The EU Declaration on the legal consequences of the Komstroy judgment on intra-EU arbitration under the Energy Charter Treaty

La Declaración de la UE sobre las consecuencias jurídicas de la sentencia Komstroy sobre el arbitraje intracomunitario bajo el Tratado sobre la Carta de la Energía

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Abstract: The EU, EURATOM and their Member States issued a Declaration in June 2024 following the CJEU's *Komstroy* judgment with a view to neutralizing the use of the Energy Charter Treaty by investors of Member States of the EU to claim in arbitration proceedings against another Member State. The Declaration tackles not only the commencement of new cases but also pending claims in which the tribunal may still have to decide on its jurisdiction or in which a court may be seized to enforce an intra-EU award. The failure of previous declarations and the subsequent adoption of an amendment to the ECT and an inter-se treaty on this matter cast serious doubts about the practical impact and success of the Declaration as such.

Keywords: Energy Charter Treaty, intra-EU arbitration, EU law, Komstroy, bilateral investment treaties, Achmea

Resumen: La UE, EURATOM y sus Estados miembros emitieron una Declaración en junio de 2024 tras la sentencia Komstroy del TJUE con vistas a neutralizar el uso del Tratado sobre la Carta de la Energía por parte de inversores de Estados miembros de la UE para reclamar en procedimientos de arbitraje contra otro Estado miembro. La Declaración aborda no sólo el inicio de nuevos casos sino también demandas pendientes en las que el tribunal arbitral aún puede tener que decidir sobre su competencia o en las que se puede recurrir a un tribunal de justicia para ejecutar un laudo intra-UE. El fracaso de declaraciones anteriores y la posterior adopción de una enmienda al TCE y un tratado inter-se sobre esta cuestión arrojan serias dudas sobre el impacto práctico y el éxito de la Declaración como tal.

Palabras clave: Tratado sobre la Carta de la Energía, arbitraje intracomunitario, Derecho de la Unión Europea, Komstroy, tratados bilaterales de protección de inversiones, Achmea.

Summary: I. Introduction. II. Context of the Declaration: the EU's comprehensive fight against intra-EU arbitration. III. Analysis of the Declaration: Would it achieve its goal? 1. Legal Nature. 2. Contents of the Declaration. A) Statement against the application of Article 26 ECT to intra-EU arbitration back to 1998. B) Non-application of intra-EU arbitration under the ECT during the period of remanence thereof after the withdrawal of a Contracting Party. 3. Legal consequences of the Declaration. IV. Concluding remarks.

I. Introduction

1. On 6 August 2024, the Official Journal of the European Union ("**EU**") published the *Declaration on the legal consequences of the judgment of the Court of Justice in* Komstroy *and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings* of 26 June 2024 ("**Declaration**").[1] The Declaration concludes, in line with the judgment rendered by the Court of Justice of the European Union ("**CJEU**") in *Komstroy*[2] on 2 September 2021, that Article 26 of the Energy Charter Treaty ("**ECT**")[3] cannot and never could serve (i.e., with *ex tunc* effects) as a legal basis for commencing arbitration proceedings against a Member State of the EU by an investor who is a national of another Member State of the EU ("**intra-EU arbitration**").

2. The Declaration is the latest attempt by the EU institutions and its Member States to put an end to the well-established practice of using the ECT by individuals and companies as the basis for intra-EU arbitration, which saw a remarkable boost over the last decade in particular following the reforms approved by several Member States of the EU to their regulatory frameworks applicable to renewable energy installations (most notably, Spain and Italy).[4] The Declaration must also be put in the context of the current process of withdrawal from the ECT of some Member States as well as the EU and EURATOM themselves, albeit related in principle only with the alleged lack of alignment of the ECT with the international law obligations of mitigation of climate change set out in the Paris Agreement of 12 December 2015.[5]

3. Significantly, the Declaration was not adopted unanimously by all EU Member States, as Hungary issued its own declaration ("**Hungary's Declaration**")[6] that pointed to different legal conclusions with regards existing arbitration proceedings, preserving their validity (i.e., with *ex nunc* effects). In revenge, the European Commission has opened an infringement procedure against Hungary "*for undermining the Union's position on the international stage*" with regards intra-EU arbitration under the ECT,[7] an approach also taken by the Commission previously against recalcitrant Member States that disagreed with a similar declaration and a subsequent treaty against intra-EU arbitration under bilateral investment treaties ("**BITs**").

4. In this paper, we will review, first and in a comprehensive manner, the context of the Declaration as a long move by the European Commission and EU Member States to get rid of intra-EU arbi-

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[1] *OJEU* L of 6 August 2024 (ELI: http://data.europa.eu/eli/declar/2024/2121/oj). The accuracy of the contents of all websites cited in this paper was finally checked on 16 December 2024.

[2] Judgment of the Court (Grand Chamber) of 2 September 2021, *République de Moldavie v Komstroy LLC* (C-741/19; EU:C:2021:655).

[3] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (*OJ* L 69, 9.3.1998, p. 1).

[4] See the statistics on investor-State arbitration under the ECT at the website of the Energy Charter Secretariat at https://www.energychartertreaty.org/cases/statistics/.

[5] According to the Energy Charter Secretariat, that is the case of the EU and EURATOM, France, Germany, Luxembourg, the Netherlands (European part of the country), Poland, Portugal, Slovenia, and Spain, plus the United Kingdom as a former Member State of the EU; see https://www.energycharter.org/media/all-news/. Italy withdrew in 2015 for other reasons. See also brief notes on the withdrawals and the effects thereof of (i) Portugal: M. Almada, M. Pereira da Silva and J.Á. Rueda García, "Portugal formalizes its withdrawal from Energy Charter Treaty (ECT)" at https://www.cuatrecasas.com/en/portugal/international-arbitration/art/portugal-formalizes-its-withdrawal-from-energy-charter-treaty; (ii) Spain: J.Á. Rueda García, "Spain withdraws from the Energy Charter Treaty" at https://www.cuatrecasas.com/en/spain/energy-infrastructure/art/spain-withdraws-energy-charter-treaty; and (iii) the EU and EURATOM: J.Á. Rueda García, "The EU and EURATOM withdraw from the Energy Charter Treaty" at https://www.cuatrecasas.com/en/spain/international-arbitration/art/energy-charter-treaty-eu-euratom-withdraw.

[6] *Declaration of the Representative of the Government of Hungary, of 26 June 2024, on the legal consequences of the judgment of the Court of Justice in* Komstroy *and of the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings*, available at https://cdn.kormany.hu/uploads/sheets/2/22/228/228f2c9ba861fae2b70f183ee4b5ddc.pdf.

[7] See https://energy.ec.europa.eu/news/july-infringement-package-key-decisions-energy-2024-07-25_en.

tration under BITs and the ECT (**II.**). Next, we will analyze the Declaration from three points of view: its legal nature, its contents, and its legal consequences (**III.**). We will finalize this paper with some concluding remarks (**IV.**).

II. Context of the Declaration: the EU's comprehensive fight against intra-EU arbitration

5. The EU institutions' stance against intra-EU arbitration under both the ECT and BITs traces its roots in the 2000s after the enlargement of the EU towards many Central and Eastern European states in 2004, 2007, and 2013, when many extra-EU investments and the disputes stemming therefrom became *ipso facto* intra-EU matters.

6. In the seminal case *Eastern Sugar v. Czech Republic*, the latter submitted to the arbitral tribunal, following several written exchanges with the European Commission, that the BIT between the Netherlands and the Czech Republic invoked by the investor could no longer be applied to the case after its accession to the EU, among other things, because "*the BIT and the EU rules are competing legal frameworks addressing the same subject-matter (i.e. the faculty of a party to invest assets on the territory of another state, and to freely dispose of the revenues)*."[8] The tribunal rejected this plea of lack of jurisdiction stating that neither the Europe Agreement of 31 December 1994 nor the Accession Treaty of 16 April 2003 provided that the BIT was terminated upon the Czech Republic's accession to the EU on 1 May 2004,[9] and affirmed that the BIT and the EU Treaties did not cover the same subject matter.[10] That tribunal moreover declared that the arbitration clause in the BIT "*is in practice the most essential provision of Bilateral Investment Treaties* [as] *the best guarantee that the investment will be protected against potential undue infringements by the host state*."[11]

The European Commission continued to make similar statements as *amicus curiae* in a multitude of arbitration proceedings commenced under the now intra-EU BITs between investors of 'old' Member States and 'new' Member States. The Commission raised the same argument in cases under the ECT, initially with some hesitation[12] and subsequently in a more vigorous manner in particular in the saga of cases pursued by investors in the renewable energy sectors of Spain and Italy.[13] Significantly, every single arbitral tribunal seized with the question of the validity of intra-EU arbitration under the ECT or BITs rejected the States' pleas of lack of jurisdiction under several lines of argumentation.

7. The legal turning point on this matter took place on 6 March 2018, when the CJEU issued its landmark judgment *Achmea* in which it held that Articles 267 and 344 of the Treaty on the Functioning of the EU ("**TFEU**") must be interpreted as precluding a provision in a BIT concluded between Member States (in the case at stake, Article 8 of the Netherlands-Slovakia BIT) under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[14]

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[8] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 101.

[9] *Id.* at paras 147, 154.

[10] *Id.* at paras 159-166.

[11] *Id.* at para. 165.

[12] See *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras 4.89-4.110, where the Commission alleged that the tribunal did not have jurisdiction only over one of the four claims submitted by the claimant (the PPA Termination Claim) because it was in the end attributable to the EU, while the other three claims were attributable to Hungary itself and so the Commission did not object to the tribunal's jurisdiction to hear them.

[13] See, *per omnes*, *Renergy S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, paras. 27-31, 52-57, 318-324.

[14] Judgment of 6 March 2018, *Slowakische Republik v. Achmea BV* (C-284/16, EU:C:2018:158).

The CJEU applied a three-step legal approach and held that: (i) an arbitral tribunal constituted under that BIT had to apply EU law to the merits of the dispute;[15] (ii) such arbitral tribunal cannot be regarded as a court or tribunal of a Member State with standing to submit to the CJEU a request for a preliminary ruling pursuant to Article 267 TFEU;[16] and (iii) arbitral tribunals can fix the seat of arbitration outside the EU and, even if they fix it within the EU, the degree of review by a court of a Member State to ensure that questions of EU law which the tribunal may have to address can be submitted to the CJEU by means of a request for a preliminary ruling is limited.[17] The CJEU considered that arbitral tribunals under BITs call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation set out in Article 4(3) of the Treaty on European Union ("**TEU**").[18]

The CJEU as well as the General Court of the EU have consistently followed the *Achmea* three-prong reasoning in all subsequent judgments dealing with awards stemming from intra-EU arbitration under BITs: on the one hand, in *PL Holdings*, in relation to an award rendered under the Belgium/Luxembourg-Poland BIT;[19] and, on the other hand, in until now four decisions related to the enforcement of the award rendered in *Micula v. Romania* under the Sweden-Romania BIT.[20]

8. Because of the *Achmea* judgment, the European Commission accelerated its initiative to formally terminate all intra-EU BITs and in their totality, even though the CJEU in *Achmea* had only dealt with the arbitration clause in the BITs and had not mentioned anything about the compatibility of the substantive provisions of those treaties with EU law.[21]

The Commission was the driving force behind the issuance by all Member States of the EU of a declaration on 15 January 2019 regarding the legal consequences of the *Achmea* judgment, in which they committed to terminate all intra-EU BITs ("**2019 Declaration**").[22] Nonetheless, only a majority of Member States of the EU subsequently entered into the *Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union*, done at Brussels on 5 May 2020

[15] *Id*. at paras 39-42. The Court identified a twofold basis on which an arbitral tribunal would have to interpret or apply EU law pursuant to the choice-of-law clause in Article 8(6) of the Netherlands-Slovakia BIT, namely (i) as forming part of the law in force in every Member State, in that case Slovakia as the host State of the investment; and (ii) as deriving from an international agreement between the two Member States.

[16] *Id*. at paras 43-49.

[17] *Id*. at paras 50-59.

[18] *Id*. at para. 59.

[19] Judgment of 26 October 2021, *Republiken Polen v. PL Holdings Sàrl* (C-109/20; EU:C:2021:875). In that case, the CJEU held that Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an *ad hoc* arbitration agreement with an investor from another Member State that makes it possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in a BIT concluded between those two Member States and is invalid on the ground that it is contrary to those articles.

[20] See Judgment of 25 January 2022, *Commission v. European Food and Others* (C-638/19, P, EU:C:2022:50); Order of 21 September 2022, *Romatsa and Others* (C-333/19, not published, EU:C:2022:749); Judgment of 14 March 2024, *Commission v. United Kingdom (Judgment of the Supreme Court)* (C-516/22, EU:C:2024:231); Judgment of the General Court of 2 October 2024, *European Food and Others v. Commission* (T-624/15 RENV, T-694/15 RENV and T-704/15 RENV, EU:T:2024:659).

[21] See European Commission, "Communication from the Commission to the European Parliament and the Council. Protection of intra-EU investment", COM(2018) 547 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547. See page 3: "*In the Achmea judgment the Court of Justice ruled that the investor-to-State arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States. (…) This implies that all investor-State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. (…) Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs*."

[22] See *Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection*, available at https://finance.ec.europa.eu/publications/declaration-member-states-15-january-2019-legal-consequences-achmea-judgment-and-investment_en. For the specific texts of the three declarations issued by the Member States and their implications for the ECT see *infra* footnotes 28-30.

("**Termination Agreement**"),[23] that has effectively put an end to the remaining intra-EU BITs[24] as well as to the so-called 'sunset clauses' of said BITs and those of other BITs that were still in force.[25]

9. With regards the ECT, soon after the *Achmea* judgment was rendered, the European Commission declared that the reasoning in that judgment also extended to Article 26 ECT as far as intra-EU arbitration was concerned.[26] The Commission encountered several difficulties in this sense, in particular two that were also reflected in the contents of the Declaration in 2024.

On the one hand, because the ECT includes non-Member States as Contracting Parties. Such a significant change in the construction of the ECT should be at least debated in the Energy Charter Conference (the conference of parties to that treaty ex Article 34 ECT), considering that Article 46 ECT does not allow reservations and because investors of non-EU Member States usually channel their investments in Member States of the EU through company hubs like Ireland, Luxembourg, or the Netherlands.[27]

On the other hand, and closely related to the former, because the vast majority of intra-EU arbitration proceedings under the ECT have been commenced by investors of 'old' Member States against another 'old' Member States. Consequently, the argument of supersession of the ECT by EU law as of the date of accession to the EU of the Member State involved in the arbitration does not apply because 'old' Member States became parties to the ECT in 1998 when they were already Member States of the then European Community ("**EC**").

It is not surprising that the Commission did not obtain consensus from the Member States on the matter, and the 2019 Declaration was a failure for the Commission's move to extend the consequences of the *Achmea* judgment to the ECT: (a) 22 Member States affirmed that the *Achmea* judgment applied in full to the ECT as it did to intra-EU BITs;[28] (b) five Member States refrained from taking a position

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[23] *OJEU* L 169 of 29 May 2020. Ireland did not sign the Termination Agreement because it was not a party to any intra-EU BIT. Austria, Finland, Sweden and the United Kingdom declined to sign the Termination Agreement (the United Kingdom had already ceased to be a Member State of the EU as of the date of signature of the Termination Agreement, but EU law continued to apply to it during the transition period after *Brexit* under the Withdrawal Agreement until 31 December 2020). On 14 May 2020, the Commission announced the opening of infringement procedures under Article 258 TFEU with letters of formal notice to Finland and the United Kingdom for failing to effectively remove intra-EU BITs from their legal orders; see https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859. While the case against Finland (INFR(2016)2169) was closed on 23 May 2024, the case against the United Kingdom (INFR(2016)2150) remains active as of 16 December 2024 and on 30 October 2020 the Commission sent a reasoned opinion to the United Kingdom (see https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687). Furthermore, on 21 December 2021, the Commission announced the opening of infringement procedures with letters of formal notice to Austria, Belgium, Italy, Luxembourg, Portugal, Romania, and Sweden; see https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201; while Austria and Sweden had not signed the Termination Agreement and had not finalised the bilateral termination of their intra-EU BITs, Belgium, Italy, Luxembourg, Portugal, and Romania have not yet completed the ratification process of the Termination Agreement. The cases against Belgium (INFR(2016)2167), Italy (INFR(2021)2243), and Luxembourg (INFR(2016)2170) were closed on 23 May 2024, while the cases against Austria (INFR(2021)2241), Portugal (INFR(2016)2160), Romania (INFR(2021)2244), and Sweden (INFR(2021)2242) remain active as of 16 December 2024. The status of infringement procedures can be checked at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en&langCode=EN.

[24] See Article 2(1) and Annex A of the Termination Agreement.

[25] *Id.* at Articles 2(2) and 3.

[26] See COM(2018) 547 final, *supra* footnote 21. In particular, pages 3-4: "*The* Achmea *judgment is also relevant for the investor-State arbitration mechanism established in Article 26* [ECT] *as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. (…) Indeed, the reasoning of the Court in* Achmea *applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the* [ECT] *does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States*."

[27] In *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, available at https://www.italaw.com/sites/default/files/case-documents/italaw170038.pdf, para. 670, the tribunal noted: "*the ECT is a multilateral agreement signed by the EU and its Member States as well as a number of other States not members of the EU. As long as there is no evidence that the Respondent's interpretation of Article 26 of the ECT is supported by all the parties to the ECT (including its non-EU signatories), it cannot guide the Tribunal's interpretation under Article 31(2)(a)-(b) of the VCLT*."

[28] *Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the legal conse-*

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on intra-EU arbitration under the ECT absent a specific judgment from the CJEU about the ECT;[29] and (c) Hungary plainly rejected the application of the *Achmea* judgment to the ECT.[30] In parallel, the Commission and the Member States of the EU also failed to stop intra-EU arbitration proceedings under the ECT with the 2019 Declaration.[31]

10. As the lack of a specific decision on the ECT divided Member States, the CJEU closed the incertitude *intramuros* the EU when it referred to the invalidity of intra-EU arbitration under the ECT in the *Komstroy* judgment. The case referred to a request for a preliminary ruling made by the *Cour d'Appel* of Paris regarding the interpretation of the concept of investment set out in Article 1(6) ECT for the purposes of the annulment of an award rendered between a Ukrainian investor and Moldova. While the underlying case was not in any way an intra-EU arbitration, as the CJEU itself acknowledged,[32] the CJEU decided first, as several Member States that had participated in the proceedings had observed, "*to specify which disputes between one Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former may be brought before an arbitral tribunal pursuant to Article 26 ECT*."[33]

In an evident *obiter dictum* and not as part of the *ratio decidendi* of the judgment,[34] and after considering that it had jurisdiction to interpret the ECT as being part of EU law,[35] the CJEU applied the

quences of the judgment of the Court of Justice in Achmea *and on investment protection in the European Union*, signed by Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, and the United Kingdom, available at https://finance.ec.europa.eu/document/download/901c4f5e-9c4e-4559-92a1-dc946e174ac5_en?filename=190117-bilateral-investment-treaties_en.pdf. See Preamble at page 2: "*Arbitral tribunals have interpreted the* [ECT] *as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied*."

[29] *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 investment protection in the European Union*, signed by Finland, Luxembourg, Malta, Slovakia, and Sweden, available at https://www.regeringen.se/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf. See Preamble at page 3: "*A number of international arbitration tribunals post the Achmea judgment have concluded that the* [ECT] *contains an investor-State arbitration clause applicable between EU Member States. (…) Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra -EU application of the* [ECT]."

[30] *Declaration of the Representative of the Government of Hungary, of 16 January 2019, on the legal consequences of the Judgment of the Court of Justice in* Achmea *and on investment protection in the European Union*, available at https://finance.ec.europa.eu/document/download/dbdd886c-93bc-4338-bbc6-223573124601_en?filename=190116-bilateral-investment-treaties-hungary_en.pdf. See Paragraph 8 at page 3: "*Hungary further declares that in its view, the* Achmea *judgment concerns only the intra-EU bilateral investment treaties. The* Achmea *judgment is silent on the investor-state arbitration clause in the* [ECT] *(…) and it does not concern any pending or prospective arbitration proceedings initiated under the ECT*."

[31] See, *per omnes*, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019, available at https://www.italaw.com/sites/default/files/case-documents/italaw11360.pdf, paras 268-270.

[32] See *Komstroy* judgment, *supra* footnote 2, at para. 41.

[33] *Id.* at para. 40.

[34] The CJEU repeated that *obiter dictum* in another *obiter dictum* in Opinion 1/20 of 16 June 2022 pursuant to Article 218(11) TFEU on the draft modernised Energy Charter Treaty (EU:C:2022:485). See para. 47: "*as regards the considerations of expediency, referred to in paragraph 25 of this Opinion, which justify the Court taking a position on the question of the compatibility of Article 26 of the ECT with the Treaties, suffice it to state, (…) the Court has already ruled on that question. It is clear from the judgment of 2 September 2021, (…), and in particular from paragraphs 40 to 66 thereof, that compliance with the principle of autonomy of EU law, enshrined in Article 344 TFEU, requires Article 26(2)(c) of the ECT to be interpreted as meaning that it is not 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*."

[35] See *Komstroy* judgment, *supra* footnote 2, at paras. 22-27. The CJEU noted that the ECT is an agreement concluded by the Council of the EU and that, as an act of one of its institutions, the provisions of the ECT form an integral part of the EU legal order from the time it enters into force that can be interpreted by the CJEU under Article 267 TFEU (*id.* at para. 23). This conclusion is not surprising considering that Paragraph 4 of the 1997 Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26(3)(b)(iii) of the Energy Charter Treaty (*OJ* L 69, 9.3.1998, p. 115) ("**1997 Statement**") and Paragraph 4 of the Statement submitted to the Energy Charter Treaty (ECT) Secretariat by the EU, EURATOM and their Member States pursuant to Article 26(3)(b)(iii) of the ECT replacing the statement made on 17

three-prong test set out in the *Achmea* judgment and held that: (i) an arbitral tribunal under Article 26(6) ECT has to apply EU law because the ECT itself is an act of EU law;[36] (ii) an arbitral tribunal constituted under the ECT is neither a court nor tribunal of a Member State of the EU with standing to make a request for a preliminary ruling to the CJEU;[37] and (iii) the same failures detected in the *Achmea* judgment on the control of awards that would jeopardize the preservation of the autonomy of EU law and of the particular nature of the law established by the EU Treaties were found in relation to the ECT.[38] The CJEU therefore concluded that Article 26(2)(c) of the 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.[39]

In the Commission's approach towards this matter, the Declaration is the logical legal consequence for the ECT after the *Komstroy* judgment just like the 2019 Declaration was for the intra-EU BITs after the *Achmea* judgment.

11. To conclude with the analysis of the context of the Declaration, it is essential to mention the process of modernisation of the ECT that was launched in 2017 with the purpose of aligning it with the Paris Agreement and state-of-the-art provisions on investor-State dispute settlement.[40] The EU and its Member States have pursued the inclusion of a so-called 'disconnection clause' whereby it would be formally understood in the proper text of the ECT that the treaty would not apply in intra-EU arbitration. This is in stark contrast with the fact that some Member States as well as the European Commission had failed before many intra-EU arbitration tribunals under the ECT to demonstrate that under the current text of the treaty it was possible to find an 'implicit disconnection clause' that would carve out intra-EU arbitration from the ECT.[41]

On 3 December 2024, the Energy Charter Conference adopted and approved the amendments to the ECT,[42] modifications and changes to the Annexes to the ECT,[43] and changes to Understandings, Declarations and Decisions with respect to the ECT,[44] among other measures.[45] For the purposes of this

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November 1997 on behalf of the European Communities (*OJ* L 115, 2.5.2019, p. 1) ("2019 Statement") had recalled that "*The Court of Justice of the European* [Communities/Union]*, as the judicial institution of the* [Communities/European Union and Euratom]*, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the* [Communities/European Union and Euratom]*, which under certain conditions may be invoked before the Court of Justice*." Moreover, in Footnote 2 of the 1997 Statement and Footnote 3 of the 2019 Statement it was recalled that "*Article 26(2)(a) is also applicable in the case where the Court of Justice of the European* [Communities/Union] *may be called upon to examine the application or interpretation of the* [ECT] *on the basis of a request for a preliminary ruling submitted by a court or tribunal of a Member State in accordance with Article* [177/267] *of the* [EC Treaty/TFEU]."

[36] *Komstroy* judgment, *supra* footnote 2, at paras. 48-50.

[37] *Id.* at paras. 51-53.

[38] *Id.* at paras. 54-65.

[39] *Id.* at para. 66.

[40] See Conference Decision CCDEC202210, 24 June 2022, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf.

[41] See, *per omnes*, *The PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14 (UNCITRAL Arbitration), Preliminary Award on Jurisdiction, 13 October 2014, available at https://www.italaw.com/sites/default/files/case-documents/italaw170717.PDF, paras 174-207, esp. paras 182-184. In *InfraRed v. Spain*, *supra* footnote 31, para. 271, the tribunal examined the *travaux préparatoires* of the ECT and found an initiative by the European Commission to include an explicit disconnection clause for intra-EU application of the ECT in 1992, but it was ultimately abandoned.

[42] See Conference Decision CCDEC202412, 3 December 2024, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202412_EN.pdf.

[43] See Conference Decision CCDEC202413, 3 December 2024, available at https://www.energycharter.org/fileadmin/DocumentsMedia/aCCDECS/2024/CCDEC202413_EN.pdf.

[44] See Conference Decision CCDEC202414, 3 December 2024, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202414_EN.pdf.

[45] See Conference Decision CCDEC202415 "Entry into Force and Provisional Application of Amendments to the Energy Charter Treaty and Changes and Modifications to its Annexes," 3 December 2024, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202415_EN.pdf; Conference Decision CCDEC202416 "Designation of the Energy Charter Secretariat as a Depositary of the Energy Charter Treaty," 3 December 2024, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202416.pdf; Conference Decision CCDEC202417 "Public

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paper, it is necessary to highlight that new Article 24(3) ECT expressly provides that Article 26 ECT does not apply to intra-EU arbitration.[46]

III. Analysis of the Declaration: Would it achieve its goal?

12. Once appropriate context to the Declaration has been provided, it is time to analyze it in detail. We will focus on its legal nature, its contents, and its legal consequences.

1. Legal nature

13. The first element of the Declaration that catches attention is its publication in the Official Journal as a non-legislative act, just like the previous Statements made by the EU (with or without its Member States) with regards the ECT.[47] To some extent, the Declaration is not new because the 2019 Statement foresaw that the Declaration might be made later on.[48] On the contrary, the 2019 Declaration on *Achmea* was never published in the Official Journal because it was not an act of EU law.[49]

14. The difference between the Declaration and the Statements lies in their legal basis: while the Statements were made, and allowed, under Article 26(3)(b)(iii) ECT in order to clarify the policies, practices and conditions of the EU, EURATOM and their Member States with regard to disputes between an investor and a Contracting Party and their submission to international arbitration or conciliation, the Declaration is an all-in statement on the correct understanding, in the view of the EU and its Member States, of the application of the ECT as far as intra-EU relations are concerned that tries to circumvent the unambiguous prohibition of reservations to the treaty established in Article 46 ECT.

From the perspective of public international law, the EU, EURATOM and their Member States seem to categorize the Declaration as a "*subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*" according to Article 31(3)(a) of the Vienna Convention on the Law of Treaties ("**VCLT**").[50] The Preamble of the Declaration expressly cites case law from the Permanent Court of International Justice and the International Court of Justice in support of the signatories' "*right of giving an authoritative interpretation of a legal rule*" as parties to an international agreement in relation to that agreement.[51] That notwithstanding, the Preamble recalls that the

communication on the Adoption/Approval of the Decisions on the Modernisation of the Energy Charter Treaty," 3 December 2024, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202417.pdf.

[46] See CCDEC202412, *supra* footnote 42: "*For greater certainty, Articles 7, 26, 30, 30 bis and 32 shall not apply among Contracting Parties that are members of the same REIO in their mutual relations*."

[47] See the 1997 Statement and the 2019 Statement (*supra* footnote 35).

[48] The main purpose of the 2019 Statement under Article 26(3)(b)(iii) (*supra* footnote 35) was to address the consequences of the adoption of Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party (*OJ* L 257, 28.8.2014, p. 121). In footnote 2 of the 2019 Statement, the EU, EURATOM and their Member States insisted that Regulation 912/2014 applied "*to cases initiated by a claimant from a non-EU Contracting Party under the* [ECT]," clarified that "[d]*isputes between an investor of a Member State and a Member State under the* [ECT] *do not fall within the scope of this statement*," and affirmed that "[t]*he EU and its Member States may address this matter at a later stage*."

[49] See *InfraRed v. Spain*, *supra* footnote 31, para. 269: "*the January Declarations were* not *adopted within the EU legal order and are* not *EU legal instruments. They are, at best, declarations by the governments of* some *EU member states*" (emphasis in the original).

[50] Done at Vienna on 23 May 1969. 1155 U.N.T.S. 331. The Declaration does not mention that provision of the VCLT because, we guess, not all Member States of the EU are parties thereto. Nonetheless, the VCLT is widely regarded as reflecting customary international law in this matter and, moreover, page 1 of the Preamble of the Declaration refers to the signatories having in mind the rules of customary international law as codified in the VCLT when they entered into the Declaration.

[51] See Preamble of the Declaration, page 1, with mentions to *Question of Jaworzina (Polish- Czechoslovakian Frontier)*, Advisory Opinion, [1923] *PCIJ Series B* No. 8, 37; *Reservations on the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, 15, 20.

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Member States of the EU have assigned that right of giving an authoritative interpretation of EU and EURATOM law to the CJEU,[52] that extends to the interpretation and application of international agreements to which the EU, EURATOM and the Member States are parties, "*in the relationship between two Member States or the European Union or Euratom and a Member State*."[53] This is the EU's legal explanation under general international law of the CJEU's confirmation in the *Komstroy* judgment of its jurisdiction to interpret the ECT as an act of EU law.[54]

On its side, Hungary's Declaration cites several provisions of the VCLT, also as rules of customary international law, to give grounds in a very generic manner to the Government's departure from the conclusions reached in the Declaration,[55] but without trying to provide a legal basis for it because it is merely a unilateral act of the Hungarian state.

15. The key issue of the Declaration is for the EU and its Member States to justify that they are entitled to enter into it considering that when the VCLT refers several times to "*the parties*" in Article 31 it would mean "*all the parties*" in the treaty at stake.[56] Aware of this pitfall, the Preamble of the Declaration insists on the signatories' standing to issue the Declaration in their condition of members of the EU as a Regional Economic Integration Organisation within the meaning of Article 1(3) ECT, that they restrict the scope of the Declaration to the bilateral relationships between the EU, EURATOM and their Member States, respectively, and, by extension, the investors from those Contracting Parties to the ECT[57] and, at the same time, it makes clear that it "*does not affect the enjoyment by the other parties to the* [ECT] *of their rights under that Treaty or the performance of their obligations*."[58]

Bearing in mind the manifest lack of success of previous attempts by the EU and its Member States to stop intra-EU arbitration proceedings with the 2019 Declaration, and taking into account that the 2019 Declaration led to the adoption of the Termination Agreement of intra-EU BITs, the Preamble of the Declaration announces that the Member States will conclude an agreement on the interpretation and application of the ECT ("Inter-Se Agreement") and that they have informed other Contracting Parties of the ECT in this respect.[59] As indicated below, only with the Inter-Se Agreement will the EU and its Member States give full effect to several elements of the Declaration, and it is likely that its contents will be copied from or at least inspired by those of the Termination Agreement.

However, in our view, neither the Declaration nor the Inter-Se Agreement can defeat the unsurmountable obstacle of the prohibition of reservations to the treaty set out in Article 46 ECT as a matter of international law. While the Preamble of the Declaration refers to the Inter-Se Agreement in a way

[52] See reference in page 1 of the Preamble to CJEU's judgment of 30 May 2006, *Commission v. Ireland (Mox Plant)* (C-459/03; EU:C:2006:345), paras 129-137.

[53] In page 3 of the Preamble the Declaration also mentions *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, *ICJ Reports 1970*, p. 3, paras 33 and 35, to recall that certain provisions of the ECT are intended to govern bilateral relations.

[54] See *supra* footnotes 35-36.

[55] See Hungary's Declaration (*supra* footnote 6), page 1, with references to Articles 26 (*pacta sunt servanda*), 28 (non-retroactivity of treaties), 40 (amendment of multilateral treaties) and 41 VCLT (agreements to modify multilateral treaties only between certain parties).

[56] Some arbitral tribunals have pointed in that direction. See *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's request for immediate termination and Italy's jurisdictional objection based on inapplicability of the Energy Charter Treaty to intra-EU disputes, 7 May 2019, para. 125, available at https://www.italaw.com/sites/default/files/case-documents/italaw10512.pdf; *InfraRed v. Spain*, *supra* footnote 31, para. 268; *Renergy v. Spain*, *supra* footnote 13, para. 371: "*being non-binding instruments and not reflecting a consensus of all EU Member States – let alone, and more importantly, all ECT Contracting Parties – the EU Member States Declarations cannot change the clear terms of the ECT or guide the Tribunal in seeking a harmonious interpretation.*"

[57] See Preamble of the Declaration, page 1: "*Considering that the members of a Regional Economic Integration Organisation within the meaning of Article 1(3)* [ECT] *hereby express a common understanding on the interpretation and application of a treaty in their* inter se *relations*."

[58] See Preamble of the Declaration, page 3.

[59] See Preamble of the Declaration, page 3. At page 4 the Preamble assures that the Inter-Se Agreement "*has been negotiated and initialled by the signatories to this Declaration as an indication that the text is stable*," and the signatories will "*make best efforts to deposit in due course their instruments of ratification, approval or acceptance of that treaty*." However, as of 16 December 2024, the text is yet to be disclosed to the public.

that resembles compliance with the requirements set out in Article 41 VCLT on agreements to modify multilateral treaties between certain of the parties only, it is well known that such possibility is subject to the inexistence of a prohibition on this matter in the treaty at stake.[60] As the tribunal in *BayWa v. Spain* noted, even by means of an *inter se* agreement following Article 41 VCLT "*it is very doubtful whether the abrogation* inter se *of the ECT as between EU Member States is compatible "with the effective execution of the object and purpose of the [ECT] as a whole"*."[61] Recalling the finding of the tribunal in *Eastern Sugar v. Czech Republic*, the abrogation of intra-EU arbitration under the ECT is a major modification of the treaty that could undoubtedly hinder the investors' full benefit from it. Moreover, as the International Law Commission has concluded, subsequent agreements under Article 31(3)(a) VCLT contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty, but it is presumed that under such agreements the parties intend to interpret the treaty, "*not to amend or to modify it.*"[62]

In our view, the future new Article 24(3) ECT containing an express disconnection clause adopted by *all the parties* to the ECT will be the genuine mechanism to put an end to (new) intra-EU arbitration proceedings under the ECT. At the same time, and paraphrasing the tribunal in *Mercuria Energy v. Poland*, the fact that it is today that the ECT would include "*an explicit wording of the intra-EU carve-out, further underscore that there has been no clear exclusion of the intra-EU arbitration under the ECT at the time of its conclusion*."[63]

Consequently, it is doubtful that the Declaration will achieve its goal of avoiding new intra-EU arbitration proceedings under the ECT.

2. Contents of the Declaration

16. The squalid four paragraphs of the Declaration focus on two intertwined aspects of the application of Article 26 ECT to intra-EU arbitration.[64]

A) Statement against the application of Article 26 ECT to intra-EU arbitration back to 1998

17. The first aspect is the reaffirmation in Paragraph 1 of the Declaration by the signatories thereof that Article 26 ECT "*cannot and never could serve as a legal basis for intra-EU arbitration proceedings*." The Declaration also states that this reaffirmation is made "*for greater certainty*," assuming that

[60] Article 41 VCLT, *supra* footnote 50: "*1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and (...) (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole*." See J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th ed., 2012, p. 386; P.-M. Dupuy/Y. Kerbrat, *Droit International Public*, Dalloz, 12th. ed., 2014, p. 344.

[61] *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 276, available at https://www.italaw.com/sites/default/files/case-documents/italaw15000.pdf. Such conclusion was endorsed in *Sevilla Beheer v. Spain*, *supra* footnote 27, para. 650; *Mercuria Energy Group Limited v. Republic of Poland*, SCC Case No. V 2019/126, Final Award, 29 December 2022, para. 413, available at https://www.italaw.com/sites/default/files/case-documents/italaw171104.pdf.

[62] "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties," adopted by the International Law Commission at its seventieth session (A/73/10), 2018, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_11_2018.pdf.

[63] *Mercuria Energy v. Poland*, *supra* footnote 61, para. 414.

[64] Contrary to the Termination Agreement, that put an end to the full contents of all intra-EU BITs despite the limited scope of the *Achmea* judgment, the Declaration does not take a stance on the compatibility of the rest of provisions of the ECT with EU law. Paragraph 4 of the Declaration reserves this matter for future, specific analysis: "*Paragraphs 1 to 3 are without prejudice to the interpretation and application of other provisions of the* [ECT] *to the extent they concern intra-EU relations.*" Hungary's Declaration (*supra* footnote 6) shares this understanding in its Paragraph 2.

it has been widely known before and after the *Komstroy* judgment.[65] It also assures that this conclusion derives from the negotiations of the ECT in the early 1990s, where the Commission apparently intervened to negotiate the treaty with *ad extra* effects only as part of its external policy while the then EC was elaborating a sophisticated internal energy market,[66] but it deliberately ignores that the Member States of the EU are also Contracting Parties of the ECT *per se* and that energy is a shared competence between the EU and its Member States as per Article 4(2)(i) TFEU.

The Declaration looks backwards and forward, trying to limit the application of the ECT in new arbitration proceedings and to exert influence on ongoing proceedings given the *ex tunc* effects of CJEU's preliminary rulings.[67] In other words, the EU and its Member States intend to extend the prohibition of intra-EU arbitration under the ECT as of 1998, when the ECT came into force for many Contracting Parties thereto that were already Member States of the then EC. On the contrary, Hungary's Declaration approaches this issue in a prospective manner, considering that "*new intra-EU arbitration proceedings could not be proceeded*" and confirming that Article 26(2)(c) ECT "*shall be interpreted and applied in such a way that it shall no longer serve as a legal basis*" for intra-EU arbitration proceedings.[68] Hungary's approach is reportedly based on its interest to protect a state-owned company that has filed several intra-EU arbitrations under the ECT against Croatia.[69]

18. According to the Declaration, the common understanding of the signatories is based on two elements of EU law[70]:

On the one hand, the CJEU's *Komstroy* judgment, which is depicted as stating that Article 26 ECT "*does not apply, and should never have been applied*" as a basis for intra-EU arbitration proceedings even though the express terms of the *Komstroy* judgment only referred to the first idea and in *obiter* (it may be argued that the second one would be a consequence of the *ex tunc* effects of judgments of the CJEU).

On the other hand, the primacy of EU law. The Declaration refers to Declaration No. 17, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, where the EU and its Member States recalled such primacy, even though such principle stems from the case law of the CJEU since the *Costa v. ENEL* judgment.[71] Paragraph 1 of the Declaration further describes the principle of primacy of EU law "*as a rule of international law governing conflict of norms in their mutual relations*."[72] The Preamble of the Declaration also mentions Articles 267 and 344 TFEU in support of this conclusion as the provisions of EU law that the CJEU understood in *Achmea* and *Komstroy* to oppose to intra-EU arbitration.

19. For all the foregoing, Paragraph 3 of the Declaration concludes that the signatories declare that Article 26 ECT "*does not apply as a basis for intra-EU arbitration proceedings*."

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[65] At page 2 of the Declaration the Preamble expressly recalls the *Achmea* and the *Komstroy* judgments as well as Opinion 1/20 (*supra* footnote 34). Hungary's Declaration (*supra* footnote 6, page 1) only relies on *Komstroy* and Opinion 1/20, in coherence with the Hungarian 2019 Declaration that rejected the application of *Achmea* to the ECT (*supra* footnote 30).

[66] See Preamble of the Declaration, page 2: "*Recalling (...) that it was not, and could not have been, the intention of the European Union, Euratom and their Member States, that the* [ECT] *would create any obligations among them since it was negotiated as an instrument of the European Union's external energy policy with the view to establish a framework for energy cooperation with third countries whereas, by contrast, the Union's internal energy policy consists of an elaborate system of rules designed to create an internal market in the field of energy which exclusively regulate the relations between the Member States*."

[67] See Preamble of the Declaration, page 2: "*Recalling that, as an interpretation by the competent court and reflecting a general principle of public international law, the interpretation of the* [ECT] *in the Komstroy judgment applies as of the approval of the* [ECT] *by the European Union, Euratom and their Member States*."

[68] See Hungary's Declaration (*supra* footnote 6), Preamble and Paragraph 1.

[69] See T. Fisher, "Hungary's MOL brings new claim against Croatia," *Global Arbitration Review*, 21 June 2024.

[70] Paragraph 1 of Hungary's Declaration (*supra* footnote 6) shares the legal basis of this understanding without further ado.

[71] Judgment of 15 July 1964, *Flaminio Costa v. Ente Nazionale Energia Elettrica (ENEL)* (C-6/64, EU:C:1964:66).

[72] Similarly, in page 2 of the Declaration the Preamble describes the principle of primacy of EU law as a "*conflict rule in* [the] *mutual relations*" of Member States and recalls that "*in order to resolve any conflict of norms, an international agreement concluded by the Member States of the European Union under international law may apply in intra-EU relations only to the extent that its provisions are compatible with the EU Treaties*."

B) Non-application of intra-EU arbitration under the ECT during the period of remanence thereof after the withdrawal of a Contracting Party

20. The second aspect of the Declaration (Paragraph 2) is the reaffirmation, also "*for greater certainty*," of the common understanding of the signatories that, as a result of the absence of legal basis for intra-EU arbitration proceedings pursuant to Article 26 ECT, the sunset clause included in Article 47(3) ECT "*cannot extend, and could not have been extended to such proceedings*." The former is a logical consequence of the first aspect and has special importance in the context of the stampede of Contracting Parties to the ECT withdrawing from it given that, according to Article 47(3) ECT, the treaty continues to apply to investments existing as of the date of the withdrawal of a Contracting Party for a period of 20 years from such date in that Contracting Party.[73]

21. Paragraph 2 is intended to be comprehensive of all situations currently affecting Member States of the EU.

On the one hand, the mention to the non-extension of the sunset clause to past situations covers the cases of all Contracting Parties that have withdrawn from the ECT and that still have to apply it to existing investments for a period of 20 years since the entry into force of their withdrawal.[74] Special reference must be made in this regard to Italy, that withdrew from the ECT in 2015 and that was nonetheless sued under the sunset clause of the ECT several times since then, but also to the set of Member States that recently withdrew from the ECT.[75]

On the other hand, the mention to future situations obviously covers the cases of any subsequent withdrawal, considering that some Member States of the EU have announced their intention to follow the steps of other Member States out of the ECT but they have yet to formally approve it.[76]

On its side, Hungary's Declaration is more nuanced and defends that the withdrawal of the applicability of Article 26 ECT in intra-EU arbitration proceedings "*may be ensured in accordance with international law by a future amendment of the* [ECT] *through bilateral or multilateral treaty between all or certain parties to the treaty, in accordance with Article 40 or 41* [VCLT]."[77]

22. For all the foregoing, Paragraph 3 of the Declaration concludes affirming that "*Article 47(3)* [ECT] *will not produce legal effects in intra-EU relations*." We explained above that it is doubtful that the Declaration will achieve its goal of avoiding intra-EU arbitration proceedings under Article 26 ECT, and it is likely that it will happen the same with its goal to neutralize Article 47(3) ECT.

3. Legal consequences of the Declaration

23. The dispositive part of the Declaration does not establish how the Declaration will be implemented by the EU, EURATOM, the Member States and third parties. That notwithstanding, the long Preamble of the Declaration contains certain statements and commitments by the signatories thereof that provide more clear guidance on what they will (have to) do to comply with the Declaration.

[73] Article 47(3) ECT, *supra* footnote 3: "*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*."

[74] Paragraph 2 of the Declaration also states: "*Article 47(3)* [ECT] *cannot have produced any legal effects in intra-EU relations when a signatory withdrew from the* [ECT] *prior to this Declaration*."

[75] See *supra* footnote 5. The Preamble of the Declaration recalls at page 1 that the previous withdrawal of a Member State from the ECT does not preclude "*an interest in expressing a common understanding on the interpretation and application of that Treaty for as long as it may be held to produce legal effects in relation to that member and in particular in respect of Article 47(3)* [ECT]."

[76] The Declaration also states: "*nor will* [Article 47(3) ECT] *produce any legal effects in intra-EU relations if a signatory withdraws from the* [ECT] *subsequently*." According to some sources, Denmark and Ireland have also announced their intention to withdraw from the ECT; see https://iareporter.com.

[77] See Hungary's Declaration (*supra* footnote 6), page 2.

Undoubtedly, such statements and commitments are inspired by several provisions of the Termination Agreement for the intra-EU BITs and underlying arbitration proceedings, and it is most likely that the Inter-Se Agreement will be drafted in a similar manner in order to address the major concerns of the EU, EURATOM and its Member States for the systemic reluctance of arbitral tribunals to deny jurisdiction in intra-EU cases under the ECT.[78] This reinforces the idea of the limited impact of the Declaration as such.

24. On the one hand, according to the Declaration, the EU, EURATOM and most importantly the Member States of the EU have the duty to inform arbitral tribunals constituted under the ECT in *pending* proceedings of the existence of the Declaration and the consequences thereof, i.e., that such arbitral tribunals have no jurisdiction to hear the case.[79] This obligation affects in particular the respondent State in the pending arbitration (indeed the most interested party in bringing an end to such proceeding) as well as the home state of the investor who started the arbitration. It is likely that the Inter-Se Agreement will contain a provision similar to Article 7(a) of the Termination Agreement in this regard.[80]

For these purposes, the Declaration refers to arbitration proceedings instituted under any of the rules of arbitration available under Article 26(4) ECT: ICSID arbitration (including its Additional Facility Rules), a sole arbitrator or *ad hoc* arbitration tribunal under the UNCITRAL Arbitration Rules or an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**").[81]

In this line, Declaration does not expressly order affected Member States to cooperate in order to avoid the enforcement of intra-EU awards rendered under the ECT, while Article 7(b) of the Termination Agreement so provides for awards rendered under intra-EU BITs.[82] In any case, the Declaration contains the great concern of the signatories for the enforcement of intra-EU awards rendered under the ECT despite the conclusion reached by the CJEU in *Komstroy*,[83] so it is likely that the Inter-Se Agreement will also include provisions for Member States to make their best efforts to hinder such kind of enforcement.

25. On the other hand, and in coherence thereof, the same principle applies if a *new* intra-EU arbitration proceeding is commenced under the ECT. In that case, the respondent State as well as the home State of the investor who started the new claim should cooperate to inform the arbitral tribunal of the

[78] See Preamble of the Declaration, page 3: "*Regretting that arbitral awards have already been rendered, continue to be rendered and could still be rendered in a manner contrary to the rules of the European Union and Euratom, including as expressed in the interpretations of the CJEU, by arbitral tribunals in intra-EU arbitration proceedings initiated with reference to Article 26* [ECT]." Same at page 3: "*Also regretting that in pending intra-EU arbitration proceedings purportedly based on Article 26* [ECT] *arbitral tribunals do not decline competence and jurisdiction*." The most notable exception has been *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Arbitration V (2016/135), Award, 16 June 2022, available at https://www.italaw.com/sites/default/files/case-documents/italaw170301.pdf, where a tribunal seated in Stockholm applied Swedish law as the *lex fori* and concluded that it did not have jurisdiction in view that Swedish law included EU law (and the *Komstroy* judgment).

[79] See Preamble of the Declaration, page 3: "*Considering that, as a result of the non-applicability of Article 26* [ECT] *y as a legal basis for intra-EU arbitration proceedings, where intra-EU arbitration proceedings are pending, the signatories to this Declaration that are concerned by those proceedings, whether as respondent or as home State of an investor, should cooperate with one another in order to ensure that the existence of this Declaration is brought to the attention of the arbitral tribunal in question, allowing the appropriate conclusion as to absence of jurisdiction of the tribunal to be drawn*." ." In this sense, at page 4 the Preamble of the Declaration identifies an obligation for arbitral tribunals "*to immediately terminate any pending intra-EU arbitration proceedings*."

[80] See Termination Agreement, *supra* footnote 23, Article 7(a): "*Where the Contracting Parties are parties to* [BITs] *on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated, they shall: (a) inform, in cooperation with each other and on the basis of the statement in Annex C, arbitral tribunals about the legal consequences of the* Achmea *judgment as described in Article 4*."

[81] See Preamble of the Declaration, page 4.

[82] See Termination Agreement, *supra* footnote 23, Article 7(b): "*Where the Contracting Parties are parties to* [BITs] *on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated, they shall: (b) where they are party to judicial proceedings concerning an arbitral award issued on the basis of a* [BIT]*, ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it*."

[83] Preamble of the Declaration, page 3: "*Also regretting that such arbitral awards are the subject of enforcement proceedings, including in third countries.*" Same at page 4: "*Considering (…) the European Union, Euratom and their Member States thereby ensure (…) the unenforceability of existing awards*."

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Declaration and the ensuing lack of jurisdiction thereof.[84] Again, it is likely that the Inter-Se Agreement will contain a provision similar to Article 7(a) of the Termination Agreement in this regard.[85]

It is significant that the Preamble of the Declaration refers to the 'obligation' of arbitral institutions not to register new intra-EU arbitration cases according to their constitutive instruments.[86] However, it is doubtful that this *ultra vires* provision will be enforced:

(i) Although the Secretary-General of ICSID has a screening power under Article 36(3) of the ICSID Convention to deny the registration of a request for arbitration if "*the dispute is manifestly outside the jurisdiction of the Centre*," it is doubtful that they would agree to conduct complex research on the legal value of the Declaration under that function.[87] Consequently, they will most likely register a new intra-EU case, forwarding to the arbitral tribunal the duty to finally decide on jurisdiction pursuant to Article 41 of the ICSID Convention and after being presented with arguments and evidence by the parties.

(ii) On 16 October 2024, the SCC published a new policy whereby its board will fix the seat of any new intra-EU arbitration proceeding outside the EU, being mindful, in its view, of its "*obligation to make every effort to ensure an arbitral award rendered under the SCC Rules is legally enforceable*."[88] Such policy was made in overt contempt of the Declaration and in order to keep a role in the administration of intra-EU arbitration proceedings under the ECT after several intra-EU awards administered by the SCC were annulled in Sweden.

26. Finally, the Declaration isolates final awards and settlements from the effects thereof. The Preamble of the Declaration applies this grandfathering to "*settlements and arbitral awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and were voluntarily complied with or definitively enforced*," without specifying a cut-off date for that.

It could be argued that said date should be that of the Declaration (26 June 2024), although Article 6 of the Termination Agreement established 6 March 2018, the date of the *Achmea* judgment, as such date for awards under intra-EU BITs while the equivalent 2019 Declaration was issued on 15 January 2019.[89] Once again, it is likely that the Inter-Se Agreement will contain a similar provision to provide

[84] See Preamble of the Declaration, page 3: "*Agreeing that where a notice of arbitration is nevertheless delivered the signatories that are concerned by those proceedings, whether as respondent or as home State of an investor, should cooperate with one another in order to ensure that the existence of this Declaration is brought to the attention of the arbitral tribunal in question, allowing the appropriate conclusion to be drawn that Article 26* [ECT] *cannot serve as a legal basis for such proceedings*." In this sense, at page 4 the Preamble of the Declaration identifies an obligation for arbitral tribunals "*to declare that any intra-EU arbitration proceedings lack a legal basis*."

[85] See Termination Agreement, Article 7(a), *supra* footnote 80.

[86] See Preamble of the Declaration, page 4: "*Considering (...) the obligation for arbitration institutions not to register any future intra EU arbitration proceedings, in line with their respective powers under Article 36(3) ICSID Convention and Article 12 SCC Arbitration rules*." In this sense, at page 3 of the Declaration the signatories regret "*that arbitration institutions continue to register new arbitration proceedings and do not reject them as manifestly inadmissible due to lack of consent to submit to arbitration*."

[87] See S. W. Schill (Gen. Ed.), *Schreuer's Commentary on the ICSID Convention*, Cambridge University Press, 3rd. ed., 2022, Vol. I, pp. 696-698.

[88] See SCC Arbitration Institute, "SCC Policy. Deciding the seat in intra-EU investment arbitrations administered under the SCC Rules" (typos corrected), 16 October 2024, available at https://sccarbitrationinstitute.se/sites/default/files/2024-11/scc_policy_seat_of_arbitration_2024-1.pdf. The Policy reads as follows: "*In investment treaty arbitrations between parties based in the EU, and/or a state that is a candidate or potential candidate for EU membership, the Board will not decide that Stockholm, or any other city, or any other judicial district within the EU, or within a state that is a candidate or potential candidate for EU membership, shall be the seat of arbitration. In such cases, the Board will decide on a seat located outside the EU and those states listed as candidates or potential candidates for EU membership*."

[89] See Termination Agreement, *supra* footnote 23, Article 6: "*Concluded Arbitration Proceedings. 1. Notwithstanding Article 4, this Agreement shall not affect Concluded Arbitration Proceedings. Those proceedings shall not be reopened. 2. In addition, this Agreement shall not affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018*." See also the definition of "Concluded Arbitration Proceedings" in Article 1: "*(4) "Concluded Arbitration Proceedings" means any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where: (a) the award was duly executed prior to 6 March 2018, even where a related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other*

legal security to all interested parties. The question remains on whether the cut-off date for ECT awards in the Inter-Se Agreement should be 2 September 2021, the date of the *Komstroy* judgment, or 6 March 2018 too as the legal consequences stemming from *Komstroy* were established authoritatively in *Achmea*.

IV. Concluding remarks

27. The experience with previous declarations and statements of the EU and its Member States shows the little impact thereof on investors, arbitral institutions and tribunals on the topic of jurisdiction to hear intra-EU claims under investment treaties. The fact that the signatories of the Declaration acknowledged that they had a specific *inter se* treaty ready for signature at the time of issuing the Declaration is the living proof they were truly aware of its limited value. Moreover, as the Contracting Parties of the ECT will ratify the amendments to the treaty as adopted in December 2024, the decision on whether the ECT applies in intra-EU arbitrations will be taken in a smooth manner (at least for *new* proceedings) with the legal security granted by an express disconnection clause in new Article 24(3) ECT excluding such kind of disputes.

28. At the same time, it remains to be seen whether aggrieved investors of one Member State of the EU will happily agree to submit a claim against another Member State hosting their investment before the domestic courts of that State, as the Declaration recalls,[90] or whether the investor would structure its investment in a way to be able to claim under Article 26 ECT against the host State as a national of a non-EU Member State.

similar proceedings in relation to such final award was pending on 6 March 2018, or (b) the award was set aside or annulled before the date of entry into force of this Agreement."

[90] See Preamble of the Declaration, page 2: "*Considering, in any event, that, where disputes cannot be settled amicably, a party may as always choose to submit in accordance with national law disputes between a Member State (or, as the case may be, the European Union or the Euratom) and an investor of another Member State for resolution to the competent courts or administrative tribunals, as guaranteed by general principles of law and respect for fundamental rights, enshrined inter alia in the Charter of Fundamental Rights of the European Union*."