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The Fate of EU Environmental and Investment Law after the *Achmea* Decision

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1. Introduction

Regulation of foreign direct investment (FDI) is one of the “most topical and controversial subjects in the EU’s external relations” ever since it became a pillar of the common commercial policy under art. 207 TFEU.³ EU institutions and Member States (MS) have been adamant to downplay the overlap between protection of foreign investors within EU single market under pre-existing international investment agreements (IIAs) and under EU law (e.g. principle of non-discrimination) as safeguarded by the ECJ, with the purpose not to undermine the sound application of EU law.⁴

On March 6, 2018, the ECJ released its decision in the *Slowakische Republik v. Achmea BV* (*Achmea*), taking a stance against the compatibility of investor-State dispute settlement (ISDS) clauses in bilateral investment treaties between MS (intra-EU BITs) and EU law.⁵ Although *Achmea* has been characterized as the cornerstone of “the beginning of a new chapter in investment treaty arbitration”,⁶ the issue as to whether IIAs investment protection might be inconsistent with EU law is far from being settled. In the wake of *Achmea*, both the EC and several MS reaffirmed their opposition to intra-EU ISDS, albeit through non-binding declarations and soft-law instruments.⁷ However, thus far ISDS tribunals have shown no deference to the *Achmea* doctrine, while further intra-EU ISDS cases have been filed thereafter.⁸

By the same token, FDI’s protection regime and its interpretation by ISDS tribunals could curtail MS’ regulatory space.⁹ This is all the more the case when it comes to the

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³ A. Dimopoulos, EU Foreign Investment Law, 2011, 1.

⁴ This point has been made clear by the EC ultimately in the 2018 Communication on the Protection of Intra-EU Investments (COM (2018) 547 final), 2.

⁵ CJEU, Case C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158.

⁶ See A. Bilanova & J. Kudrna, *Achmea: The End of Investment Arbitration as We Know It*, EILA Rev. 2018 (1), 261, 281.

⁷ EU Communication n. 4.

⁸ The number of intra-EU ISDS disputes totals 178 at the end of 2018, with six claims filed in 2018 alone. Of these, four were filed under the European Charter Treaty, while other two under applicable intra-EU BITs. UNCTAD, IIA’s Issues Note No. 2/2019, Fact Sheet on Investor–State Dispute Settlement Cases in 2018, 3.

⁹ J.E. Vinuales, *Foreign Investment Law and the Environment in International Law*, 2013, 253-278.

implementation of environmental and climate policies,¹⁰ which might ultimately lead to stranding of foreign investors' assets.¹¹ Given the vagueness and breadth of IIAs investor protection provisions, environmental regulatory measures adopted in the implementation of such policies could be deemed in breach of such provisions, thus becoming subject of ISDS litigation.¹² The EC itself is aware of this risk, as it has stated that this "highlights the need to reflect on how investors' legitimate interests can be better protected" in the context of the EU 2030 climate and energy framework.¹³

This article aims to explore the avenues currently available to ensure that EU's environmental and climate law and policy as implemented at the domestic level and the IIAs regime as interpreted by ISDS tribunals are properly aligned, with a view to devising a benchmark to prevent and avoid policy conflicts.

2. The *Achmea* Judgment: Are Intra-EU BITs against EU Law?

Few judgments have produced as many writings and discussions among scholars as the ECJ's decision in *Achmea*.¹⁴ In 2008, Dutch insurer Achmea B.V. initiated arbitration against Slovakia, alleging that the reversal of the latter's decision to privatize the health insurance market breached the 1991 The Netherlands-Slovakia BIT (the 1991 BIT). The arbitral tribunal established under UNCITRAL rules and seated in Frankfurt found in favor of the investor.¹⁵ Consequently, Slovakia challenged the award before German courts, which in turn submitted a request for preliminary ruling to the ECJ on the compatibility with EU law of the arbitration agreement in the 1991 BIT. The matter was deemed "of considerable importance", in light of the high number of intra-EU BITs still in force and containing similar ISDS provisions.¹⁶

¹⁰ K. Tienhaara, Regulatory Chill in a Warming World: The Threat to Climate Policies Posed by Investor-State Dispute Settlement, TEL 2018 (2), 229-250.

¹¹ Deutsche Gesellschaft für Internationale Zusammenarbeit, From Riches to Rags: Stranded Assets and the Governance Implications for the Fossil Fuel Sector (Nov. 3, 2017), <https://library.ecc-platform.org/publications/riches-rags-%E2%80%93-stranded-assets-and-governance-implications-fossil-fuel-sector>.

¹² V. Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?', Vanderbilt Journal of Transnational Law 2015 (48), pp. 1285-1313; L. Johnson, International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It, Environmental Law Reporter 2009 (39), 11147-11160.

¹³ EC Staff Working Document, Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and the Council on the promotion of the use of energy from renewable sources, SWD (2016) 418 final, 57.

¹⁴ For an analysis of *Achmea*, inter alia, A. Bilanova, n. 6.

¹⁵ *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13.

¹⁶ *Achmea* n. 5, para. 14.

The importance of the issue was further stressed by the active participation of the EC through *amicus briefs*, as well as other MS, which intervened in favor either of Slovakia or Achmea.¹⁷ Two aspects of the *Achmea* judgment are relevant for the purpose of our analysis: (1) the compatibility between the 1991 BIT substantive and procedural protections and EU law; (2) the legitimacy of ISDS under EU law.

2.1. The Compatibility of Intra-EU BITs with EU Law

The ECJ first examined the compatibility of ISDS under art. 8 of the 1991 BIT with art. 267 and 344 TFEU. The matter touches upon the relationship between two different, and potentially conflicting, legal orders: general international law, to which IIAs belong, and EU primary law.

The starting point of the ECJ's reasoning is the autonomy of the EU legal system, which cannot be impaired or compromised by international agreements.¹⁸ Such autonomy is a direct consequence of the fact that EU law stems from independent sources of law. This circumstance justifies the primacy of EU law not only over MS domestic law, but also conflicting provisions of international law applicable to MS' intra-EU relationship.¹⁹ In other words, the ECJ leveraged the principle of primacy of EU law as rule of conflict to settle potential discrepancies between EU law and intra-EU BITs. Art. 267 and 344 TFEU thus represent the procedural backbone of the principle of autonomy, as they ensure consistency and uniformity in the interpretation of EU law.

The ECJ then considered if the resolution of the dispute in *Achmea* entailed any interpretation and application of EU law. Here, it observed that, even if the arbitral tribunal were to rule exclusively on Slovakia's breach of the 1991 BIT, it would have to apply both: (1) the law in force of the contracting party concerned; (2) the provisions of other relevant agreements in force between the contracting parties.²⁰ The ECJ considers EU law as falling into both categories, being it part of Slovakia's domestic law and law stemming from a treaty between the parties to the BIT.²¹ Hence, the ECJ infers that the tribunal might interpret or apply EU

¹⁷ N. De Sadeleer, *The End of The Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunal under Bilateral Investment Treaties Concluded between Two Member States*, *European Journal of Risk Regulation* 2018 (2), 231.

¹⁸ *Achmea* n. 5, para. 32.

¹⁹ *Id.*, para. 33.

²⁰ Article 8(6), 1991 BIT.

²¹ *Achmea* n. 5, para. 41.

law,²² thus triggering art. 344 TFEU and potentially jeopardizing the application of art. 267 TFEU.²³

2.2. The Legitimacy of ISDS under EU Law

The second question referred to the ECJ was if ISDS tribunals, as ad hoc international adjudicating bodies, can be deemed as a “court or tribunal” under art. 267 TFEU. The ECJ relied on the exceptional nature of *Achmea* tribunal’s jurisdiction to clarify that it is not part of the EU’s judicial system.²⁴ Unlike other judicial body constituted by international agreement, the *Achmea* tribunal does not meet the fundamental requirement of “establishment by law”, since it does not entertain a sufficient link to the MS’ judicial system with regard to the interpretation and application of domestic law.²⁵ Notably, the decision in *Achmea* diverges from ECJ’s previous case law with regard to arbitration tribunals’ power to refer.²⁶ Moreover, in *Achmea* the ECJ rules out the arguments brought forward by AG Wathelet. In his opinion, the AG noted that “it cannot be disputed that an arbitral tribunal constituted and seised in accordance with art. 8 BIT is established by law”, since it derived its jurisdiction from a treaty and the relevant domestic pieces of legislation ratifying it, “by virtue of which the BIT became part of the legal orders of those MS”.²⁷ For the purpose of art. 267 TFEU, ISDS tribunals would merely constitute a dispute settlement mechanism between MS, albeit created in the context of a BIT.²⁸

According to ECJ’s case law, whenever an issue of interpretation of EU law arises in the context of arbitration:

“the ordinary courts may be called upon to examine them, either in the context of their collaboration with arbitration tribunals, in particular in order to assist them [...] or in the course of a review of an arbitration award [...]. It is for those national courts and tribunals to ascertain whether it is necessary for them to make a

²² *Id.*, para. 42.

²³ The request for preliminary ruling concerned exclusively the compatibility between the ISDS provision in the 1991 BIT and EU law. Broader concerns relating to the compatibility between substantive IIA protection standards and EU law in general were not analysed.

²⁴ *Achmea* n. 5, para. 45.

²⁵ C-337/95, *Parfums Christian Dior*, EU:C:1997:517. In general terms, such requirement has to be considered as prevailing over the other criteria, namely the permanent character of the judicial body and the compulsory nature of its jurisdiction, see C-349/11, *Belov*, EU:C:2013:48, par. 38.

²⁶ C-102/81, *Nordsee v. Reederei Mond*, EU:C:1982:107; C-125/04, *Denuit and Cordenier*, EU:C:2005:69, para. 13. In fact, The Court has already accepted compulsory arbitration provided for by MS law as courts under the preliminary reference procedure (see *Merck Canada*, C-555/13, EU:C:2014:92, paras 15–25).

²⁷ *Achmea* n. 5, Opinion of Advocate General Wathelet, 19 September 2017, para. 96.

²⁸ *Id.*, para. 130.

reference to the Court [under art. 267 TFEU] in order to obtain the interpretation [...] of provisions of Community law.”²⁹

In the ISDS system, arbitral awards are final and subject to a very limited review before domestic Courts. Yet, if and how such power of review can be exercised depends entirely on “the extent that national law permits”.³⁰ Furthermore, ISDS arbitral awards should not be subject to review by MS courts, insofar as it is left up to the same tribunal to choose its own seat, and therefore the law governing judicial review of its decision.³¹ By according previous consent to arbitration in IIAs, MS would remove from the jurisdiction of their own courts disputes “which may concern the application or interpretation of EU law”, thus acting in violation of art. 19(1) TEU.³²

The lack of guarantee in the ISDS system as to the presence of a judicial review mechanism before MS courts to prevent execution of awards potentially in contrast with EU law indeed played an influential role in *Achmea*.³³ In fact, the ECJ recognized that judicial bodies established by treaty – including tribunals – are not in principle incompatible with EU law.³⁴ Yet adopting a broad interpretation of art. 344 TFEU,³⁵ ISDS could undermine sincere collaboration under art. 4(3) TEU and mutual trust among MS under art. 2 TEU.³⁶ Thus, ISDS clauses in intra-EU IIAs would encroach on “the structured network of principles, rules and mutually interdependent legal relations binding the EU and MS reciprocally and binding its MS to each other”.³⁷ From this perspective, *Achmea* unwinds in a very assertive and formalistic way ECJ’s institutional concerns with regard to its judicial authority, reinforcing its aim to ensure the supremacy and autonomy of systemic elements of EU law.³⁸

3. The Swift Reaction of Intra-EU ISDS Tribunals to *Achmea*

From a practical standpoint, *Achmea* could be understood as leading to intra-EU ISDS clauses – if not intra-EU BITs as a whole – be deemed no longer enforceable against MS. If

²⁹ C-102/81, paras. 15-16.

³⁰ *Achmea* n. 5, para. 53.

³¹ *Id.*, para. 51.

³² *Id.*, para. 55.

³³ J. Kokott & C. Sobotta, Investment Arbitration and EU Law, Cambridge Yearbook of Eur. Legal Stud. 2016 (18) 3-19, at 11.

³⁴ *Achmea* n. 5, para. 54.

³⁵ *N. De Sadeleer*, n. 17, 371.

³⁶ *Achmea* n. 5, para. 58.

³⁷ *Id.*, para. 33. The ECJ refrained from ascertaining whether the potential interpretation or application of EU law by the *Achmea* tribunal would in any way be binding as a matter of EU law on MS domestic court. J.H. Pohl, Intra-EU Investment Arbitration after the *Achmea* Case: Legal Autonomy Bounded by Mutual Trust?, Eur. Cons. L. Rev. 2018 (4), 778-779.

³⁸ J. Lindeboom, Why EU Law Claims Supremacy, Oxford J of Legal St. 2018 (2), 328-356. For a critical view on the understanding of the principle of autonomy in *Achmea*: P. Koutrakos, The Autonomy of EU Law and International Investment Arbitration, Nordic J. of Intl. L. 2019 (1), 41-64.

this interpretation was adopted, no further ISDS litigation could be brought relying on such clauses, tribunals already constituted would have to decline their jurisdiction, and MS' domestic courts would have to set aside, or refuse to enforce, awards rendered under intra-EU BITs.³⁹

Yet, whilst intra-EU ISDS cases are still being filed in a broad range of sectors, very little deference has been given to the *Achmea* doctrine. Such backlash is based on different arguments, which ultimately unravel the short reach of *Achmea* to prevent ISDS litigation, mostly due to misconceptions in IIAs' interpretation under international law.⁴⁰

The following survey focuses on ISDS cases grounded on changes in energy and environmental policies in the light of the mandate to achieve decarbonisation or enhance environmental protection. All these cases have been brought under the Energy Charter Treaty (ECT), the only IIA specifically directed to protect investments in the energy sector, while comprising all MS and the EU as parties thereto.⁴¹

3.1. *Vattenfall v Germany*

In 2012, Vattenfall AB and others commenced arbitration against Germany, claiming that the state's decision to phase out nuclear energy amounted to either expropriation of its assets or breach of fair and equitable treatment (FET) under art. 13 and 10(1) ECT.⁴² Following Germany's specific objection to the tribunal's jurisdiction after *Achmea*, the tribunal issued a separate decision on August 31, 2018.⁴³ The tribunal assessment was twofold: first, it examined if EU law could be relevant to determine its jurisdiction in light of art. 26(6) ECT and the Vienna Convention on the Law of Treaties (VCLT);⁴⁴ second, it ascertained whether *Achmea* could be relevant to intra-EU ISDS arbitration under a mixed agreement such as the ECT.

³⁹ In fact, this is the vision adopted by the EC in its 2018 Communication (n. 4), 3-4.

⁴⁰ A. Gourgourinis, After *Achmea*: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation, EILA Rev. 2018 (3) 282-315, 293-302.

⁴¹ While Italy denounced the ECT in 2016, the treaty provides for a survival clause under Article 47(3), whereby it will continue to apply to protected investments for a period of 20 years following a contracting party's withdrawal.

⁴² Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, 31 August 2018 (Vattenfall). For an in-depth case study, F. Romanin Jacur, The Vattenfall v. Germany Disputes: Finding a Balance between Energy Investments and Public Concerns, in Y. Levashova, T. Lambooy, I. Dekker (eds), Bridging the Gap between International Investment Law and the Environment, Eleven International Publishing, 2016, 339.

⁴³ On the decision, K. Georgaki, The Decision on the *Achmea* Issue in Vattenfall v Germany, or: How to Escape the Application of the CJEU's Decision in *Achmea* in Three Steps, Oxford Business Law Blog, 28 November 2018.

⁴⁴ Vattenfall n. 44, para. 108 ff. Art. 26(6) ECT reads as follows: "A tribunal [...] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law".

As for the first question, the tribunal recognized EU law as part of international law, the TEU and TFEU constituting treaties under art. 38(1) ICJ Statute.⁴⁵ The tribunal also noted that art. 26(6) ECT applies only to the merits of the dispute, and not to jurisdictional matters.⁴⁶ Moreover, EU law was not deemed to constitute “applicable rules and principles of international law” under art. 26(6) ECT, and therefore should not be regarded as “relevant rules of international law applicable in the relations between the parties” under art. 31(3)(c) VCLT.⁴⁷ In the tribunal’s view, art. 26 ECT as understood within its object and context was sufficiently clear to include intra-EU disputes from its scope in light of EU law provisions.⁴⁸ As for the second question, regardless of the applicability of EU law for the purposes of jurisdiction, the tribunal ruled out the *rationale* of *Achmea* given the lack of any explicit reference to ISDS clauses contained in multilateral agreements such as the ECT.⁴⁹ The same line of reasoning has been followed by other tribunals with regard to litigation brought under the ECT⁵⁰, as well as other intra-EU BITs.⁵¹

3.2. *Eskosol v. Italy*

The dispute in *Eskosol* arose from MS’ gradual reduction and ultimate back-rolling of Feed-In-Tariffs (FIT),⁵² which allegedly amounted to a breach of investors’ legitimate expectations to a stable and reliable regulatory scheme affecting the investment’s economic viability, thus violating the FET standard in art. 10(1) ECT.⁵³

The *Eskosol* tribunal reaffirmed *Achmea*’s limited reach as to intra-EU BITs as opposed to multilateral agreements like the ECT.⁵⁴ Where recognizing the dual nature of EU law as part of MS domestic law and law deriving from a treaty between the same, the tribunal stated that EU law should not constitute a body of rules and principles of international law.⁵⁵ Therefore, EU law “simply is not part of the applicable law of any ECT dispute”, and should be regarded

⁴⁵ *Id.*, para. 146

⁴⁶ *Id.*, para. 121.

⁴⁷ *Id.*, para. 153.

⁴⁸ *Id.*, para. 169.

⁴⁹ The tribunal also dismissed Germany’s argument that an award rejecting its *Achmea*-based jurisdictional objection would ultimately be unenforceable, since it considered enforceability not to be an issue that could impinge upon the question of its jurisdiction. *Id.*, para. 230.

⁵⁰ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018.

⁵¹ *C.D. Holding Internationale and UP v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para. 252-260.

⁵² As of 2019, 37 cases have been filed against Spain, Italy, Czech Republic and Bulgaria. *K. Tienhaara and C. Downie*, *Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes*, *Global Governance* (2018) 24, 451-471.

⁵³ *Eskosol S.p.A. v. Italian Republic*, ICSID Case no. ARB/15/50, 6 May 2019 (*Eskosol*). *D. Haverbeke et al.*, *Arbitration in the EU Energy Sector: Recent Developments and Case Law*, *EEELR* (2017) 26, 154-171; *C. Verburg and N. Lavranos*, *Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the Achmea Judgment for intra-EU ECT Arbitrations*, *EILA Law Rev.* (2018) 3, 197-222.

⁵⁴ *Id.*, para. 168 ff.

⁵⁵ *Id.*, para. 172.

by the tribunal merely as a matter of fact.⁵⁶ Hence, the tribunal could not find any likelihood to assess EU law, since the measures at stake were purely domestic, not implementing or being necessitated by EU legislation.⁵⁷

Furthermore, building on the assertion of autonomy of the EU legal order embraced in *Achmea*, the tribunal examined the distinction between the ECT and the EU treaties as distinct sub-systems of international law, “with no precise hierarchy” between them.⁵⁸ In the tribunal’s words:

“each authority is empowered in its sub-system to render decisions within its sphere, such as the ECJ’s *Achmea* Judgment under the EU Treaties and the awards of various arbitral tribunals under the ECT. A given State may be subject to obligations arising from both types of decisions.”⁵⁹

Rephrased, ISDS tribunals are not by any means bound by ECJ’s jurisprudence when deciding disputes under IIAs, and vice versa.⁶⁰ For, no principle of international law would allow the tribunals to interpret the text of the ECT so as to give priority to external treaties and the jurisprudence of courts interpreting them.⁶¹

The tribunal then dismissed the argument whereby *Achmea* would as such invalidate the ECT – or single provisions thereof. This postulates that the incompatibility between art. 26 ECT and art. 277 and 344 TFEU would constitute a violation of MS’ domestic rule of fundamental importance under art. 46(1) VCLT.⁶² In the tribunal’s opinion, such incompatibility amounts only to a potential violation of EU law, rather than a blatant one, as required by art. 46(2) VCLT. Importantly, the tribunal took on EC’s ambiguous position towards intra-EU IIAs since 2004 and the AG’s conclusions in *Achmea* to frame the issue of the compatibility between ISDS and EU law as an “open and complex question” until the ECJ rendered the *Achmea* judgment in 2018.⁶³ Regardless, no room was found by the tribunal to maintain that as a matter of international law an ECJ judgment could automatically invalidate a treaty like

⁵⁶ *Id.*, para. 176.

⁵⁷ *Id.*, para. 174.

⁵⁸ *Id.*, para. 181.

⁵⁹ *Id.* Masdar n. 50, para. 340, where the tribunals concludes that “the two legal orders can be applied together as regards the Parties’ arbitration agreement in the ECT, as “nothing in EU law can be interpreted as precluding investor-State arbitration under the ECT and the ICSID Convention”.

⁶⁰ *Id.*, para. 184.

⁶¹ 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, Decision on Jurisdiction, June 6, 2016, para. 75.

⁶² Eskosol n. 53 para. 191.

⁶³ *Id.*, para. 193.

the ECT or parts thereof.⁶⁴ In fact, such conclusion would encroach upon the principle of *pacta sunt servanda*, which grounds all obligations entered into by the parties to a treaty.⁶⁵

Lastly, even if *Achmea* was to invalidate consent to arbitration under art. 26 ECT, it could only operate prospectively. The ECJ judgment in *Achmea* was posterior to the commencement of *Eskosol*, whereas the tribunal's jurisdiction needs to be determined at the time of the commencement of the proceeding.⁶⁶ Moreover, any consent to ISDS given by MS under the ECT had been accepted by investors in good faith, thus falling within the exception to the general rule of retroactive operation of invalidation of international treaties under art. 69(2) VCLT.⁶⁷ This comes as a result of the tribunal's textual interpretation of the ECT and the above-mentioned wavering attitude of MS and the EC towards intra-EU IIAs.⁶⁸

4. Beyond *Achmea*: The Implications for EU Environmental Law and Policy

While *Achmea* has not disrupted the intra-EU ISDS system, it remains unclear if, and how, ISDS decisions in the above cases will affect the application of EU rules to achieve decarbonisation or ensure environmental protection. Concerns in this respect are perfectly legitimate, especially in light of the ECT's investor-friendly approach, with substantive provisions often formulated in vague and broad terms.⁶⁹ Hence, we now turn to display available avenues to allow tribunals to properly encompass EU environmental and climate legislation in their decision-making process.

4.1. EU Law and IIAs as Separate Legal Systems of Law

The relationship between EU and the international legal orders (and, broadly, on the nature of EU law as a whole) is a contested topic, whose resolution has no unambiguous answer.⁷⁰ This is a direct consequence of EU law's complex nature and the different ways in which it can be qualified.⁷¹

⁶⁴ *Id.*, para. 198.

⁶⁵ *Id.*, para. 188. Charanne B.V. and Construction Investments S.a.r.l. v. Spain, SCC Case No. 062/2012, Award, January 21, 2016, para. 437.

⁶⁶ *Eskosol* n. 53, para. 202.

⁶⁷ *Id.*, para. 206.

⁶⁸ *Id.*, para. 206.

⁶⁹ *Corporate Europe Observatory*, One Treaty to Rule Them All (13 June 2018), available at <https://corporateeurope.org/en/international-trade/2018/06/one-treaty-rule-them-all>.

⁷⁰ *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.117.

⁷¹ *Ibid.*, para. 4.20.

While this issue might seem devoid of practical consequences, the perspective adopted will influence the choice of the conflict rules to be applied.⁷² In turn, the application of different conflict rules will lead to one legal order prevailing over the other.⁷³

As Sections 2 and 3 clarified, courts and tribunals belonging to different legal orders apply different conflict rules. In *Achmea*, the ECJ positioned itself from the perspective of EU law as an autonomous legal order, with primacy functioning as relevant conflict rule. In contrast, tribunals have firmly placed themselves from the perspective of international law. They are established under, and derive their jurisdiction from, arbitration clauses embedded in IIAs. Thus, EU law acquires relevance only inasmuch as it is part of international law. Importantly, any conflict arising between the two systems must be solved according to the conflict rules set out in the VCLT. Overall, this further cements the understanding that intra-EU ISDS only takes place within the international legal order, and that no room for primacy of EU law lies outside of the EU legal system, which only involves EU institutions and its MS.

4.2. Rules of Conflict in Action

Within the context of Intra-EU BITs, the disputing parties have sought to settle the conflict between IIAs and EU law by relying on the rules in the VCLT. Thus, MS and the EC argued that EU fundamental treaties, as later treaties, terminated or suspended Intra-EU BITs or provisions thereof, either under art. 59 or 30(3) VCLT.

Both articles are premised on the sameness of the two treaties' subject matter,⁷⁴ and on their incompatibility. However, tribunals have consistently held that no sameness exists between EU treaties, concerned with the establishment and regulation of the common market, and BITs or single provisions thereof, focused on FDI protection.⁷⁵ In addition, there is also no incompatibility, since IIAs's protections are cumulative to those under EU law.⁷⁶ Thus, EU law will not displace Intra-EU BITs and ISDS, and tribunals will retain their jurisdiction.

The situation diverges with respect to the ECT, where the prevalence of EU law over the latter is based on both being part of the international law applicable to the dispute under art.

⁷² A. Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, Santa Clara J. of Int'l Law (2014) 12, 111-157, 150-151.

⁷³ C. Tietje *et al.*, *Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals, and the Lost Opportunity of the Micula Arbitration*, J. W. Investment & Trade (2015) 16, 208.

⁷⁴ This occurs when the two treaties refer to the same topic or substance, as opposed to the same set of facts or goals. *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 172 (Euram).

⁷⁵ *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 160; Euram n. 74, para. 178; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, para. 587.

⁷⁶ Euram n. 74, para. 213 and 267; *Achmea* n. 15, para. 262 and 274.

26(6) ECT.⁷⁷ The tribunal in *Eskosol* has made clear, however, that no inherent incompatibility between the ECT and EU Treaties exists, and therefore both can well apply to the dispute at the same time.⁷⁸ Moreover, being the dispute rooted in international law, the issue of jurisdiction must be settled accordingly, leaving no room for principles such as primacy of EU law.⁷⁹

At best, EU law could be relevant in its domestic dimension,⁸⁰ inasmuch as tribunals would consider it as a matter of fact relevant to the merits of the case.⁸¹ Yet, where this might be sufficient to shield the EU legal order from interpretation hampering the sound application of EU law, it still does not solve another issue: ISDS claims will continue to be filed against MS when their compliance with EU law is put at odds with ECT.

4.3. How To Ensure Consistency between ISDS and EU Environmental and Climate Law

Since tribunals will retain jurisdiction over intra-EU cases, it is worth clarifying the tools available to ensure that ISDS decisions will not curtail MS' (and EU's) efforts to enhance environmental and climate protection.⁸² More specifically, such instruments inform the conduct of each subject involved in ISDS disputes, namely the State, the investor, and the tribunal.

Firstly, while devising environmental, energy and climate policies, MS must seek to ensure political credibility and regulatory stability,⁸³ defined as “the holy grail of every investor in every sector”.⁸⁴ Regulatory changes are simply unavoidable. Yet, they might withstand tribunals' scrutiny, inasmuch as they do not yield a discriminatory or protectionist intent, or contravene representations to foreign investors.⁸⁵ If a State adopts clear-cut environmental

⁷⁷ *Electrabel* n. 70, para. 4.120-4.127; *Vattenfall* n. 42, para. 145-146; *Eskosol* n. 53, para. 117-123.

⁷⁸ *Electrabel* n. 70, para. 4.146. *Charanne* n. 65, para. 144; *RREEF* n. 61, para. 79; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, para. 286; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 199; *Masdar* n. 50, para. 340; *Novenergia v Spain*, SCC Arbitration 2015/063, Final Arbitral Award, 15 February 2018, para. 462.

⁷⁹ *RREEF* n. 61, para. 72-73; *Blusun* n. 78, para. 278; *Eiser* n. 78, para. 181; *Novenergia* n. 78, para. 460-461.

⁸⁰ *Eskosol* n. 53, para. 123.

⁸¹ By considering EU law as a matter of fact, tribunals will not be able to engage in analysis on the validity, interpretation, and application of substantive EU law, thus safeguarding the EU legal order's autonomy. This is the approach followed in recent treaty practice, e.g. art. 8.31.2, EU-Canada Comprehensive Economic and Trade Agreement.

⁸² *N. Lavranos and C. Verburg*, Renewable Energy Investment Disputes: Recent Developments and Implications for Prospective Energy Market Reforms, in *M. Roggenkamp, C. Banet* (eds), *European Energy Law Report XII*, Intersentia, Cambridge-Antwerp-Chicago, 2018, 91-93.

⁸³ For a detailed account of the policy credibility with regard to decarbonisation efforts, *S. Bassi et al.*, The credibility of the European Union's efforts to decarbonize the power sector, LSE Grantham Research Institute Policy Report, December 2017.

⁸⁴ *G. Bellantuono*, The Misguided Quest for Regulatory Stability in the Renewable Energy Sector, in *J W En L and Bus* 2017 (10), 274-292.

⁸⁵ *Eiser* n. 78; *Novenergia* n. 78.

and climate commitments and targets, and backs them with consistent regulatory schemes, this would diminish investors' chances to successfully bring a claim for breach of legitimate expectations under FET. ISDS cases on FIT discussed in Section 3.2 are instructive in this regard.⁸⁶ The newly enacted RES directive and Energy Union Governance regulation embrace regulatory stability and certainty for investors as fundamental elements underpinning MS' energy and climate policies.⁸⁷

Secondly, before investing in any host country, investors should conduct an adequate assessment of the potential political and regulatory risks. Investors are expected to behave prudently by evaluating business and country conditions in which the investment will take place, as well as how such conditions could change over time.⁸⁸ Regulatory changes fall into the ordinary business risks borne by investors.⁸⁹ As awards have made clear, it is only when such changes amount to a radical alteration of the regulatory framework's essential characters that legitimate expectations may be considered breached.⁹⁰ In this context, the performance of due diligence could help determining which regulatory changes were reasonably foreseeable, and therefore not in breach of legitimate expectations.⁹¹ The importance of investor's due diligence was underscored in *Antin v. Spain*. Here, the extensive legal, regulatory and market due diligence provided additional grounding to the investor's legitimate expectations, which were ultimately found breached.⁹²

Lastly, absent any foreseeable radical changes in current IIAs' texts recognizing MS' right to regulate,⁹³ ISDS tribunals should rely on proportionality when assessing the domestic regulatory choices of a given host State.⁹⁴ Nothing in IIAs prevents host States from entertaining their sovereign right to regulate in the public interest.⁹⁵ However, the risk of being exposed to compensation for damages could lead MS to dwindle their ambitions and refraining from adopting measures that it would have otherwise enacted.⁹⁶

⁸⁶ Charanne n. 65, para. 514.

⁸⁷ EC Communication on A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy (COM 80(2015) final). Article 17 para. 6, Regulation on the Governance of the Energy Union (No. 2018/1999). Article 6, Proposal for the Renewable Energy Directive (No. 2018/2001).

⁸⁸ *A.R. Sureda*, Judging under Uncertainty, 79.

⁸⁹ *Y. Selinova*, Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for Current Arbitration Cases, *ICSID Review* (2018) 33, 440-441.

⁹⁰ *Eiser* n. 78; *Novenergia* n. 78.

⁹¹ Charanne n. 65.

⁹² *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018.

⁹³ This approach has been followed in recent EU FTAs, such as CETA and the EU-Japan EPA.

⁹⁴ Although proportionality is not alternative to the rules on treaty interpretation under the VCLT, it can be understood as a general principle under art. 38(1)(c) ICJ Statute: *G. Bücheler*, Proportionality in Investor-State Arbitration, Oxford, OUP, 2015, 67-80.

⁹⁵ Charanne, n. 65, para 499. *Eiser* n. 78, para 362.

⁹⁶ *K. Tienhaara*, n. 10.

Proportionality as a method of adjudication is key as it addresses the relationship between the ends pursued by the state, the means employed to achieve it and its concrete effects, balancing the interference of the State with the interests of foreign investors.⁹⁷ Thus it can be both a tool to determine MS' right to limit individual rights and "a mechanism of coordination between the supranational legal order and national legal orders".⁹⁸ We are aware that proportionality might be used as a judicial law-making tool to justify particular preferences, especially in a context where ISDS tribunals are not bound by precedent and follow inconsistent patterns of reasoning.⁹⁹ Yet, if correctly deployed, proportionality would provide a neutral, argumentative framework for transparent and stringent case-specific analysis.¹⁰⁰ Although the extent to which ISDS tribunals engage in proportionality analysis is unclear, proportionality is clearly gaining ground as a way to assess investor's legitimate expectations under FET or the lawfulness of host State's conduct in expropriation claims.¹⁰¹

4.4. Non-enforcement of Intra-EU ISDS Awards

One last avenue to safeguard the application of EU environmental and climate laws is to halt ISDS awards' enforcement before domestic courts. In this scenario, the task would fall on MS' domestic courts to refuse enforcement of those Intra-EU awards on the grounds of their incompatibility with EU's main tenets.

Enforcement will differ depending on whether the relevant award is rendered under ICSID or other arbitration rules (e.g., UNCITRAL). In the latter case, the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (NY Convention) art. V applies.¹⁰² Under art. V(2)(b) NY Convention, enforcement could be denied if the award is contrary to public policy of the State in which enforcement is sought. A MS' *lex fori* necessarily incorporates EU law. Since the ECJ in *Achmea* already recognized ISDS's contrariety to the principle of autonomy of EU law, intra-EU awards could be denied enforcement on the

⁹⁷ N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (1996), 23-24.

⁹⁸ A. Stone Sweet and J. Mathews, *Proportionality Balancing and Global Constitutionalism* Col JTL (2008) 47, 144.

⁹⁹ C. Verburg, *Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement*, J W Investment & Trade 2019 (2-3), 425-454, 429-436.

¹⁰⁰ For example, with regard to the FIT litigation, one tribunal stated that the proportionality criterion "is satisfied as long as the changes are not capricious or unnecessary and do not amount to suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework". Charanne n. 65, para. 517.

¹⁰¹ B. Kingsbury and S. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest? The Concept of Proportionality*, in S. Schill (ed), *International Investment Law and Comparative Public Law*, OUP, 2010, 88-102; G. Bücheler n. 96, 132-136 (on expropriation) and 193-208 (on FET).

¹⁰² H. Wehland, *The Enforcement of Intra-EU BIT Awards: Micula v Romania and Beyond*, J W Investment & Trade (2016) 17, 942-963.

grounds that they operate against EU public policy.¹⁰³ However, this approach was unsuccessfully tested in the *PL Holdings v Poland* annulment proceeding before Swedish courts.¹⁰⁴

An alternative approach would be to assert the invalidity of the arbitration agreement under the law of the place where the award was made (art. V(1)(a) NY Convention). When a MS is chosen as seat of arbitration, EU law and its *acquis* (including *Achmea*) are incorporated into domestic law. Thus, enforcement should be denied on the grounds that, following the entry into force of the EU Treaties, arbitration agreements in Intra-EU IIAs have ceased being valid.¹⁰⁵ While the argument based on art. V(1)(a) NY Convention proved unsuccessful in *PL Holdings*,¹⁰⁶ it was accepted in the enforcement proceedings of the *Achmea* award before German courts, which ultimately declared art. 8 of the 1991 BIT inapplicable as a result of Slovakia's accession to the EU.¹⁰⁷

Conversely, awards rendered under ICSID are deemed binding as final judgments of the states' own domestic courts.¹⁰⁸ Thus, MS courts' will have no power to review whether the ICSID tribunal exceeded its jurisdiction or the ICSID award is consistent with public policy.¹⁰⁹ In this instance, the conflict between different legal orders arises again in all of its complexity.¹¹⁰ Exemplary are the latest developments in the saga of *Micula v. Romania*, where Swedish courts have denied enforcement of an ICSID award because such enforcement would have resulted in Sweden's violation of sincere cooperation under EU law.¹¹¹ Relevant, such situation would not arise if investors seek enforcement of Intra-EU awards outside the EU. However, it cannot be utterly ruled out that international comity and political pressure will *de facto* prevent enforcement also outside the EU.¹¹²

5. Conclusions

The international regime governing FDI protection has traditionally run alongside the development of the EU internal market and legal system. Yet, in *Achmea* the ECJ set a

¹⁰³ T. Singla, *Achmea: The Fate and Future of Intra-EU Investment Treaty Awards Under the New York Convention*, EJIL Talk, 8 May 2018.

¹⁰⁴ *PL Holdings v Poland*, Svea Court of Appeals, Judgment on Set-Aside Application, 22 February 2019.

¹⁰⁵ Singla n. 103; Wehland n. 102, 950-951.

¹⁰⁶ *PL Holdings* (n. 104), 45.

¹⁰⁷ L. Bohmer, In now-public decision, reasoning of German Federal Supreme Court on set aside of BIT award is clarified (IARepporter, 11 November 2018). In light thereof, investors have tried to seek enforcement outside of the EU, so as to limit the possibility for EU law principles to be considered in MS domestic courts. For example, investors have sought to enforce the *Novenergia* award in the United States, after Swedish courts stayed the proceedings domestically.

¹⁰⁸ Art. 54 ICSID Convention.

¹⁰⁹ Wehland n. 102, 957.

¹¹⁰ Tietje n. 73.

¹¹¹ J. Dahlquist, Swedish Court declines to enforce ICSID award (IARepporter, 5 February 2019).

¹¹² Eskosol n. 53, para. 230-232.

milestone in favor of the latter's supremacy over the former. The EC and MS are fiercely opposing ISDS as it entrusts litigation regarding domestic measures involving EU law "to private arbitrators, who cannot properly apply EU law", without ensuring any judicial dialogue with the ECJ.¹¹³ However, ISDS tribunals so far have regularly discarded *Achmea* under several different legal grounds.

How this paper has emphasized, such situation of inherent conflict is not without consequences for EU's environmental and climate law and policy, and the time when its practical implications will appear may not be too far away. On April 12, 2019, a Swiss-registered subsidiary of Gazprom sent a notice of dispute under art. 26 ECT to the EC, alleging that the amendment to the gas directive (no. 2009/73/EC) could breach its vested rights related to its investment in the Nord Stream 2 pipeline.¹¹⁴ If eventually filed, this would become the first ECT claim brought against the EU. Relevant, this notice of dispute had been sent a few days before the same EC adopted a recommendation for a Council resolution on modernization of the ECT, with a view to include, *inter alia*, specific provisions on host states' right to regulate and sustainable development.¹¹⁵

This article has analyzed a set of instruments currently available to eliminate, or at least manage, the existing conflict. However, as the collision course between the international investment and EU legal orders advances, even to resort to such instruments might not suffice. Hence, the only viable solution would be a revision of applicable IIA standards, to strike a more equitable balance between investors' rights and the EU right to regulate.

¹¹³ EC Communication 2018, n. 4.

¹¹⁴ J. Ballantyne, EU threatened with first ECT claim (GAR, 24 April 2019).

¹¹⁵ EC Recommendation for a Council decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty, COM(2019) 231 final.