regulate. In particular, during the fourth negotiation round held in March 2021, the EU presented its proposal to phase out the investment protection of fossil fuels from the ECT.[107] One could also imagine that the EU would opt out of the ISDS mechanism insofar as it grounds intra-EU disputes – while remaining a contracting State to the ECT and consenting to extra-EU arbitration. It is the solution that has been favored by Canada in the new United States-Mexico-Canada Agreement, replacing the North American Free Trade Agreement, which entered into force on 1 July 2020. By doing so, investors from EU member States would no longer have access to ISDS mechanisms against EU States, while benefiting from it for extra-EU disputes.

In relation to ISDS, the Commission is also advocating for the establishment of an investment court designed as a semi-permanent court-like system, partly inspired by the WTO dispute settlement mechanism. However, these negotiations are taking place under the auspices of the UNCITRAL, outside the scope of the ECT reform.

According to leaked diplomatic cables, negotiations to reform the ECT have so far 'fallen flat', in particular due to the required unanimity to amend the ECT.[108] From a macro-economic perspective, the *Komstroy* ruling certainly leaves EU investors in the energy sector with legitimate concerns as to the scope of their protection within the EU. Although studies show that the connection between ISDS and the decision to trigger an investment is at best remote,[109] it may however make intra-EU investment more expensive, as it will increase risk premiums.

There is now undoubtedly a need for a new comprehensive set of rules aimed at ensuring EU investors' standards of protection when investing within the territory of the EU in the energy sector.

103 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union', supra note 28.

104 As of 1 June 2020, German nationals had initiated 76 of the 130 ECT claims, see *Statistics of ECT cases as of 1/6/2020*, p. 6, available at https://www.energycharter.org/fileadmin/DocumentsMedia/News/Statistics_Cases_under_the_Energy_Charter_Treaty_as_of_1_June_2020.pdf

105 Council of the EU, 'Council adopts negotiation directives for modernization of Energy Charter Treaty', Press release, 15 July 2019.

106 EU Commission, 'European Union's Proposal for the modernization of the Energy Charter Treaty', 27 May 2020.

107 EU Commission, 'Fourth negotiation round to modernize Energy Charter Treaty' (News Archive, 5 March 2021).

108 K. Taylor, 'Leaked diplomatic cables show 'limited progress' in Energy Charter Treaty reform talks', *Euractiv*, 6 July 2021.

109 L. Johnson, B. Skartvedt Güven and J. Coleman, 'Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?', Columbia Center on Sustainable investment, Columbia University, 11 Dec. 2017; L. N. Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence', Yearbook on International Investment Law and Policy, 2009/2010, K. Sauvant (ed.) (OUP, 2010).