Review of ICSID Decision on Rockhopper Italia S.P.A., Rockhopper Mediterranean LTD and Rockhopper Exploration PLC v. Italian Republic[1] under the European Union's Interpretation of International Arbitration Regarding Intra-EU Disputes Under Energy Charter Treaty and Recent Developments on Energy Charter Treaty

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Abstract

The matter of whether the international arbitral tribunals have jurisdiction over the "disputes arising between European investors and member states of the European Union (EU)", as known as "*intra-EU*" disputes, has been widely discussed during the past years. EU member states repeatedly claimed that the international arbitral tribunals do not have jurisdiction over intra-EU disputes. However, the international tribunals continuously argued that they do. Rockhopper Italia S.P.A., Rockhopper Mediterranean LTD and Rockhopper Exploration PLC v. Italian Republic[2] (Rockhopper) is one of the examples of this matter. There, the tribunal decided in favour of the latter argument. However, in the Republic of Moldova v. Komstroy LLC[3] (Komstroy), The Court of Justice of the European Union (CJEU) has extended the interpretation of its decision in Slovak Republic v. Achmea B.V.[4] (Achmea) and ruled that **Energy Charter Treaty (ECT) does not apply to and international tribunals do not have jurisdiction on intra-EU disputes.** The essay will summarise the Rockhopper Italia S.P.A., Rockhopper Mediterranean LTD and Rockhopper Exploration PLC's (Claimants) and Italian Republic's (Respondent) arguments regarding the objection to jurisdiction and the tribunal of Rockhopper's (Tribunal) decision. Following that, it will discuss the Claimants' and the Respondent's (Parties) arguments and focus on the relevant case law, including CJEU's Achmea and Komstroy decisions. Lastly, it will give a brief summary of the recent developments in the ECT following the Komstroy decision.

[1] ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, 29 June 2019.

[2] ibid

[3] Case C-741/19, [2021].

[4] Case C-284/16, [2018].

1. Rockhopper Italia S.P.A., Rockhopper Mediterranean LTD and Rockhopper Exploration PLC v. Italian Republic

1.1. *Procedural History*

On 14 April 2017, the Claimants requested for arbitration under the ECT and The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). On 28 March 2018, the Respondent objected to jurisdiction by claiming the ECT and ICSID Convention lack jurisdiction regarding intra-EU disputes. Following that, the Claimants submitted their response to the intra-EU jurisdictional objection.

On 29 January 2019, the Respondent submitted the Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union (Declaration).

The Tribunal held the hearing to issue a ruling on the intra-EU jurisdictional objection considering the Parties' arguments prior to any other ruling.

1.2. *Arguments Regarding the Tribunal's Jurisdiction*

1.2.1. Applicability of the ECT to Intra-EU Disputes

(1) Respondent's Arguments

The Respondent claims that, where Parties are subjects of EU law, protection of investments is governed by EU law, and EU law forbids concluding agreements which might affect EU legal order. In addition to that, the Respondent gives examples such as Opinion 1/09 of the CJEU of 8 March 2011 (Opinion 1/09) and the Judgment of the CJEU of 30 May 2006 (MOX Plant Case).

Moreover, the Respondent refers to articles 1, 16 and 25 of the ECT and claims Article 1 of ECT defines the EU as a single and unified territory and Article 25 of ECT proves EU has a preferential treatment.

The Respondent also claims that the fact that ECT lacks an express clause limiting its application does not definitively mean the lack of contracting states' aim to limit the scope of ECT under articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

Furthermore, the Respondent argues the aim of ECT is to regulate the energy sector of east of Europe and the Union of Soviet Socialist Republics, not the internal EU. Also, the Respondent claims that the regulations regarding the energy sector in the EU which were already adopted (or about the be adopted) certify the EU's intention for intra-EU disputes to be without the scope of ECT.

Also, the Respondent states that EU and EU member states usually object to the jurisdiction of arbitral tribunals and the European Commission requested to intervene when it came to intra-EU disputes. It argues that the practice of EU member states, which has been the same since the first intra-EU investment dispute arose under the ECT[5], confirms that EU and EU member states do not want intra-EU disputes to be covered by ECT.

Additionally, the Respondent claims that under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon Treaty), EU member states cannot enter into inter se agreements since the direct foreign investments are part of the common commercial policy of EU and only can be regulated by EU.

More than that, the Respondent claims that both ECT and Lisbon Treaty apply to the same subject matter. Based on Article 30 of the VCLT "the same subject matter" should be interpreted as to compare the scopes of the treaties, not the provisions. Therefore, the Respondent rejects the Claimants' argument that Article 16 of the ECT is applicable. In addition, the Respondent claims that Article 41 of the VCLT protects the rights of other contracting parties which do not enter into the new agreement as a response to the Claimants' argument that Article 41 of the VCLT bans EU member states from establishing a different system between EU member states to protect the other contracting states' right to provide international arbitration to their investors.

Lastly, the Respondent claims that EU law is more favourable both for investors and the investment since it offers a more "developed and articulated legal system".

(2) Claimants' Arguments

[5] *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Award, 25 November 2015 ("***Elektrabel***")

First, the Claimants claim that since Opinion 1/09 is about the aim to create a united legal order regarding the patents, it requires EU law to be applicable, however, the Respondent's approach is irrelevant to this case since ECT does not require for EU law to be applied for particular kinds of disputes. In addition to that, the Claimants point out that parties still have the right to apply to EU courts.

Secondly, the Claimants state that their claims are not based on the EU law, but international law and articles 10 and 13 of the ECT; and under ECT, the applicable law regarding this dispute is international law and the provisions of ECT. Since MOX Plant Case is about the disputes which require EU law to be applied, it is also irrelevant to Rockhopper.

Moreover, the Claimants argue that there is no provision in ECT which limits the disputes to be resolved under ECT where one of the parties is an investor from a specific contracting state. The Claimants also claim that the situation in the ECT is the exact opposite since Article 46 of the ECT forbids making reservations to the ECT.

Furthermore, the Claimants claim that articles 16 and 25 of the ECT do not mean that Article 26 of the ECT does not apply to intra-EU disputes. Firstly, The Claimants state that Article 16 of the ECT covers the situations when there are two different international agreements applicable on the same matter between the same parties and one of the agreements is more favourable regarding the investors and investment. Secondly, the Claimants explain that Article 25 of the ECT does not discuss anything regarding the intra-EU disputes. The Claimants also state that EU member states had the opportunity to add a disconnection clause to the ECT while it was being drafted, as they did add to more than twenty treaties, which could prevent Article 26 of the ECT from being applied for intra-EU disputes, however, they did not.

Also, the Claimants claim that the term "Europe" which is used in ECT only means a "geographical area", therefore the use of this term should not be interpreted as if it generates an exclusive regime for EU.

Then, the Claimants reminded that nineteen investment arbitral tribunals rejected the intra-EU objections. Additionally, the Claimants submit that various tribunals and commentators have reached the same conclusion that the scope of the subject matter of EU law and intra-EU investment treaties is different and Article 30 of the VCLT is not applicable regarding the objection of jurisdiction to intra-EU disputes. In addition to that, the Claimants state that even

if the Lisbon Treaty and ECT share the same subject, even if it is agreed that the scope of these two treaties is the same, according to articles 30(3) and 30(4)(a) of the VCLT, ECT would nevertheless be applied. Furthermore, the Claimants state that Article 30 of the VCLT should be interpreted with Article 41 of the VCLT which prevents the interpretation of the Lisbon Treaty as a way to eliminate investors' right to apply to international arbitration. Also, the Respondent's suggested method of interpretation would be irrelevant and, more importantly, opposite of the ECT's purpose.

Also, the Claimants claim that Article 16 of the ECT ensures that ECT supersedes other agreements which are less favourable regardless of whether they are prior or subsequent, and the Respondent could not prove EU law is more favourable than the ECT. Additionally, the Claimants state that EU law does not include sufficient provisions to provide extensive and fair treatment as much as ECT does. The Claimants also add that EU law does not grant the right to investors to apply to international arbitration. Finally, the Claimants also state that EU law does not provide the right for investors to bring claims against a state directly in international arbitration, whereas ECT does.

1.2.2. Relevance of CJEU's Achmea Judgement

(1) Respondent's Arguments

The Respondent claims that even the ECT is a multilateral treaty, that does not affect the bilateral nature of the arbitration offers. The Respondent also points out that CJEU states on the Achmea that *"EU has to be aware the autonomy of the EU and its legal order when entering into international agreements"*[6], therefore, based on that, the Respondent also claims that EU law should be applied if there is an intra-EU dispute in question. In addition to that, the Respondent claims that EU law should be defined as international law.

Also, the Respondent suggests to the Tribunal to embrace a different approach regarding the interpretation of the Achmea than the decision on the Masdar Solar&Wind Cooperatief U.A. v. Kingdom of Spain[7] (Masdar), because the interpretation of the Opinion of Advocate General Wathelet in Achmea (Opinion) was refused by the CJEU and the Opinion deduces meaningless

[6] Case C-284/16, Slovak Republic v. Achmea B.V., [2018].

[7] ICSID Case No. ARB/14/1, Award, 16 May 2018.

implications based on the silence of the CJEU regarding the alleged differences between BITs and ECT.

Finally, the Respondent claims that the principles adopted in the Achmea are also applicable to the enforcement phase of the awards, and since making sure that the award is enforceable is one of the arbitral tribunals' most important duties, the Tribunal should not proceed with the arbitral tribunal regarding this case.

(2) Claimants' Arguments

The Claimants submit that the Achmea is not relevant to this case based on the following reasons:

(a) The Tribunal had been authorised by the ECT, therefore the interpretation of the CJEU is unnecessary.

(b) Even if it is accepted that Achmea is relevant regarding disputes based on BITs, it cannot be interpreted as it is relevant regarding disputes based on the ECT. Firstly, Achmea is concerned with an intra-EU BIT, while the ECT includes the EU and, separately, EU member states and secondly, Achmea focused on two provisions of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Achmea BIT) regarding the applicable law where ECT does not include such a clause.

(c) The Claimants argue that the effect of the Achmea on the enforcement stage of awards is unclear. Additionally, the Claimants refer to the interpretation of the tribunal in Ioan Micula et al. v. Romania[8] which lays down theories regarding the enforcement of awards are not in the scope of the duties of the tribunal.

Furthermore, the Claimants state that 26(6) of the ECT does not refer to EU law where it provides terms of the ECT, and international law should be applied.

Finally, the Claimants submit that the Masdar tribunal's interpretation of the Opinion is appropriate, and Achmea could not answer some of the problems stated such as the application of the ruling regarding multilateral treaties.

[8] ICSID Case No. ARB/05/20, Award, 11 December 2013.

1.2.3. Connection of the Vattenfall AB and others v. Federal Republic of Germany Decision[9] (Vattenfall)

The Respondent rejects the interpretation of the tribunal of Vattenfall regarding Achmea while the Claimants claim that the Vattenfall decision supports their argument. This decision will be discussed widely in the below including the Parties' arguments.

1.2.4. Effects of the Declaration of the EU Member States

(1) Respondent's Arguments

The Respondent claims the Declaration means that signing contracting parties do not want to be subjected under Article 26 of the ECT regarding intra-EU disputes.

Moreover, the Respondent claims the Declaration is a legal document under Article 1 of the Vienna Convention on Diplomatic Relations since it had been signed by the permanent representatives under Article 31.2 of the VCLT, the fact that the purpose for it to be binding can be understood by the language. In addition to this, the Respondent also states that non-EU signatories of the ECT have never disapproved of the Declaration and the objection to Article 26 of ECT covering intra-EU disputes.

Lastly, the Respondent claims that the Declaration should be interpreted as it aims to explain the extent of the ECT and how it must be in accordance with the EU law.

(2) Claimants' Arguments

The Claimants claim the language of the Declaration does not express the intent for the ECT was never to apply to intra-EU disputes and any kind of confirmation which states ECT tribunals do not have, and never had, jurisdiction regarding intra-EU disputes.

The Claimants also submit that the Declaration is only an interpretation of EU member states regarding the effects of Achmea on intra-EU disputes under ECT and it states extra discussions should be held regarding the matter.

Moreover, the Claimants point out five EU member states signed an additional declaration named Declaration of the Representatives of the Governments of the Member States, of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in Achmea and on

[9] ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018.

Investment Protection in the European Union which states that Achmea is silent regarding intra-EU disputes under the ECT, and it would be irrelevant to interpret it extensively.

Additionally, the Claimants state that CJEU does not have the authority to remove the tribunals' capacity to establish their competence under the ECT.

Furthermore, the Declaration is unable to have a legitimate or binding effect regarding Tribunal's jurisdiction under the ECT, because:

(a) The Declaration cannot withdraw the Respondent's consent regarding Rockhopper due to the inability to have a retroactive effect.
(b) The Declaration is not explicit enough to create binding obligations regarding ECT.
(c) The Respondent has no right to participate in the Declaration under Article 47 of the ECT since they have withdrawn from the ECT on 1 January 2016 and the provisions of the ECT will be applying as they were on the date of the withdrawal until 1 January 2036.
(d) Diplomats do not have the power to rule legally binding rules and there is no evidence stating they were authorised to do so.

1.3. *Tribunal's Decision Regarding Jurisdiction*

The Tribunal points out EU law does not supersede the ECT, as stated in Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic[10] (Blusun) and Opinion 1/09 or the MOX Plant Case are not related to Rockhopper. Also, as again stated in Blusun, the Tribunal holds that there is no evidence suggesting inconsistency between EU law and the ECT.

Moreover, the Tribunal submits that none of the investor-state arbitral tribunals has concluded that Achmea establishes a sustainable objection to tribunals' jurisdiction since the CJEU issued its judgement.

Then, the Tribunal points out that the reasoning of Achmea is based on particular conditions of Achmea BIT, therefore it has limited application and not to ECT. Therefore, the Tribunal agrees with the other tribunals such as Vattenfall and Masdar. The Tribunal also stated that

[10] ICSID Case No. ARB/14/3, Award, 27 December 2016.

Achmea cannot be interpreted as it is related to Article 26 of the ECT regarding intra-EU disputes under any circumstances.

The Tribunal also explains that EU law is included in public international law on a specific scale such as regulating EU system, yet EU law does not go further than that.

Furthermore, the Tribunal states that since the Declaration is not a part of EU legal order, it is not legally binding, and it is just an interpretation.

Additionally, the Tribunal points out the CJEU has not interpreted the applicability of Achmea to intra-EU disputes under ECT.

Based on all the reasons above, the Tribunal rules none of the objections does affect the jurisdiction of the Tribunal. In conclusion, the Tribunal rejects the Respondent's objections to jurisdiction.

2. Parties' Arguments and Relevant Decisions

2.1. *Applicability of ECT and ICSID Convention*

2.1.1. Texture and Purpose of the ECT

Article 26 of the ECT regulates the dispute settlements between investors and contracting parties and Article 26(6) of the ECT is as follows: *"A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."* Additionally, according to articles 26(4), and 26(2)(c) of the ECT; ICSID has jurisdiction over the dispute.

The Respondent claims that EU law should be included in the scope of the *"international law"* term stated in Article 26(6) of the ECT. Even though numerous tribunals righteously ruled that EU law can be defined as *"international law",* for example, the tribunal of Electrabel ruled that *"EU law is international law because it is rooted in international treaties"*[11]*,* they still concluded that tribunals have jurisdiction regarding intra-EU disputes.

In relation to the Respondent's claims regarding the articles 267 and 344 of the Treaty of the Functioning of the European Union (TFEU), in my opinion, interpretation of these articles

[11] *Electrabel,* para. 4.120.

in Achmea cannot be interpreted as arbitral tribunals do not have jurisdiction regarding intra-EU disputes based on multilateral treaties.

According to the second paragraph of Article 267 of the TFEU, *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union…".* In addition, Article 344 of the TFEU is as follows: *"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."*

However, the tribunal of Vattenfall stated that *"The Tribunal does not consider it established that Articles 267 and 344 TFEU, as interpreted in the ECJ Judgment, conflict with Article 26 ECT."*[12] Moreover, in Charanne B.V. Construction Investments S.A.R.L. v. Kingdom of Spain[13] (Charanne), the Tribunal ruled that *"The scope of Article 344 TFEU cannot, therefore, be to prohibit Member States to submit any dispute that could involve an interpretation of European treaties to a dispute settlement proceedings other than those provided by EU framework."*[14] Additionally, as stated in Electrabel, *"Moreover, the Tribunal notes the important legal fact that the European Commission itself, in signing the ECT, accepted the possibility of international arbitrations under the ECT, both between a non-EU investor and an EU Member State or between an EU investor and a non-EU Member State, without any distinction or reservation."*[15]

The Respondent also claims that ECT and the Lisbon Treaty are both applicable to the concerning dispute between parties under Article 30 of the VCLT. Article 16 of the ECT points out that if there are two different international agreements regarding the same matter between the same parties, the most favourable one for the investment and the investor should be applied. However, the scope of parts III and V of the ECT and Lisbon Treaty is different as stated by numerous commentators and tribunals and ECT regulates specifically the subject matter of the dispute. According to Article 30(2) of the ECT, "*When a treaty specifies that it is subject to,*

[12] *Vattenfall*, para.212.

[13] Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration No. 062/2012, Final Award, 21 January 2016.

[14] *Charanne,* para. 444.

[15] *Electrabel,* para. 4.158.

or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Additionally, even if the Lisbon Treaty and ECT share the same subject, according to the articles 30(3) and 30(4)(a) of the VCLT, since the ECT is the earlier-in-time treaty and it is not incompatible with the Lisbon Treaty, and ECT would be applied.

Moreover, articles 31 and 32 of the VCLT regulate principles of interpretation the international treaties. However, these articles do not limit the scope of the ECT, and they cannot be interpreted as the lack of a disconnection clause does not mean anything. What is more, Article 41 of the VCLT regulates circumstances of modification of the multilateral treaties by agreements between parties, and according to Article 41(1) of the VCLT, the modification of the treaties is possible, if the modification is provided by the treaty itself or if it is not forbidden by the treaty and it does not have an effect in a way to limit other parties' right or it is not against to the purpose of the treaty or it does not affect the execution of it effectively.

In addition, Article 25(1) of the ECT rules that preferential treatments apply to the parties of the Economic Integration Agreement (EIA). However, 25(2) of the ECT clarifies the meaning of the EIA: "*For the purposes of paragraph (1), 'EIA' means an agreement substantially liberalising, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame."* As it can be understood clearly by the language of the 25(2) of the ECT, this provision is not applicable to intra-EU disputes.

Furthermore, ECT defines the term "Regional Economic Integration Organisation" stated in Article 1(3) of the ECT as an "*organisation constituted by states to which they have transferred competence over certain matters".* The language of this provision does not express that intra-EU disputes are not in the scope of the ECT and interpretation of this provision in this way would be against the purpose of the ECT.

Lastly, arguments regarding MOX Plant Case and Opinion 1/09 are irrelevant to disputes arising based on the ECT, because MOX Plant Case required EU law to be applied where Opinion 1/09 is affiliated with designates a unified patent system under EU law and as stated above, on the contrary, ECT requires provisions of the ECT and international law to be applied.

As it can be seen clearly, the applicable law to Rockhopper is provisions of the ECT and ICSID Convention, along with international law. ICSID Convention rules that "*The Tribunal shall be the judge of its own competence."*[16]

2.1.2. The Effect of the Declaration

Article 1 of the Vienna Convention on Diplomatic Relations defines the terms frequently used in the treaty, yet there is no evidence which suggests that the Declaration is a legal document. In addition to that, Article 31.2 of the VCLT is as follows: "*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."* Moreover, as stated above, Article 31 of the VCLT regulates the general rules of interpretation and nothing in the texture or the context of these articles suggests that interpretations have a legally binding effect. Therefore, it cannot be claimed that the Declaration has a legally binding effect under Article 31.2 of the VCLT.

Moreover, according to Article 47(3) of the ECT, *"The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date."* Therefore, even if it is accepted that the Respondent can participate in the Declaration, the provisions of the ECT would not be affected and would be applied to the Respondent as they were on the date of the withdrawal until 1 January 2036.

2.2. *Relevant Decisions*

2.2.1. Achmea Decision

In an ad hoc arbitration between the Slovak Republic and Achmea B.V., the tribunal seated in Frankfurt ruled on behalf of Achmea B.V. Following the tribunal of Achmea's decision, the Slovak Republic challenged the award before The German Federal Court of Justice. Upon the request of The German Federal Court of Justice, CJEU interfered and ruled that investment arbitrations based on intra-EU BITs are incompatible with EU law. Following the CJEU's

[16] ICSID Convention, Article 41(1).

decision on Achmea, EU member states started claiming that arbitral tribunals based on multilateral treaties, such as ECT, also do not have jurisdiction regarding intra-EU disputes. However, tribunals kept ruling that Achmea is limited with the BITs and arbitral tribunals still have jurisdiction based on the international treaties over the intra-EU disputes.

2.2.2. Masdar Decision

Masdar constitutes one of the important decisions regarding the matter. In Masdar, one of the parties' numerous disagreements was the applicability of ECT to intra-EU disputes.

Tribunal of Masdar ruled that "*On a plain reading of the text of Article 26, including the exclusory language of Article 26(3), the Tribunal concludes that there is nothing in the text of the ECT which precludes intra-EU disputes from its scope"*[17] and *"…EU law is not incompatible with the provision for investor-State arbitration contained in Part V of the ECT, including international arbitration under the ICSID Convention."*[18]

The tribunal of the Masdar agreed with the Advocate General's Opinion which states investment protection mechanisms provided by BITs and in the ECT are different and Achmea is silent regarding the ECT and submitted that Achmea cannot be applied to ECT since it is a multilateral treaty.

Based on the findings above, the tribunal of Masdar concluded that Achmea does not apply to ECT.

2.2.3. Vattenfall Decision

The dispute between the parties of the Vattenfall was based on the ECT. Tribunal of Vattenfall ruled that the interpretation of the articles 267 and 344 of the TFEU in the Judgment of Achmea does not apply to the international arbitration based on the ECT and stated that *"When States enter into international legal obligations under a multilateral treaty, pacta sunt servanda and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the independent legal obligations*

[17] *Masdar*, para. 313.

[18] *Masdar*, para. 340.

entered into by one State or another, and depending on the parties to a particular dispute."[19] Furthermore, the tribunal of Vattenfall held that the transfer of particular matters cannot be interpreted as ECT should not be applied to intra-EU disputes.

Moreover, the tribunal of the Vattenfall stated that articles 267 and 344 of TFEU do not concern the same subject matter with part III or part V of the ECT.

Furthermore, the tribunal ruled that the fact that the ECT does not include a disconnection clause is "telling" and stated that *"If it was intended that intra-EU arbitration would not be available to Investors, it would have been necessary to make such an intention explicit, either in the ECT itself or through the adoption of a supplementary instrument."*[20] *"The absence of such a clause confirms that the ECT was intended to create obligations between Member States of the EU, including in respect of potential investor-State dispute settlement."*[21]

Also, the tribunal of Vattenfall found that the enforceability of the tribunal's decision is not relevant to objection to jurisdiction.

In conclusion, the tribunal of Vattenfall ruled that ECT applies to intra-EU disputes.

2.2.4. Komstroy Decision

Since Achmea, there was a debate going on regarding the effect of the Achmea, whether it would apply to multilateral treaties as well as BITs. Tribunals generally ruled that the Achmea decision does not apply to intra-EU disputes based on the multilateral treaties, since it is limited with the intra-EU BITs. In FREIF Eurowind Holdings Ltd v Kingdom of Spain[22] (Eurowind), the tribunal held that *"The ECT is a multilateral agreement to which the EU is itself a signatory. The EU, therefore, consented to its dispute resolution provisions. It is difficult to see how the ECT would violate EU principles of mutual trust, sincere cooperation or the autonomy of EU*

[19] *Vattenfall*, para. 156.

[20] *Vattenfall*, para. 202.

[21] *Vattenfall*, para. 206.

[22] Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 2017/060, Final Award, 21 March 2021.

law in such circumstances".[23] However, CJEU's recently ruled Komstroy decision challenged tribunals' previous decisions.

According to the CJEU's Komstroy decision *"CJEU has jurisdiction to interpret the ECT."*[24] CJEU stated that *"However, first, the Court has held that, where a provision of an international agreement can apply both to situations falling within the scope of EU law and to situations not covered by that law, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply."*[25]

In Komstroy, CJEU ruled that it must be concluded that *"ECT itself is an act of EU law"*[26] and *"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."*[27]

The consequence of CJEU'S finding in Komstroy's is that ECT is not applicable regarding intra-EU disputes.

3. Effect of the Komstroy Decision and Recent Developments Regarding the ECT

3.1. Enforcement/Setting Aside of Intra-EU Awards Outside of the EU

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The tribunal of the Green Power v. Spain which was constituted under the Stockholm Chamber of Commerce in Stockholm is the first tribunal that declined jurisdiction regarding an intra-EU dispute following the CJEU's Komstroy decision. However, this approach was not embraced by other tribunals. In fact, the tribunal of Triodos SICAV II v. Spain which was also constituted under the Stockholm Chamber of Commerce in Stockholm, refused to follow the approach of the tribunal of the Green Power v. Spain.

Despite the multiple tribunals' above findings on jurisdiction regarding the intra-EU disputes even after the Achmea and Komstroy decisions, the approach of the domestic courts

[23] *Eurowind*, para. 330.

[24] *Komstroy*, para. 27.

[25] *Komstroy*, para. 29.

[26] *Komstroy*, para. 49.

[27] *Komstroy*, para. 66.

in the EU was to refuse the enforcement of the intra-EU awards. For instance, enforcement of the Micula v. Romania[28] (Micula) award was refused by Luxembourg's Court of Cassation in 2022.

However, this seems to be not the case for Australia and the UK. In April 2023, the High Court of Australia ruled that intra-EU objection in enforcement proceedings was ineffective. Furthermore, as recently as May 2023, the English High Court enforced an intra-EU award, Infrastructure Services v. the Kingdom of Spain, despite CJEU's Achmea and Komstroy decisions and stated that there are no proper grounds for the non-enforcement of the said award.

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However, it should be kept in mind that, on 9 November 2023, the Advocate General published an Opinion which proposes for the CJEU to find the UK in breach of EU law following the UK's Supreme Court's decision on the enforcement of the Micula award.

3.2. Extra-EU Cases

Especially following the Komstroy decision, there is a growing concern regarding the possibility of the intra-EU controversy extending to extra-EU cases. What is more, intra-EU objections were brought up in extra-EU cases recently, such as CMC v Mozambique and Deutsche Telekom v India (UNCITRAL) award before The German Federal Court of Justice (BGH). However, it should be pointed out that, regarding the latter, BGH ruled that Achmea does not extend to extra-EU BITs.

Following these developments, in September 2023, the European Commission published a non-paper in order to provide a common approach for EU member states regarding the BITs with third countries.

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3.3. Modernisation of the ECT

After several EU member states started facing arbitration proceedings against them, the European Commission started calling for a reform. Especially upon the critics regarding how ECT is incompatible with the requirements that the Paris Agreement imposes, modernisation works accelerated. However, after parties agreed on an agreement in principle in June 2022

[28] ICSID Case No. ARB/05/20, Final Award, 11 December 2013.

following a number of rounds of negotiations, the voting on the "agreement in principle" of the modernized ECT was to take place in April 2023 after a delay which also once again postponed, this time, indefinitely.

However, it should be stated that there has been a recent development which could be perceived as a positive step towards ECT. The European Commission proposed a Council Decision on 1 March 2024 which provides for member states that are contracting parties to the ECT not to prevent proposed amendments and changes regarding the ECT and its Annexes along with Understandings, Declarations and Decisions.

3.4. Withdrawals from the ECT

Since 2022, several EU member states, such as Spain, Belgium, Netherlands, Slovenia, Denmark and Portugal, announced their intentions to leave the ECT. Moreover, after the European Commission recommended for EU to withdraw from the ECT on 7th July 2023; France, Germany and Poland officially withdrew from the ECT as of December 2023. Furthermore, Luxembourg is to be withdrawn from the ECT as of mid-2024.

However, it should be kept in mind that due to the sunset clause of the ECT (Article 47(3)), even though states leave the ECT, they will be bound by it 20 years from such date. Regarding this matter, the European Commission states that the mentioned sunset would not apply to intra-EU disputes since the ECT has never applied to intra-EU disputes anyway. Lastly, numerous tribunals rejected this argument so far, for instance, Italy still faces claims based on the ECT, including intra-EU disputes, even though it left the ECT in 2016.

4. Conclusion

As explained above in detail, tribunals held that ECT applies to intra-EU disputes since it is a multilateral treaty, despite the Achmea decision which suggests that arbitral tribunals lack jurisdiction regarding intra-EU disputes. Tribunals reasoned their decisions based on the clear meanings of the treaties and previous awards/decisions. However, in Komstroy, CJEU ruled that ECT does not apply to intra-EU disputes based on the same grounds as Achmea. EU member states argued and still continue to argue in multiple arbitral proceedings and enforcement stages of the awards ruled on intra-EU disputes that ECT is incompatible with EU law based on the Komstroy decision. However, especially following the enforcement decisions

of domestic courts of the non-EU states, it seems like the approach of the Komstroy decision may actually stay limited to domestic courts of the EU member states.