

# Kluwer Arbitration Blog

## Intra-EU Investment Reform: What Options for the Energy Charter Treaty?

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The [recently leaked treaty for the termination of intra-EU BITs](#) can be seen as the culmination of an ongoing effort by the European Commission to discourage investment arbitration between Member States, reflecting, in the eyes of many, a tension between public international law and EU law. In spite of this, and even after the Court of Justice of the European Union's (CJEU) *Achmea* decision, intra-EU proceedings are still being instituted, most recently in the cases of *VM Solar Jerez v. Spain* and *Strabag v. Germany*.

In the aftermath of *Achmea*, EU Member States [expressed their intention to terminate all intra-EU BITs by 6 December 2019](#). While they seem to have reached consensus on the future of intra-EU BITs, *Achmea*'s impact on intra-EU investor-state arbitration under the [Energy Charter Treaty \(ECT\)](#) remains disputed. [Twenty-two Member States](#) declared that intra-EU arbitration under the ECT was equally incompatible with primary EU law and sought to “discuss without undue delay whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the Energy Charter Treaty. [Hungary rejected this view](#), finding that “the *Achmea* judgment concerns only the intra-EU bilateral investment treaties” and holding that “the future applicability of the ECT in intra-EU relations requires further discussion and individual agreement amongst the Member States”. [Finland, Luxembourg, Malta, Slovenia, and Sweden](#) refrained from taking any position.

The Commission is of the view that [the investor-state arbitration clause of the ECT](#), “if interpreted correctly”, is not applicable between EU Member States. As a consequence, the ECT does not offer an invitation to arbitrate for investors in intra-EU constellations. In absence of a valid arbitration agreement, tribunals lack both competence and jurisdiction. The EU has argued its position in *amicus curiae* briefs to arbitral tribunals (one of them cited extensively [here](#)) and domestic courts ([here](#) and [here](#)).

### Jurisdictional questions before tribunals

Arbitral tribunals have uniformly rejected the Commission's view in the known proceedings so far. Jurisdictional objections asserting that the arbitration provisions of the ECT are not applicable for disputes between an EU Member State and an investor of another EU Member State have been

dismissed under different theories.

In *Masdar Solar v. Spain*, the first decision to follow *Achmea*, the tribunal tersely pointed out that the CJEU has not touched upon the issue of applicability of the ECT. The reasoning was expanded on in *Foresight Luxembourg Solar v. Spain* and *CEF Energia v. Italy*. The tribunal in *Vattenfall* handed down an elaborate [Decision on the Achmea Issue](#) (already discussed [here](#)). In determining the ordinary meaning of Article 26 ECT, the *Vattenfall* tribunal found no indication in the wording, context, or object and purpose of this provision that intra-EU disputes should be excluded. It also stressed that the ECT does not contain a “disconnection clause” ensuring that provisions in mixed agreements apply only to third parties and not between EU Member States. The tribunal in *Cube Infrastructure v. Spain* added a historical reasoning as to the nature of the ECT to the interpretation. In *LBBW v. Spain*, the tribunal also accorded primacy to the treaty from which it derived its jurisdiction, the ECT, over primary EU law in case of conflict.

In *Eskosol v. Italy*, the tribunal dealt with the Declaration by the 22 Member States, dismissing its nature as a binding interpretative instrument. A similar ruling on jurisdiction came from the tribunals in *Rockhopper v. Italy* and *SolEs Badajoz v. Spain*. In *I.C.W. Europe Investments v. Czech Republic*, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic* and *WA Investments-Europa Nova v. Czech Republic*, the tribunals found that, since the seat of arbitration was Switzerland, EU law was simply international law between third countries. Yet another tribunal in *9REN Holding v. Spain* simply found no incompatibility between the claims under the ECT and EU law. A [future preliminary ruling](#) might reshuffle the argumentative cards for both sides.

### Amending the Energy Charter Treaty

The alternative to judicial clarity would be a straightforward political decision. The [Energy Charter Conference](#), the governing and decision-making body for the Energy Charter process composed of all states or regional economic integration organisations which have signed or acceded to the ECT, has approved the modernisation of the ECT. [On 15 July 2019, the Commission was authorised by the Council to enter into negotiations on behalf of the EU.](#) In its [negotiating directives](#), the Council seeks to “bring the ECT provisions on investment protection in line with the modern standards of recently concluded agreements by the EU and its Member States” and “in line with the EU approach in its investment protection agreements and the position taken by the EU in UNCITRAL WG III and ICSID, to ensure that this approach is reflected in the Modernized ECT”. It committed to “ensure that any rule or commitment agreed upon by the European Union should be in line with the EU legal framework”. The EU submitted this position to the [policy options for modernisation of the ECT](#) adopted on 6 October 2019 by the Energy Charter Conference.

Beyond the harmonious interpretation suggested by the EU, there is no explicit carve-out provision for intra-EU disputes in the ECT. Article 46 ECT prohibits any reservations to the Treaty, barring unilateral modifications by individual parties. While it seems unlikely – recalling the position taken by Hungary and insinuating the doubtful minds of Finland, Luxembourg, Malta, Slovenia, and Sweden – that a uniform position of EU member states will emerge in the near future, what are the legal options?

Amendments are possible under Article 42 ECT following a proposal by any contracting party. These are then communicated by the Secretariat at least three months before the proposed adoption

by the Energy Charter Conference. Following adoption, the depositary submits the amendments to all contracting parties for ratification, acceptance, or approval. On the ninetieth day after submission to the depositary by at least three fourths of the contracting parties, the amendments enter into force for those parties.

The ECT has 56 members, including the EU and Euratom. This means that the Union and its member states are a small stretch away from reaching a three fourths majority on their own. One such amendment took place in 1998 to incorporate the new WTO system.

### ***Inter se* agreements**

Article 41 of the Vienna Convention on the Law of Treaties provides that the modification of multilateral treaties between a select group among the parties to a multilateral treaty (referred to as an *inter se* agreement) must either be provided for by the treaty or at least not be prohibited. Nor may it affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations or relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

The Commission has already submitted the argument before arbitral tribunals (rejected [here](#) and [here](#)) that the Lisbon Treaty constitutes an *inter se* agreement. Since Article 46 ECT prohibits any reservations to the Treaty, however, one might reason that the effective execution of the object and purpose of the treaty as a whole would pose an obstacle to an *inter se* agreement. The “object and purpose” of a treaty may be deducted from its preamble and its core substantive provisions (such as Article 2 ECT), particularly those from which no reservation or derogation is permitted. In the case of the ECT, an *inter se* agreement could be understood to defeat the general prohibition of reservations.

In addition, Article 16 ECT specifically denies any derogation from the investment provisions of the ECT in the case of prior or subsequent agreements (see in this regard also [the reasoning of the Vattenfall tribunal](#)) unless more favourable. Even in the case of a valid *inter se* agreement, it is doubtful whether the investor state dispute settlement provisions would not still apply.

### **Withdrawal and association agreement**

Finally, the EU could at any time withdraw in accordance with Article 47 ECT through written notification to the depositary. Taking effect one year after the date of the receipt by the depositary (or any specified later date), the Union and its member states could then conclude an association agreement with the remaining members of the ECT in accordance with Article 43 ECT. The downside of this construction would be the 20-year sunset clause in Article 47 ECT triggered by a unilateral by the EU and its members.

### **Article 26(3)(b)(ii) statements**

There remains a possibility under the ECT itself. Article 26(3)(b)(ii) allows, “for the sake of

transparency, each party listed in Annex ID (this includes the EU) to provide a written statement of its policies, practices and conditions to the Secretariat. In May, the EU submitted a [new statement](#) to ensure that the EU judicial system is recognised for purposes of the fork-in-the-road clause. However, it is clarified in a footnote that none of it concerned intra-EU investments, adding that the Union “may address this matter at a later stage”. In [Vattenfall](#), the EU had taken recourse to its previous statement that “[t]he Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party” to restrict the offer to extra-EU investors. The tribunal did not share the view.

## Outlook

In terms of the envisaged reform of intra-EU investment dispute settlement the creation of an institutionalised mechanism as envisioned in the [CETA Agreement](#) deserves mentioning. In this regard, [in April 2019 the CJEU has already confirmed its compatibility with primary EU law](#). An alternative would be “a future Multilateral Investment Court” exercising jurisdiction over the ECT as set out in the [negotiating directives](#).

Since it might be put into question, following the benchmark set by the [CJEU in Opinion 1/17](#), whether the current system of investment protection under the ECT is even legitimate in extra-EU constellations from a Union law perspective, the EU will continue to seek reform. Depending on the momentum during the reform process, it will either aim at a holistic solution for all parties to the ECT or an explicit or implicit carve out for intra-EU disputes alongside reformed investment protection provisions for extra-EU investments disputes. Both options depend on a large-scale consensus by all parties to the ECT.

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