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Regime collision between EU law and Investment law: Analyzing the Investment Tribunal's Decision on the *Achmea* issue in the *Vattenfall* case

Andrej Lang

TRANSNATIONAL ECONOMIC LAW RESEARCH CENTER

Law School
Martin Luther University
Halle-Wittenberg
Universitätsplatz 5
06108 Halle (Saale)
Germany

Tel.: +49 345 / 55 23149
/ 55 23180
Fax: +49 345 / 55 27201

E-Mail: telc@jura.uni-halle.de
www.telc.uni-halle.de

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Transnational Economic Law Research Center

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A. Introduction

EU law and international investment law are on collision course. The bone of contention is which court shall decide intra-EU investor-state disputes. While the ECJ indicated in its *Achmea* judgment that only itself and the domestic courts of the member states may decide such disputes, the Investment Tribunal in the *Vattenfall* case has now decided in the context of the Energy Charter Treaty ("ECT") that *Achmea* does not preclude its jurisdiction. This raises several questions: Who is right – the ECJ or the investment tribunal? Does the reasoning in *Achmea* apply to the ECT? How should this clash of courts be resolved under the rules of conflict of public international law? And what happens if the conflict is not resolved?

B. Background

In its path-breaking *Achmea* judgment, the ECJ found that international treaties which shift the jurisdiction for disputes relating to EU law onto external investment tribunals contradict the EU's federalized legal system. More specifically, the ECJ held that arbitration clauses in bilateral investment treaties between EU member states ("Intra-EU-BITs") interfere with the autonomy of EU law which comprehensively safeguards the ECJ's final interpretive authority in matters of EU law (cf. para. 58). Although the *Achmea* decision explicitly refers only to Intra-EU-BITs, its broad reasoning also seems to apply to intra-EU disputes under the ECT. Against this background, *Daniel Thym* has already interpreted *Achmea* sweepingly as a Death Sentence for Autonomous Investment Protection Tribunals (in German, *see* here).

How would investment tribunals established under the ECT respond to this invasive ruling by the ECJ? To put this into context: The ECT is a multilateral treaty with currently 53 members, of which all EU member states (except Italy), EURATOM, the EU itself and several third countries are parties. It focuses on the protection of foreign investors and the possibility of dispute resolution by investment tribunals. Pursuant to Art. 26 ECT, an investor may bring investor-state disputes before an investment tribunal. No other investor-state arbitration clause has been invoked as often by investors worldwide as Article 26 ECT. At present, over 50 intra-EU proceedings are pending under the ECT alone, the vast majority of them against Spain, Italy and the Czech Republic for the withdrawal of subsidies for solar energy plants. One of those proceedings concerns the ICSID investor-state litigation between the Swedish energy company Vat-

tenfall and Germany. Following the policy decision of the German government to phase-out nuclear power in the aftermath of the Fukushima nuclear power plant disaster, Vattenfall asserts claims for damages amounting to 4.7 billion euros.

C. The Tribunal's decision

In its decision in the Vattenfall case on the *Achmea* issue of August 31, 2018, the Investment Tribunal – of which two of its three members had already issued the award in *Eureko B.V. v. Slovak Republic* that was subject of the ECJ's *Achmea* decision – concludes that the *Achmea* ruling does not preclude the Tribunal's jurisdiction. The Tribunal's ruling is based on three main premises: i) that EU law is international law within the meaning of Art. 26(6) ECT; ii) that it is not for the Tribunal to extend the *Achmea* ruling to the ECT; and iii) that Art. 16 prevents the ECT from being modified to the detriment of investors.

I. EU law as international law

The first jurisdictional issue concerned the question whether EU law forms part of international law. This issue is pertinent because Art. 26(6) ECT provides that "[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". In other words, the Tribunal may only consider EU law and the ECJ's *Achmea* judgment if EU law constitutes international law within the meaning of Art. 26(6) ECT. In the investment law literature, it is disputed whether an investment tribunal should apply EU law as part of international law within the framework of investment law clauses or, because of EU law's self-conception as an autonomous and constitutional legal order of its own kind, treat it as national law. The Tribunal holds that „EU law, to the extent of the TEU and the TFEU, including their interpretation by the ECJ, constitutes a part of international law" (para. 150). Without questioning the "autonomous or constitutional nature of the TEU and the TFEU" (para. 145), the Tribunal argues that according to "Article 38(1)(a) of the Statute of the International Court of Justice, any kind of international convention, 'whether general or particular', constitutes international law" (para. 145). This interpretation is convincing, especially if it is viewed from the perspective of how regime collisions between different legal orders are best resolved. If an investment tribunal was not even entitled to consider EU law as part of the relevant law, how is it supposed to craft a legal arrangement that sufficiently takes into account the concerns that underlie EU law?

II. Does the *Achmea* ruling apply to the ECT?

The key issue in the Tribunal's decision on the *Achmea* issue was whether the ECJ's *Achmea* ruling applies to intra-EU disputes within the framework of the ECT. While *Achmea* concerned an arbitration clause in an Intra-EU-BIT, the ECT is a multilateral treaty whose members are not only EU member states but also the EU itself and third states. Does the ECJ's reasoning extend to the ECT or is it limited to Intra-EU-BITs?

In order to analyze this question, it is helpful to distinguish two related but distinct issues: First, what is the best interpretation of the *Achmea* decision and, second, what is the institutional role of an investment tribunal established under Art. 26 ECT. The Tribunal largely circumvents the first issue by putting emphasis on the second issue. While acknowledging that "there is a certain breadth to the Court's wording, addressing provisions 'such as' the dispute resolution provision of the BIT in that case", it concludes that "it is an open question whether the same considerations necessarily apply to the ECT" (para. 161). In the end, the Tribunal rejects the applicability of the *Achmea* ruling to the ECT on the basis of institutional considerations, arguing that "[i]t is not for this Tribunal to extrapolate from the ECJ Judgment […] or to decide which other scenarios would pose the same EU law concerns as those that the ECJ found in relation to the Dutch-Slovak BIT" (para. 164).

How convincing is the Tribunal's reasoning? On the first issue concerning the best interpretation of *Achmea*, it is my view that the ECJ's reasoning also extends to intra-EU-disputes under the ECT. According to the ECJ's *Achmea* ruling, investor-state dispute arbitration clauses in Intra-EU BITs interfere with the autonomy of Union law on three conditions, summarized in recital 58 of the judgment: i) the interpretation of EU law by an external judicial body, ii) the inadequate safeguard of the ECJ's final interpretive authority and iii) the impairment of the principle of mutual trust. These conditions are also met in intra-EU disputes under the ECT. First, an investment tribunal would at least potentially interpret EU law. In fact, this is precisely what the investment tribunal did in the *Vattenfall* case. Secondly, it is not assured that investor-state disputes are brought before the ECJ because investment tribunals cannot be, according to the *Achmea* decision, „regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU", which would be entitled to submit questions to the ECJ for a preliminary ruling (para. 49). Thirdly, in intra-EU disputes under the ECT, the principle of mutual trust is affected because these disputes are outsourced from national courts to international investment tribunals.

The Tribunal in *Vattenfall* stresses several formal differences between

the ECT and an Intra-EU-BIT, in particular that the "ECT is a multilateral treaty" and that "[t]he wording of Article 26 ECT is different to Article 8 of the Dutch-Slovak BIT". However, these differences alone do not justify a different legal assessment. The ECJ points out in *Achmea* that the establishment of a court responsible for the interpretation of an international agreement „is not in principle incompatible with EU law" (para. 57). This in turn does not mean, however, that these agreements are compatible with EU law. As for Intra-EU BITs, the Court requires that „the autonomy of the EU and its legal order is respected". The three conditions which the ECJ in *Achmea* considered to be decisive for an impairment of the autonomy of Union law are also given in intra-EU disputes under the ECT.

Besides Art. 351 TFEU (see here for a detailed analysis in German), there is no basis in EU Treaty law to differentiate between international agreements concluded by the EU with third countries on the one hand and agreements concluded by the member states on the other hand. Hence, there are good arguments to assume that the ECJ's reasoning in *Achmea* applies to the ECT. Nevertheless, the Investment Tribunal's judgement in *Vattenfall* is not surprising: From an institutional perspective, an investment tribunal is not required to speculate about whether the ECJ's reasoning applies to the ECT if he ECJ does not explicitly state so itself. The legal uncertainty concerning the scope of the *Achmea* judgment is caused by the ECJ's short and apodictic reasoning and should be resolved by the ECJ itself.

III. Conflict of law analysis

Via *obiter dictum* the Tribunal finally engages in a conflict of laws analysis, examining several conflict clauses of public international law to assess whether EU law prevails over the ECT in the case of conflict. At the center of the Tribunal's analysis is Art. 16 ECT which provides that a derogation from Part V of the Treaty, the central provision of which is Article 26 ECT, is only permissible by provisions of a prior or subsequent international agreement „where any such provision is more favorable to the Investor or Investment". In other words, an international agreement that does not treat investors more favorably than the substantive and procedural investment protection standards of the ECT cannot modify Article 26 ECT *inter se*.

The Tribunal invokes Art. 16 ECT in two alternative ways: First, it refers to Art. 16 ECT in the context of Article 41 of the Vienna Convention of the Law of Treaties („VCLT"). which provides that „[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if […] (b) the modification in question is not prohibited by the treaty". According to the Tribunal,

Art. 16 ECT prevents the ECT from being modified to the detriment of investors through subsequent EU Treaties (para. 221). Second, the Tribunal relies on the *lex specialis* rule to assess whether it should apply Art. 16 ECT or Art. 351 TFEU as a conflict clause, concluding that Art. 16 ECT as "the clearer conflict rule" must prevail over Art. 351 TFEU. However, the *lex specialis* principle of general public international law does not seem suitable for solving a regime conflict between two different self-contained regimes. In fact, self-contained regimes such as the EU or the international investment law regime tend to have conflict clauses that are favorable to their own law – the EU conflict clause of supremacy favors EU law, Art. 16 ECT favors investor concerns over non-investment concerns. This is why norm conflicts between two different self-contained regimes are best resolved by applying the conflict clauses of general public international law, especially Art. 41 VCLT. While Art. 16 ECT plays a role in the context of Art. 41 VCLT, it is not correct to apply Art. 16 ECT as a conflict clause in a norm conflict with EU law.

Art. 41 VCLT lays down a variation of the *pacta tertiis* rule to protect parties to a multilateral treaty such as the ECT from modifications through a subsequent treaty to which they are not a party, provided that the original treaty prohibits such modifications. On this point, the Tribunal's reasoning is correct: From the perspective of general public international law, as exemplified by Art. 41 VCLT, "Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT" because "Article 16 confirms the effectiveness of Article 26 and the Investor's right to dispute resolution" (para. 229). While the ECJ's reasoning in *Achmea* is entirely based on the constitutional character of EU law, the conflict of laws rules of public international law were crafted in accordance with the principle of sovereign equality of states: Hence, they treat international treaties „equally". According to this yardstick, even the TEU or the TFEU cannot simply override the strong investor protections set forth in in Art. 26 ECT in conjunction with Art. 16 ECT. In sum, the Tribunal's conflict of laws analysis ultimately reaches the right outcome but for – partially – the wrong reasons.

D. Going forward

Although several investment tribunals before had already denied the relevancy of the *Achmea* ruling for investor-state litigation under the ECT for different reasons (see Masdar v. Spain, Gavrilovic v Croatia, Antaris v. Czech Republic), the decision of the Investment Tribunal in the *Vattenfall* case outlined above is by far the most detailed and important pronouncement on this issue from an investment tribunal so far. It is likely that

this decision will have precedential value for future investment tribunals in determining the relationship between EU law and the ECT, if not represent the ultimate response of the investment community to the ECJ's *Achmea* ruling. Of course, the consequence is that the investor-state arbitration clause of Art. 26 ECT is inapplicable to intra-EU disputes from the perspective of EU law but applicable from the perspective of public international law.

If both judicial bodies, the ECJ and the investment tribunals under the ECT, stick to their respective legal viewpoint, which seems likely at this point, what will happen going forward? What ultimately tips the scales in this judicial regime conflict is the allegiance of national courts. Investment tribunals are no transnational creatures, but they critically depend on the law of the place of arbitration, on enforcement, and thus on national courts. Given the supremacy of EU law, member state courts are required to set aside any provision in conflict with EU law, including provisions in international treaties such as Art. 26 ECT. But if Art. 26 ECT is inapplicable, there is – due to the ex tunc-effect of ECJ judgments – no arbitration agreement and hence no legal basis for the arbitration proceeding. In Germany, the invalidity of an arbitration agreement can, roughly formulated, be asserted at practically any stage of the proceedings and lead to the termination of the arbitration proceedings or to the revocation of the arbitration award. At the same time, EU law cannot prevent the enforcement of arbitral awards outside the territory of the EU and the possibility of enforcing arbitral awards outside the host state is a core element of the enforcement regime of international investment law.

In the *Vattenfall* case, commentators expect the Investment Tribunal to render a final award on jurisdiction, merits and damages by the end of this year. The outcome will not only be relevant to the ECJ, but also to the Bundesverfassungsgericht which had concluded in a landmark decision that Vattenfall was entitled to damages as a result of the nuclear power phase-out, and more generally, to the legitimacy of international investment law. What happens to the award, if the Tribunal decides to render one, and how the regime collision between EU law and international investment law plays out, will ultimately depend on the decisions of national courts at the level of enforcement in each individual case – at the cost of legal certainty.

Andrej Lang, LL.M. (NYU) is Senior Research Lecturer of the Chair for Public Law, European Law and International Economic Law at the Martin-Luther-University Halle-Wittenberg.

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