

# AG Szpunar's Opinion in Case C-741/19: Preparing the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty?

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Julian Scheu, Petyo Nikolov (International Investment Law Centre Cologne)

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The investor-State dispute settlement (ISDS) mechanism provided by Art. 26 (2) (c) of the Energy Charter Treaty (ECT) is highly relevant to the protection of intra-EU investments.<sup>[fn]</sup> In 2018, about 45 per cent of all treaty-based intra-EU investment arbitrations were brought pursuant to the ECT. See UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, IIA Issue Note 3.2018, p. 1.<sup>[fn]</sup> In its widely discussed landmark *Achmea* judgment, the Court of Justice of the European Union (CJEU) found that the ISDS clause contained in the Dutch-Slovakian bilateral investment treaty (BIT) was incompatible with European Union (EU) law. As recently confirmed by the Frankfurt Higher Regional Court in *Raiffeisen v. Croatia*, the *Achmea* ruling is not specific to the treaty at issue but applies to all intra-EU BITs.

This post addresses the practically important question which remains unanswered: whether the *Achmea* judgment is also applicable to ISDS proceedings under Art. 26 ECT. The legal consequences would be severe for pending and future ECT investment claims especially with respect to the enforceability of awards.

On 3 March 2021, Advocate-General Szpunar (AG) delivered a remarkable opinion in CJEU case C-741/19 which contributes to this controversy. The AG concludes that *Achmea* should be extended to intra-EU ECT arbitration. In the following, we will provide an analysis of the opinion (I.) and give an outlook on what to expect from future developments of intra-EU investment arbitration (II.).

## **I. Analysis of the Szpunar Opinion in Case C-741/19**

### **An Obiter Dictum Opinion**

Considering the circumstances of the preliminary ruling procedure, the AG's findings on Art. 26 ECT were unexpected. The case concerns the setting aside of an ECT investment arbitration award before the Paris Court of Appeal. The underlying dispute between a Ukrainian investor and the Republic of Moldova relates to the purchase of electricity. In 2013, the Paris-seated tribunal in *Komstroy* (formerly known as *Energoalians*) *v. Moldova* rendered an UNCITRAL award in favour of the investor. Subsequently, the respondent State filed an action to set aside the award at the seat of arbitration.

The Paris Court of Appeal referred three questions to the CJEU as to whether the claimant had a protected investment under Art. 26 (1) ECT. After acknowledging that neither the investor's home State nor the concerned host State are EU Member States, the AG asked whether the CJEU was competent to rule on the matter (paras. 30 et seq.).

In line with the *Hermès* case (C 53/96, EU:C:1998:292, para. 32), such a competence would exist if the relevant provision was potentially applicable in an intra-EU context (para. 37). Whether Art. 26 ECT is potentially applicable within the Union would depend, however, on its compatibility with EU law (para. 47). Accordingly, the CJEU would only be competent to render a preliminary ruling if Art. 26 ECT was compatible with EU law. Otherwise, no legitimate interest to rule on the notion of investment under Art. 26 (1) ECT in a dispute between two non-EU parties would exist. Thus, the CJEU should seize the opportunity to clarify whether its *Achmea* ruling was applicable to ISDS under Art. 26 ECT (para. 48).

The analysis provided by the AG is remarkable and clearly motivated by its outcome. In view of legal certainty, great interest in clarifying the matter indeed

exists. Nevertheless, the AG's reasoning is flawed. It suggests that any ruling on the notion of investment under Art. 26 (1) ECT would be moot if intra-EU ECT arbitration under Art. 26 (2) (c) ECT was incompatible with EU law. That is simply not the case, as Art. 26 (2) (a) ECT provides for the competence of the national courts of the host State. Any dispute brought before a national court under Art. 26 (2) (a) ECT requires an investment in the sense of Art. 26 (1) ECT. The notion of investment is therefore independent from the ISDS mechanism. Consequently, as far as the compatibility between Art. 26 ECT and EU law is concerned (paras. 46-90), the opinion's findings are beyond the scope of the preliminary ruling procedure and were made *obiter dictum*. The CJEU is therefore not competent to rule in that regard.

### **The Opinion's Main Findings Regarding Intra-EU ECT Arbitration**

By applying the reasoning developed by the CJEU in *Achmea*, AG Szpunar concluded that intra-EU ECT arbitration was incompatible with EU law (para. 79). He opined that the ISDS mechanisms provided by the BIT at issue in *Achmea* and the ECT were without a doubt comparable (para. 73). Corresponding submissions to the Court were made by the EU Commission and the Governments of France, Germany, Spain, Italy, the Netherlands, and Poland (para. 72).

First, the AG emphasised that, like the ISDS clause in *Achmea*, Art. 26 ECT allows for the submission of disputes to arbitration that may relate to the interpretation of EU law. According to Art. 26 (6) ECT, the tribunal shall decide disputed issues in accordance with the ECT and applicable rules and principles of international law. As the CJEU elucidated in *Achmea*, EU law is a part of such rules of international law since it must be regarded on a twofold basis: 'as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States' (*Achmea* judgment, para. 41). On this basis, the AG concluded that the risk of ECT tribunals interpreting or applying EU law existed (paras. 74-75).

Second, the AG assessed that a tribunal established pursuant to Art. 26 ECT does not form part of the EU's court system (para.76-78). Therefore, such a tribunal is not entitled to seek the CJEU's guidance on matters of EU law and, thus, it constitutes a threat to the principle of autonomy of EU law (para. 79).

Then, the AG considered whether the *Achmea* ruling must be distinguished from intra-EU ECT arbitration because the EU itself is a party to the ECT (paras. 81 et seq.). On this basis, arbitral tribunals have so far declined all jurisdictional objections related to *Achmea*. The AG argued that in principle, the EU could be subject to decisions of a court established by an international agreement, provided that the autonomy of the EU law was preserved. But since ISDS pursuant to Art. 26 ECT poses such a threat to the EU legal order, the Union being a party to the treaty cannot remedy the incompatibility with EU law (para. 83).

Finally, AG Szpunar considered the submissions made by the Hungarian, Finnish, and Swedish government. Instead of *Achmea*, CJEU Opinion 1/17 should apply to the assessment of Art. 26 ECT (para. 84). The AG dismissed these arguments by recalling that Opinion 1/17 concerns ISDS between the EU and third countries, not intra-EU ISDS proceedings (para.88).

### **Evaluation of the Findings**

On the substance, we agree with the AG's conclusion. As we have argued elsewhere, the *Achmea* ruling is indeed transposable to intra-EU ECT arbitration. The AG's opinion, however, remains vague as to why *Achmea* cannot be distinguished by the ECT's multilateral nature. As recalled by the EU Commission and the German Government (para. 41), the ISDS mechanism under Art. 26 ECT is of bilateral nature and thus perfectly comparable to ISDS clauses contained in intra-EU BITs.

In principle, any multilateral treaty can be divided into bundles of bilateral relationships, provided that the violation of an obligation does not impair the common interest of all States involved. Imagine a situation in which host State A refuses to arbitrate against investors from State B, but consents to proceedings against investors from State C. State A violates Art. 26 ECT, but this only affects the bilateral relationship between States A and B, whereas the interests of State C remain untouched. Therefore, the multilateral nature of the ECT does not hinder the transferability of *Achmea* to intra-EU ECT arbitration.

## **II. Consequences for Intra-EU Investment Arbitrations**

In view of its lack of competence, the CJEU should not address the issue of intra-EU ECT arbitration in a preliminary ruling procedure which is limited to the notion of investment under Art. 26 (1) ECT. Since the issue is far too important to be clarified by way of *obiter dictum*, the Court should instead use the Government of Belgium's request to rule on the matter.

We expect that the CJEU will transpose its *Achmea* ruling to the ECT. The incompatibility of intra-EU investment treaty arbitration with EU law must then be acknowledged as a matter of principle. As we have analysed elsewhere, the practical consequences will be manifold. On the one hand, ICSID tribunals and non-ICSID tribunals seated outside of the EU will remain competent to settle intra-EU investment disputes. Their awards, however, will be unenforceable, at least within the EU. On the other hand, non-ICSID tribunals seated within the EU will no longer be competent to settle such disputes. Should they nevertheless render awards in violation of the law of the seat (*lex arbitri*), such awards will be unenforceable within and outside of the EU.

Is this the end of intra-EU investment arbitration? Maybe not yet, as a recent Opinion delivered by AG Kokott suggests (discussed here). There are indeed good reasons for not applying *Achmea* to arbitration agreements directly concluded between a State and an investor. Thus, contract-based investment arbitration might continue to be part of the European legal landscape.