



**Sind Investitionsschiedsverfahren (ISDS)
zwischen den EU-Mitgliedstaaten
auf Basis der Energiecharta mit dem
EU-Recht vereinbar?**

von

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Ein Gutachten im Auftrag des
Umweltinstitut München e.V.

Februar 2018

Ergebnisse in Stichpunkten

**Amicus Curiae oder Streit-
helfer ist eine am Rechts-
streit unbeteiligte Person,
der gestattet wird, während
des Verfahrens Stellung zu
nehmen. Die EU-Kommis-
sion nutzt diese Möglich-
keit regelmäßig, um bei
Investitionsschiedsverfah-
ren innerhalb der EU zu
intervenieren – bisher ohne
einschlägige Erfolge.**

**Der Vertrag über die Ar-
beitsweise der Euro-
päischen Union, kurz
AEUV, ist die rechtliche
Grundlage für die Arbeit
der EU-Institutionen. Er
ist ein völkerrechtlicher
Vertrag zwischen den
Mitgliedstaaten und neben
dem EUV (Vertrag über die
Europäische Union) einer
der Gründungsverträge der
EU.**

Obwohl der Energiecharta-Vertrag (ECV) das einzige internationale Investi-
tionsschutzabkommen (IIA) ist, bei dem die EU selbst Vertragspartei ist, ist
die Vereinbarkeit des ECV mit dem EU-Recht weitestgehend unklar. Denn
jenseits ihrer Interventionen als **amicus curiae** hat die EU-Kommission bis-
her keine klare Position bezogen oder Schritte unternommen, um die vor-
herrschenden Rechtsunsicherheiten aufzulösen.

Das vorliegende Gutachten kommt in Bezug auf die Investor-Staat-Schieds-
gerichtsbarkeit (ISDS) nach dem Vertrag nun zu folgenden zentralen Ergeb-
nissen:

- Die Schiedsklausel des ECV ist in einigen Punkten nicht mit dem EU-Recht vereinbar. Diese Unvereinbarkeiten gefährden die Effektivität und Einheitlichkeit des Unionsrechts sowie die Entscheidungskompetenzen der europäischen Gerichte.
- Die Schiedsklausel des ECV ist in ihrer Anwendung zwischen den EU-Mitgliedstaaten insbesondere nicht mit Art. 267 und 344 AEUV vereinbar.
- Darüber hinaus steht der ECV auch materiell-rechtlich in einigen Punkten im Widerspruch zum Unionsrecht, was auch in Zukunft zu Unklarheiten führen wird: Bisher sind erst zehn ECV-Verfahren zwischen EU-Mitgliedstaaten entschieden; mindestens weitere 50 Fälle sind zurzeit jedoch noch anhängig. Konkrete Konflikte werden daher nicht lange auf sich warten lassen.

Im März 2016 hat der Bundesgerichtshof (BGH) dem Europäischen Ge-
richtshof EuGH Fragen zur Vereinbarkeit der ISDS-Klausel aus einem bila-
teralen Investitionsschutzabkommen (BIT) zwischen der Slowakei und den
Niederlanden mit europäischem Recht vorgelegt. Dieses Urteil soll am 6.
März 2018 ergehen. Zwar kommen bisher der BGH sowie Generalanwalt
Wathelet zu dem Schluss, dass die ISDS-Klauseln mit EU-Recht vereinbar
sind. Die vom BGH sowie vom Generalanwalt gezogenen Schlussfolgerun-
gen lassen sich jedoch nicht ohne Weiteres auf den ECV übertragen. Im Ge-
genteil: Ein Vergleich spricht eher für die Unvereinbarkeit der Schiedsklausel
des ECV mit EU-Recht:

- Die Lösungen, die der Generalanwalt und das BGH in Bezug auf das niederländisch-slowakische BIT vorgeschlagen haben, sind nicht auf den ECV übertragbar und sind ohnehin nicht überzeugend. Darin betont der Generalanwalt die Möglichkeit der Mitgliedstaaten, Schiedssprüche im nationalen Vollstreckungsverfahren zu überprüfen, sowie die Möglichkeit der

ICSID, das Internationale Zentrum für die Beilegung von Investitionsstreitigkeiten, gehört zur Weltbank und sitzt in Washington. Die ICSID-Konvention regelt Investitionsschiedsverfahren und die Durchsetzung von Schadensersatzforderungen.

Die Brüder Ioan und Viorel Micula hatten Rumänien auf Grundlage des schwedisch-rumänischen BITs vor einem ICSID-Tribunal verklagt. Ihnen wurden \$250 Millionen Schadensersatz zugesprochen. Seitdem versuchen sie, diesen Schiedsspruch in mehreren Staaten, u.a. in den USA, zu vollstrecken (Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Final Award 11 Dec 2013).

Die EU-Kommission hat in einer Stellungnahme vom 30. März 2015 klargestellt, dass jegliche Zahlungen seitens Rumänien gegen das Unionsrecht, insbesondere gegen das EU-Beihilferecht, verstößen würden (Beschluss (EU) 2015/1470 der Kommission vom 30. März 2015 über die von Rumänien durchgeführte staatliche Beihilfe SA.38517 (2014/C) (ex 2014/NN) — Schiedsspruch vom 11. Dezember 2013 in der Sache Micula/Rumänien).

Kommission, ggf. Vertragsverletzungsverfahren einzuleiten. Damit sei seiner Meinung nach die Letztentscheidungskompetenz des EuGHs ebenso wie die einheitliche Auslegung und Anwendung des Unionsrechts gewahrt.

- Diese Möglichkeiten sind tatsächlich aber nur in seltenen Fällen gegeben. Bezüglich der Vollstreckungsverfahren gilt: Da der ECV die Vollstreckung nach der **ICSID-Konvention** zulässt, haben die EU-Mitgliedsstaaten in diesen Fällen keine rechtliche Handhabe, um auf den Schiedsspruch Einfluss zu nehmen. Ebenso fehlt eine rechtliche Handhabe, wenn die Bildung des Schiedsgerichts und/oder die Vollstreckung des Schiedsspruches außerhalb der EU stattfinden. Beide Möglichkeiten können von Investoren jederzeit beliebig genutzt werden. Der **Micula-Fall** ist ein gutes Beispiel, dass das tatsächlich passiert.
- Die Möglichkeit eines Vertragsverletzungsverfahrens darf nur als letztes Mittel angesehen werden – und ist mit Sicherheit nicht als Mittel der Wahl zur Herstellung von Rechtssicherheit zu akzeptieren. Anderenfalls würden ständig rechtswidrige Situationen geschaffen, die sich erst durch ein Vertragsverletzungsverfahren auflösen ließen. Ein Mitgliedstaat wäre damit dem Dilemma ausgesetzt, sich für einen Rechtsbruch entscheiden zu müssen. Die Möglichkeit, sich außergerichtlich mit einem Investor zu einigen, erscheint somit besonders attraktiv.
- Der EuGH hat in seiner Rechtsprechung klargestellt, dass bereits dann eine Unvereinbarkeit vorliegen kann, wenn nur das Risiko eines Konflikts zwischen einem internationalen Abkommen und der Autonomie des Unionsrechts besteht. Weiterhin hat der EuGH klargestellt, dass das Rechts- und Gerichtssystem der Union ein vollumfängliches Rechtssystem darstellt, das damit auch für EU-Investoren ein vollständiges und ausbalanciertes Regime an einklagbaren Grundfreiheiten und Grundrechten bereithält. Ein zusätzlicher Zugang zu Schiedsgerichten ist daher nicht nur nicht notwendig, sondern unterminiert die Grundprinzipien und die Funktionsweise des Unionsrechts. Die EU hat zudem auch eigene Mittel, zum Beispiel Strukturförderungsmaßnahmen, um Defiziten in mitgliedstaatlichen Gerichtssystemen entgegen zu wirken – die teilweise als Argument für zusätzlichen Schutzbedarf für Investoren angebracht werden.
- Die Argumentation des Generalanwalts bezüglich der Schutzstandards, die Investoren nach dem ECV zu Gute kommen, ist nicht überzeugend. Er argumentiert, dass die gewöhnlich in BITs festgeschriebenen Schutzstandards für Investoren weiter reichen als das Unionsrecht und daher nicht das

Unionsrecht verletzen können. Diese Ansicht ignoriert aber, dass ein weitergehender Schutz für bestimmte wirtschaftliche Akteure vielen Grundprinzipien des Unionsrechts, insbesondere in Bezug auf den Schutz des öffentlichen Interesses und der Umwelt, zuwiderläuft. Das Unionsrecht basiert auf negativer und positiver Harmonisierung sowie bereichsspezifischen Ausnahmen, einem Grundrechtskatalog und speziellen bereichsübergreifenden Schutzvorschriften, wie etwa für den Umweltschutz (Artikel 11 AEUV). Es ist damit grundlegend anders ausgestaltet als internationale Investitionsschutzabkommen.

Die Ergebnisse dieses Gutachtens könnten weitreichende Konsequenzen für bestehende und zukünftige internationale Investitionsschutzabkommen haben. Zwar ist sich die EU-Kommission der Problematik von Investitionsschiedsverfahren innerhalb der Union bewusst, zieht aber bisher nicht die nötigen Konsequenzen. Unsere Ergebnisse weisen an den folgenden Punkten über die Ausgangsfrage hinaus:

- Die Problematik der Vereinbarkeit von ISDS mit dem EU-Recht gilt nicht nur für intra-EU-Fälle im Rahmen des ECV. Ein so weitreichender Investorenschutz, wie er im ECV festgeschrieben ist, findet sich in der überwiegenden Mehrheit der seit 1990 geschlossenen BITs. Die Einheitlichkeit des Unionsrechts und des EU-Gerichtswesens ist daher auch gefährdet, wenn Investoren aus einem Nicht-EU-Mitgliedstaat stammen.
- Wenn der EuGH die Umgehung einer Überprüfbarkeit durch die Gerichte der Mitgliedstaaten und des EuGHs als ausreichend ansieht, um eine Vereinbarkeit mit Unionsrecht zu verneinen, so hätte dies weitreichende Konsequenzen. Damit wären alle BITs innerhalb der EU, die eine ISDS-Klausel enthalten, mit dem EU-Recht unvereinbar. In diesem Sinne argumentiert auch die Kommission, wenn sie wiederholt darauf hinweist, dass die Vereinbarkeit von Artikel 54 der ICSID-Konvention vom EuGH überprüft werden muss.¹

¹ In ihrer Stellungnahme zu *Electrabel/Ungarn*, hat die Kommission argumentiert, dass, wenn ein EU-Investor einen ICSID-Schiedsspruch durch ein mitgliedstaatliches Gericht vollstrecken lässt, dieses Verfahren ausgesetzt werden muss und das entsprechende Gericht den EuGH nach Artikel 267 AEUV anzurufen hat. Der EuGH hat dann über die Anwendbarkeit von Artikel 54 der ICSID-Konvention zu entscheiden; Siehe *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 5.19. Siehe auch, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraphs 334-340.

- Die Möglichkeiten, die Unvereinbarkeiten des ECV mit Unionsrecht aufzulösen, sind jedoch rechtlich sowie politisch schwierig. Das ist zum einen der Fall, weil die EU selbst Mitglied des ECV ist und weil die EU-Mitgliedstaaten zu unterschiedlichen Zeitpunkten dem ECV beigetreten sind. Zum anderen ist der ECV ein multilaterales Abkommen, dem auch Nicht-EU-Mitgliedstaaten angehören. Insbesondere die Strategie der Kommission, als *amicus curiae* zu intervenieren, ist hinsichtlich der bisherigen ausbleibenden Erfolge fragwürdig. Erste Schiedsgerichte haben nun auch begonnen, die Kommission nicht mehr zuzulassen.
- Wenn man die Haltung der EU-Kommission gegenüber den andauernden Verhandlungen für neue Investitionsschutzabkommen betrachtet, erscheint ihre Strategie inkohärent. Eigentlich sollte die jetzige Situation, in der es sich rechtlich und politisch als äußerst schwierig darstellt, eine Exit-Strategie zu finden, zur Vorsicht gegenüber neuen Verträgen aufrufen. Die EU scheint sich hingegen weiterhin auf ähnliche Weise die Hände binden lassen zu wollen.

Zusammenfassung in deutscher Sprache

In dem vorliegenden Gutachten zeigen wir, dass die durch den ECV eröffnete Schiedsgerichtsbarkeit die Effektivität, die Einheitlichkeit sowie die Autonomie des Unionsrechts und die Kompetenzen des EuGHs untergräbt. Insbesondere ist die Eröffnung der Schiedsgerichtsbarkeit zwischen EU-Mitgliedstaaten nicht mit Artikel 344, 261 und 18 AEUV vereinbar. Dieses Ergebnis ist unabhängig davon, ob auch materiell rechtlich Unvereinbarkeiten zwischen dem ECV und dem Unionsrecht bestehen. Zum besserem Verständnis der Problematik sind diese jedoch auch im vorliegenden Gutachten erläutert. Im Ergebnis ist festzuhalten, dass die Schiedsklausel des ECV in ihrer Anwendung zwischen den EU-Mitgliedstaaten ein paralleles Rechts- und Gerichtssystem schafft, das mit grundlegenden Prinzipien des Unionsrechts nicht vereinbar ist.

Eine ähnliche Problematik existiert zwar auch im Zusammenhang mit anderen Investitionsschutzabkommen, die eine parallele Schiedsgerichtsbarkeit schaffen. Der ECV wirft aufgrund seines multilateralen Charakters und der Mitgliedschaft der EU als eigenständige Vertragspartei aber besondere Fragen auf. Darüber hinaus besteht eine Gefahr für das Unionsrecht, die Autonomie des EU-Rechtssystems und die Zuständigkeiten des EU-Gerichtswesens nicht nur in intra-EU-Fällen – obwohl die Kommission sich in ihren Stellungnahmen auf diese Fälle begrenzt.

Die Kommission musste in der Vergangenheit für die Kurzsichtigkeit bei der Erschaffung der Schiedsgerichtsbarkeit bereits ein hohes Lehrgeld zahlen. In den letzten Jahren sind die Klagen von EU-Investoren gegen andere EU-Mitgliedstaaten geradezu explodiert und werden auch in naher Zukunft nicht weniger. Diese Erfahrung sollte eigentlich genügend Anreize bieten, den Unvereinbarkeiten solcher Schiedsklauseln mit dem Unionsrecht entgegenzuwirken. Im Falle des ECV wird es vermutlich noch Jahrzehnte dauern, bis – sollten Schritte seitens der EU eingeleitet werden – diese überhaupt Wirkung zeigen. Es sei denn, alle Vertragsparteien des ECV fangen unverzüglich an, den ECV in diesem Aspekt nachzuverhandeln.

In der Zwischenzeit hinkt das ISDS-Regime des ECV den neueren internationalen Investitionsschutzabkommen deutlich hinterher. Die Untätigkeit der EU in Bezug auf den ECV und die Diskrepanz zwischen den alten und neueren ISDS-Regimen lassen die europäische Investitionspolitik als inkohärent oder sogar unglaubwürdig erscheinen. Eine einheitliche Strategie der Kommission lässt sich bisher nicht erkennen.

Dabei hat die Kommission die hier genannten Risiken der ISDS-Klauseln schon früh erkannt. Seit mindestens 2009 hat sie auf die Gefahren durch die ECV-Schiedsklausel für das Unionsrecht hingewiesen und die Notwendigkeit einer Klärung durch den EuGH – insbesondere der Vereinbarkeit der ICSID Konvention mit Unionsrecht – in den Raum gestellt. In der kürzlich veröffentlichten Stellungnahme des Generalanwalts Wathelet zeigt auch dieser die Widersprüchlichkeit der Kommissions-Positionen auf. Diese fühlte sich durch die erkannten Risiken jedoch nicht veranlasst, von einem erneuten Verweis auf die ICSID-Konvention im Freihandelsabkommen mit Singapur, das 2013 verhandelt wurde, abzusehen.²

Während die neusten Vorschläge der Kommission zum multilateralen Investitionsgerichtshof zur Förderung der Einheitlichkeit und Kohärenz der EU-Investitionspolitik begrüßenswert erscheinen, sollte der Fall des ECV aber weiterhin zur Vorsicht ermahnen: Dieser zeigt deutlich, wie schwer vergangene Fehleinschätzungen wieder zu berichtigen sind.

Auch die Kommission als Gründungsmitglied des ECV erkennt nun an, dass die Anwendung der Schiedsklausel des ECV zwischen den EU-Mitgliedstaaten unrechtmäßig ist. Späte Einsicht ist zwar besser als keine, allerdings hat die Schiedsklausel des ECV in der Zwischenzeit eine Situation geschaffen, die von tiefgreifender Rechtsunsicherheit, enormen wirtschaftlichen Risiken für alle Beteiligten und einem politischen Patt geprägt ist.

2 Schlussanträge des Generalanwalts Wathelet, Rechtssache C 284/16, Slowakische Republik gegen Achmea BV (Vorabentscheidungsersuchen des Bundesgerichtshofs [Deutschland]), ECLI:EU:C:2017:699, Fußnote 199.

Summary of conclusions

It is hard to imagine a time in which the legal question posed in this paper could be more necessary, or answers more elusive. Despite the unique status of the Energy Charter Treaty (ECT) as the only international investment agreement (IIA) in force to which the EU is a party, its compatibility with EU law is still unclear. No action has been taken by the Commission with regard to the ECT and action in the near future seems unlikely.

In 2016, the largest known award ever made in an intra-EU investor-state dispute settlement (ISDS) case prompted the German Federal Court of Justice (Bundesgerichtshof, in the following: BGH) to make a preliminary reference to the Court of Justice of the European Union (CJEU) on the compatibility with EU law of the intra-EU bilateral investment treaties (BIT) under which the claim was brought. The BGH was called upon as the last instance by Slovakia seeking to set aside an arbitral award rendered in favour of the Dutch investor Achmea (formerly Eureko). The case concerned gradual restrictions on the privatization of the health insurance system initiated in 2006 by the new government. The Dutch investor that offered private health insurance services through a subsidiary established in Slovakia sued the latter on the basis of the Netherlands-Czechoslovakia-BIT before an investment tribunal established in Frankfurt am Main. The BGH stayed the proceedings and referred questions on the compatibility of the BIT's arbitration clause with Article 344, 267 and 18 of the Treaty on the Functioning of the European Union (TFEU)¹ to the CJEU. On 19 September 2017, the Opinion of Advocate General Wathelet was published. The arguments made respectively by the BGH and AG Wathelet are referred to in detail in our analysis. A final decision of the CJEU is now to be expected on 6th March 2018.

The decision of the CJEU on the compatibility of the ISDS clause in the Netherlands-Czechoslovakia BIT with EU law will prove significant for the future of intra-EU ISDS claims. But the decision is unlikely to address fully all issues pertaining to the intra-EU application of the ECT.

We propose the following tentative assessment:

- Incompatibilities between the ECT and EU law can be found, and these may prove sufficiently adverse as to undermine the effectiveness of the EU's judicial system. The ECT's ISDS clause in its application between the EU Member States is in breach of Article 344 and 267 TFEU. Substantive incompatibilities may also arise. The fact that these remain - in practice to date - merely hypothetical does not lessen the urgency of addressing the problem. Only ten intra-EU cases under the ECT are closed; at least 50 such cases are still pending.

¹ Consolidated Version of the Treaty on the Functioning of the European Union, Art. 216, 2008 O.J. C 115/47, [hereinafter TFEU].

- The recent Opinion of AG Wathelet concerning the Netherlands-Czechoslovakia BIT provides a useful set of indicators against which one can measure the ECT. Wathelet argues that Articles 19 the Treaty of the European Union (TEU)², 267 TFEU and 344 TFEU ultimately cannot be violated by that BIT because of the safeguards inherent in the possibility of review of awards and of bringing infringement proceedings against Member States.³ While his conclusions on those Articles leave room for doubt, these safeguards are in any case not fully applicable to the ECT, and therefore cannot be relied upon. If the CJEU finds the possible avoidance of review by courts of the EU and its Member States as determinative of an incompatibility with EU law – as Wathelet’s analysis suggests – then any ISDS provision allowing such a dispute to be brought under ICSID rules must be regarded as incompatible. Indeed such is implied by the Commission’s repeated threats to refer to the CJEU on the compatibility of Article 54 of the ICSID Convention with EU law.⁴
- Several elements of investment protection contained in the ECT overlap with or go beyond the standards of investment protection under EU law. For Wathelet, the fact that the scope of these protections overlap with EU law or are wider than under EU law, does not necessarily “create a risk of conflict”. The Commission has long argued that investors are already adequately protected under the “complete system” of EU law, thus rendering the intra-EU application of such mechanisms unnecessary. Both of these positions are beset by some serious inconsistencies. A third position is more widely established in legal scholarship: namely that these standards of investor protection do go further than EU law. And in so doing they upset the balance with other fundamental considerations of EU law (including public policy and environmental protection) – a balance which is central to the functioning of the EU Treaties – and for this reason, they must be incompatible.

² Consolidated Version of the Treaty on European Union Art. 48, 2010 O.J. C 83/01 [hereinafter TEU].

³ Arguably such assurances are neither guaranteed under the Netherlands-Czechoslovakia BIT.

⁴ In its submissions to the *Electrabel v Hungary* tribunal, the Commission has argued that, should claimants seek enforcement in a national court of the EU of an ICSID Award which is contrary to EU law, proceedings would be stayed under Article 267 TFEU, in order for the CJEU to decide on the application of Article 54 of the ICSID Convention. See *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 5.19. The Commission took the same position in its submission as *amicus curiae* to the *Micula* tribunal, see: *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraphs 334-340.

- One important caveat to these findings is that we do not consider such incompatibilities with EU law unique to the ECT; nor do we consider – as the Commission does – the treaty’s application only problematic in an intra-EU context. The investment protection standards in the ECT are comparable to the vast majority of BITs originating in the 1990s, and the possibility of undermining the effectiveness of the EU judicial system does not disappear simply because the investor does not hail from a Member State.
- Another caveat is that these conclusions regarding the incompatibility of the ECT do not lead to any clear legal implications, largely for two reasons: the fact of the EU being itself a contracting party to the ECT and the temporal differences in EU membership and ECT ratification for various Member States. As a result, the allocation of any particular obligation to address these incompatibilities cannot be meaningfully achieved through legal means alone. Neither the Commission’s piecemeal strategy of making *amicus curiae*⁵ interventions, nor the initiation of infringement proceedings against individual Member States provides an adequate response. A political consensus must be sought as to how to proceed. This lack of any clear legal exit-strategy raises a number of serious questions regarding future consequences of the EU’s current efforts to engage in bi- and multilateral IIA negotiations.

5 An *amicus curiae* is someone who is not a party to a case, but who has been permitted to submit conclusions to the tribunal. Whether participation as an *amicus curiae* is allowed depends on the applicable procedural rules and the discretion of the arbitrators. The majority of BITs do not include any specification on third party participation so that usually ICSID or UNCITRAL Arbitration Rules (2010) apply.

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Table of Abbreviations

BGH	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
BIT	Bilateral investment treaties
CCP	Common commercial policy
CETA	Comprehensive Economic and Trade Agreement between the EU and Canada
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
FDI	Foreign direct investment
FTA	Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
ISDS	Investor-state dispute settlement
MFN	Most-Favored-Nation
REIO	Regional Economic Integration Organisation
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of the Treaties

Introduction

The Energy Charter Treaty (ECT) was first signed in December 1994 and entered into legal force in April 1998. To date, it has been signed or acceded to by fifty-two states, as well as the European Union and Euratom. It provides “a multilateral framework for energy cooperation that is unique under international law” and is designed to “promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources”.⁴ One of the ECT’s principle areas of concern is investment protection and investor-state dispute settlement (ISDS).

At present it remains the only international investment agreement (IIA) in force to which the EU is contracting party.⁵ The fact that the EU is a contracting party to the ECT renders an analysis of the interaction between the ECT and EU law fraught with unique complexities. The institutions of the Union and its Member States are bound by international agreements entered into by the EU by virtue of Article 216 of the Treaty on the Functioning of the European Union;⁶ the Commission has expressly acknowledged this.⁷ From an EU law perspective, the application of Article 216 means that an international agreement can only prevail over secondary EU law; primary law still enjoys primacy over an international agreement. Moreover, the EU institutions do not have the competence to change the EU Treaties simply by way of an international agreement; amendments can only be made through the procedure of Article 48 of the Treaty on European Union.⁸

The ECT’s arbitration clause (Article 26) accords investors of a contracting party to the agreement the right to initiate ISDS proceedings against another contracting party in whose territory they have an investment, if the standards of investor protection guaranteed under the ECT have been breached. Investors are able to initiate arbitration proceedings pursuant to the ICSID Convention, the UNCITRAL Arbitration Rules, or before the Arbitration Institute of the Stockholm Chamber of Commerce.

This ISDS clause has been invoked in some 12% of all known ISDS claims, more than any other single IIA.⁹ There are a total of 50 intra-EU disputes based on the ECT still pending.¹⁰ Among the claims under the ECT are several of the most controversial ISDS cases to date. Both claims brought by Swedish energy company Vattenfall against Germany were initiated under the ECT; these challenges to Germany’s energy and environmental policies have dragged the issue of ISDS from obscurity into mainstream European politics.

In *Vattenfall II* – for which an award is pending – the company is claiming compensation for losses ostensibly incurred as a result of Germany’s response to the Fukushima disaster in Japan, after which Germany committed to close all its nuclear power plants by 2022. The 4.7 billion EUR being claimed in *Vattenfall II* is the largest amount known to have been claimed in a dispute between an EU investor and an

4 See website of the ECT: www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ [Accessed: 14 Nov 2017]

5 The Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) entered provisionally into force on 21 September 2017, but its investment provisions are not yet in force. See: <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/> [Accessed: 14 Nov 2017]

6 Consolidated Version of the Treaty on the Functioning of the European Union, Art. 216, 2008 O.J. C 115/47, [hereinafter TFEU]: “1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

7 Amicus Curiae Submission of the European Commission cited in *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.99: “According to the European Commission, the European Union was the driving force behind the adoption of the European Energy Charter of 17 December 1991 and ‘played a key role in negotiating the subsequent Energy Charter Treaty, signed in December 1994’... the European Union, being legally bound by the ECT as a party, has to respect the ECT’s terms by virtue of Article 300(7) EC (Article 216(2) TFEU): ‘It follows that, within the Community’s legal order, the Energy Charter Treaty is binding on the institutions of the Community and the Member States under Article 300(7) EC. In particular, any act adopted by the institutions may thus not violate the international obligations assumed by the Community.’”

8 Consolidated Version of the Treaty on European Union Art. 48, 2010 O.J. C 83/01 [hereinafter TEU]. See, CJEU, Opinion 2/94 ECHR (1996) ECR I-1759, paras 30–5.

9 Of the 817 ISDS claims known to UNCTAD, 102 have been brought under the ECT. See United Nations Conference on Trade and Development’s (UNCTAD) Investment Policy Hub: <http://investmentpolicyhub.unctad.org/ISDS> [Accessed: 14 Nov 2017]

10 See detailed list in Annex 2

EU member state. This is also among the 21 largest compensation claims ever made in any ISDS case worldwide; the largest known awards to date (50 billion USD) were also the result of ECT-based claims.¹¹

In recent years, the reform of photovoltaic (PV) energy policies has prompted a boom in ECT-based claims against Spain, Italy and the Czech Republic by PV investors, suggesting growing tensions between EU policy-making and obligations contracting parties incur under the ECT. Of the cases currently pending against those three countries, 43 have been initiated by investors whose home state is another EU member state. This trend prompted Italy to renounce the ECT in January 2016, but (as a result of the agreement's so-called sunset clause) that withdrawal will only be effective as of 2036. All other EU member states have remained contracting parties to the agreement.

The question of the compatibility with EU law of the ECT's intra-EU application is therefore very timely. It is also far from straightforward to answer. Presently, the EU's investment policy is in a state of almost constant flux.

i) Uncertain times

When the ECT was adopted in 1994, foreign investment fell within the competences of the member states. Much has changed since then. Foreign direct investment (FDI) now falls within the common commercial policy (CCP) of the European Union, having become part of the sphere of exclusive competence of the European Union with the entry into force of the Lisbon Treaty in 2009.¹² EU negotiations over bilateral investment treaties (BITs) and agreements including an investment chapter have gathered pace, and agreements between the EU and US, Canada, China, Japan, Vietnam, Singapore and Myanmar remain at various stages of completion.¹³ To establish a coherent foundation for the exercise of this competence, the EU has established transitional arrangements regarding member states' BITs with third countries¹⁴ and a framework for managing financial responsibility linked to ISDS claims under treaties to which the EU is a party.¹⁵ To rather complicate matters, earlier this year the CJEU gave its interpretation of Article 207(1) TFEU and decided that non-direct foreign investment (portfolio investment) and ISDS do not fall within the CCP, the latter because it 'removes disputes from the jurisdiction of the courts of the Member States'.¹⁶

The exercise of the EU's new competences has prompted some controversy, and numerous legal proceedings are on-going which may be relevant to the question we address in this analysis. The "elephant in the room" in the debate over EU investment policy is undoubtedly *the compatibility with EU law of ISDS in general* – a point that it is difficult to avoid in the following analysis.

Firstly however, the following ongoing proceedings should be taken into account:

- In September 2017 the Belgium federal government made its long-awaited request for an Opinion of the CJEU on the compatibility with the Treaties of the new Investment Court System (ICS) – the major innovation intended to replace ISDS, which has been included in both the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and the EU-Vietnam free trade agreement.
- Since 2004, the Commission has increasingly taken the view that intra-EU BITs are an "anomaly within the internal market" and has been encouraging Member States to terminate them. Around 190 intra-EU BITs remain in force.¹⁷ In 2015 the Commission initiated pilot infringement

11 The widely reported 50 billion USD award in the Yukos arbitrations is in fact the sum total awarded by three ISDS tribunals in respect of concurrent claims brought against Russia by former shareholders of the OAO Yukos Oil Company: *Hulley Enterprises Ltd. v. Russian Federation* (PCA Case No. AA 226), *Veteran Petroleum Limited v. The Russian Federation* (PCA Case No. AA 228), *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227).

12 TFEU Art. 3, para. 1, and Art. 207.

13 For an overview of ongoing negotiations, see European Commission, DG Trade, Negotiations and agreements: <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> [Accessed: 14 Nov 2017].

14 EU Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, (2012) OJ L351/40.

15 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 L257/121.

16 Opinion 2/15, ECLI:EU:C:2017:376, para. 292.

17 Anne-Karin Grill, Sebastian Lukic, "The End of Intra-EU BITs: Fait Accompli or Another Way Out?" *Kluwer Arbitration Blog*, November 16, 2016 <http://arbitrationblog.kluwerarbitration.com/2016/11/16/the-end-of-intra-eu-bits-fait-accompl-or-another-way-out/> [Accessed 14 Nov 2017].

proceedings against five member states (Austria, the Netherlands, Romania, Slovakia and Sweden) for failure to terminate their intra-EU BITs.

- In 2016, the largest known award ever made in an intra-EU ISDS case prompted the German Federal Court of Justice (*Bundesgerichtshof*, in the following: BGH) to make a preliminary reference to the CJEU on the compatibility with EU law of the intra-EU BIT under which the claim was brought. The BGH was called upon as the last instance by Slovakia seeking to set aside an arbitral award rendered in favour of the Dutch investor Achmea (formerly Eureko). The case concerned gradual restrictions on the privatization of the health insurance system initiated in 2006 by the new government. The Dutch investor that offered private health insurance services through a subsidiary established in Slovakia sued the latter on the basis of the Netherlands-Czechoslovakia-BIT before an investment tribunal established in Frankfurt am Main. The BGH stayed the proceedings and referred questions on the compatibility of the BIT's arbitration clause with Article 344, 267 TFEU and 18 TEU to the CJEU. On 19 September 2017, the Opinion of Advocate General Wathelet was published. The arguments made respectively by the BGH and AG Wathelet are referred to in detail in our analysis. A final decision of the CJEU is now pending.
- And in the background of all this tumult, one 2013 ICSID Award has been creeping towards a showdown with the EU Commission. In *Micula v Romania*¹⁸ - brought under the Sweden-Romania BIT – the tribunal awarded the investors \$250mil in compensation. The claimants are presently seeking enforcement of the award in numerous states, including in the US. The Commission has committed to intervene in any and all enforcement proceedings.¹⁹ In a Commission Decision adopted on 30 March 2015, it was argued that any payment of compensation made to claimants pursuant to the ICSID award – whether through voluntary implementation or forced execution – would constitute unlawful and incompatible State aid and therefore violate EU law.²⁰ The Commission ordered Romania to recover payments already made. In November 2015, Ioan Micula applied to the CJEU to annul the Commission decision.²¹ That judgement is pending.

The problem raised by extra-EU enforcement, highlighted in the *Micula* proceedings, is discussed in more detail below. The significance of this case is however worth emphasising. The Commission has intervened by submitting legal arguments as *amicus curiae* to the US court. The US case however clearly illustrates the limitations of any attempt (by the EU or its Member States) to ensure the effectiveness of the EU's judicial system in the face of the ISDS system. If the CJEU upholds the Commission Decision and finds that the *Micula* award *does* violate EU law, but the Commission *fails* in its attempt to block enforcement of that award in the US, there can no longer be any illusions. Because this situation would finally demonstrate that no matter what incompatibilities can be found between EU law and any treaty to which the EU is a party and which provides recourse to ISDS, the EU simply does not enjoy the authority to prevent awards which violate EU law from being enforced outside the EU. And this is the major strength of the system of international investment arbitration: the capacity for enforcement in third states which are not bound by the law of the host state.

ii) Summary of conclusions

In light of the above, it is hard to imagine a time in which the legal question posed in this paper could be more necessary, or answers more elusive. Despite the unique status of the ECT as the only IIA in force to which the EU is a party, its compatibility with EU law is still unclear. No action has been taken by the Commission with regard to the ECT and action in the near future seems unlikely. The outcome of the proceedings mentioned above may shed light on this question. In particular, the pending decision of the CJEU on the compatibility of the ISDS clause in the Netherlands-Czechoslovakia BIT with EU law will prove significant for the future of intra-EU ISDS claims. But the decision is unlikely to address fully all issues pertaining to the intra-EU application of the ECT.

18 Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Final Award 11 Dec 2013.

19 The Commission in its *amicus curiae* brief to the US Court of Appeals Second Circuit notes that it “has also intervened (or intends to intervene) in proceedings concerning the recognition and enforcement of the Award that are currently pending before the domestic courts of five E.U. Member States”. See Brief for Amicus Curiae, The Commission of the European Union in support of defendant-appellant, (15-3109-cv) in Ioan Micula, European Food S.A., v Government of Romania, United States Court of Appeals for the Second Circuit, 4 Feb 2016. p 11.

20 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013 OJ L232/43.

21 Action brought on 30 November 2015 — *Micula/Commission* (Case T-694/15) (2016/C 038/93) OJ C 38/69.

First and foremost, a future ruling by the CJEU would be ultimately determinative of this question.

We propose the following tentative assessment:

- Incompatibilities between the ECT and EU law can be found, and these may prove sufficiently adverse as to undermine the effectiveness of the EU's judicial system. The ECT's ISDS clause in its application between the EU Member States is in breach of Article 344 and 267 TFEU. Substantive incompatibilities may also arise. The fact that these remain - in practice to date - merely hypothetical does not lessen the urgency of addressing the problem. Only ten intra-EU cases under the ECT are closed; at least 50 such cases are still pending.
- The recent Opinion of AG Wathelet concerning the Netherlands-Czechoslovakia BIT provides a useful set of indicators against which one can measure the ECT. Wathelet argues that Articles 19 TEU, 267 TFEU and 344 TFEU ultimately cannot be violated by that BIT because of the safeguards inherent in the possibility of review of awards and of bringing infringement proceedings against Member States.²² While his conclusions on those Articles leave room for doubt, these safeguards are in any case not fully applicable to the ECT, and therefore cannot be relied upon. If the CJEU finds the possible avoidance of review by courts of the EU and its Member States as determinative of an incompatibility with EU law – as Wathelet's analysis suggests – then *any* ISDS provision allowing such a dispute to be brought under ICSID rules must be regarded as incompatible. Indeed such is implied by the Commission's repeated threats to refer to the CJEU on the compatibility of Article 54 of the ICSID Convention with EU law.²³
- Several elements of investment protection contained in the ECT overlap with or go beyond the standards of investment protection under EU law. For Wathelet, the fact that the scope of these protections overlap with EU law or are wider than under EU law, does not necessarily "create a risk of conflict". The Commission has long argued that investors are already adequately protected under the "complete system" of EU law, thus rendering the intra-EU application of such mechanisms unnecessary. Both of these positions are beset by some serious inconsistencies. A third position is more widely established in legal scholarship: namely that these standards of investor protection *do* go further than EU law. And in so doing they upset the balance with other fundamental considerations of EU law (including public policy and environmental protection) – a balance which is central to the functioning of the EU Treaties – and for this reason, they must be incompatible.
- One important caveat to these findings is that we do not consider such incompatibilities with EU law unique to the ECT; nor do we consider – as the Commission does – the treaty's application only problematic in an intra-EU context. The investment protection standards in the ECT are comparable to the vast majority of BITs originating in the 1990s, and the possibility of undermining the effectiveness of the EU judicial system does not disappear simply because the investor does not hail from a Member State.
- Another caveat is that these conclusions regarding the incompatibility of the ECT do not lead to any clear legal implications, largely for two reasons: the fact of the EU being itself a contracting party to the ECT and the temporal differences in EU membership and ECT ratification for various Member States. As a result, the allocation of any particular obligation to address these incompatibilities cannot be meaningfully achieved through legal means alone. Neither the Commission's piecemeal strategy of making *amicus curiae* interventions, nor the initiation of infringement proceedings against individual Member States provides an adequate response. A political consensus must be sought as to how to proceed. This lack of any clear legal exit-strategy raises a number of serious questions regarding future consequences of the EU's current efforts to engage in bi- and multilateral IIA negotiations.

²² Arguably such assurances are neither guaranteed under the Netherlands-Czechoslovakia BIT.

²³ In its submissions to the *Electrabel v Hungary* tribunal, the Commission has argued that, should claimants seek enforcement in a national court of the EU of an ICSID Award which is contrary to EU law, proceedings would be stayed under Article 267 TFEU, in order for the CJEU to decide on the application of Article 54 of the ICSID Convention. See *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 5.19. The Commission took the same position in its submission as *amicus curiae* to the *Micula* tribunal, see: Ioan Micula et al. v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraphs 334-340.

I. BACKGROUND

A. The Intra-EU Dimension of the ECT

In his recent Opinion on the compatibility with EU law of the Netherlands-Czechoslovakia BIT, AG Wathelet briefly discusses the ECT and concurs that “if no EU institution and no Member State sought an opinion from the Court... that is because none of them had the slightest suspicion that [the ECT] might be incompatible”.²⁴

This statement is disingenuous, at best. The EU Commission clearly *does* have *much more* than a slight suspicion about the incompatibility of the ECT with the Treaties, at least in respect of its intra-EU application. Over the past decade, the European Commission has made repeated attempts to challenge the intra-EU application of the ECT, as well as ISDS claims brought under intra-EU IIAs. In numerous *amicus curiae* briefs submitted to individual tribunals in ISDS cases brought under the ECT since 2009,²⁵ the Commission has comprehensively argued for the non-application of the ECT between member states both on the grounds of the supremacy of EU law *and* in terms of the ECT itself.²⁶ Although the *amicus* submissions of the Commission have not been made public, tribunals have referred to their arguments extensively. The Commission has largely urged tribunals to avoid *creating* any incompatibility with EU law in their awards by seeking a harmonious interpretation and recognizing the supremacy of EU law. The suspicion of *potential* incompatibility inherent in the ECT has therefore long been apparent. Recently, in its 2016 Award, the tribunal in *Blusun v Italy* notes that both the Respondent and the Commission “argue that the dispute resolution clause, Article 26 of the ECT, is itself incompatible with Article 344 of the TFEU, which provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application the Treaties to any settlement other than those provided for therein.’”²⁷

Broadly speaking, the Commission has focused on two primary concerns regarding incompatibilities between investment arbitration (brought either under the ECT or under bilateral investment treaties) and EU law. These are neatly summarized in documentation accompanying a July 2017 Commission initiative and public consultation on investment disputes:

- “intra-EU investment arbitration excludes judicial review by national courts and the EU Court of Justice, preventing such courts from ensuring the full effect of EU law (violation of Articles 19 TEU, 267 TFEU and 344 TFEU)”
- “those treaties overlap and create a risk of conflict with provisions of primary and secondary law, which create a complete system of investment protection for intra-EU investments”²⁸

These two themes form the framework for our analysis below in Part II.

To date, tribunals have by and large (politely) dismissed or sidestepped these concerns, insisting on the absence of any conflict with EU law. The position has been summarised thus: the treaty ‘establishes extensive legal rights and duties that are neither duplicated in EU law nor incompatible with EU law.’²⁹

The respective positions of the European Commission and various ISDS tribunals are however clearly at odds. This situation illustrates how the relevant legal issues are dealt with by overlapping but distinct legal regimes. Arguably, this rift betrays the fact that these regimes – of ISDS tribunals and EU courts – are ultimately competing for jurisdiction over the matters in dispute. In application, the respective rules that bind these regimes do not necessarily produce congruent answers. Recently, a more antagonistic dynamic between the Commission and ISDS tribunals may be emerging: at least two recent Commission

24 Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, para 43.

25 While these *amicus* submissions are mostly unpublished, many tribunals have responded substantively to the arguments raised therein in their decisions, thereby giving an insight into the EU Commission’s position. See Annex 1 for a list of cases in which the Commission is known or reported to have participated, or requested to participate, as *amicus curiae*.

26 The latter arguments are summarised below in Part I.B.

27 *Blusun S.A., Jean-Pierre Lecocq and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3. Award of 27 December 2016, para. 288

28 European Commission, Inception Impact Assessment: Prevention and amicable resolution of investment disputes within the single market. Ref. Ares(2017)3735364 - 25/07/2017, p 3

29 *Blusun v Italy*. ICSID Case No. ARB/14/3. Award of 27 December 2016, para. 297, citing *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureka B.V. v. The Slovak Republic*) Award on Jurisdiction, Arbitrability and Suspension of 26 Oct 2010, para 245

applications to participate as *amicus curiae* were rejected by the tribunals,³⁰ and one tribunal has forthrightly asserted that – in the event of incompatibility – the ECT must prevail over EU law.³¹

Perhaps in response to these developments, the Commission’s July 2017 consultation paper referred to above goes a step further and expressly characterises the application of the ECT to intra-EU disputes as “unlawful” and “incompatible with EU law”.³² This seems to represent a modest shift away from warning tribunals against creating substantive incompatibilities through interpretation, towards classifying the jurisdiction of such tribunals as incompatible *per se*.

One can only speculate as to whether the Court would side with the Commission in this debate, since the opinion of the CJEU on the matter has been neither given, nor requested. Even if the CJEU were to find the intra-EU application of the ECT incompatible, there is no guarantee however that this would have any tangible impact on the exercise of jurisdiction by ISDS tribunals. This is one of the many complications in assessing the consequences of any incompatibility. Indeed, such a ruling might rather serve as a signal to investors to bring their claims in such a way as to ensure that the EU’s courts are unable to frustrate any ensuing awards by choosing a seat of arbitration outside the EU and seeking enforcement in non-EU member states.

Before further delving into an analysis of the intra-EU application of the ECT, it is worth summarising here the arguments raised by the Commission which are *based on the ECT*, for a complete contextual understanding of this complex issue. These illustrate important characteristics of the agreement, many of which are disputed.

B. Interpreting the ECT

Three principle arguments have been raised regarding the non-applicability of the ECT to intra-EU disputes.

i) The ECT does not apply between Member States

Article 16 ECT explicitly prohibits any *inter se* modifications that reduce the level of protection for investors provided for under the ECT.³³ This Article provides a clear rule on conflicts between the terms of the ECT and any prior or subsequent international agreements, whose terms “concern the subject matter of Part III [Investment Promotion and Protection] or V [Dispute Settlement]” of ECT. The rule clearly stipulates that the provisions which are “more favourable to the Investor or Investment” shall apply.³⁴ Some scholars submit that any other interpretation would also be invalid under international law on treaty interpretation, due to the centrality of the ISDS clause to the purpose of the ECT and its “individual rights dimension”.³⁵

30 Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L v Kingdom of Spain, ICSID Case No. ARB/13/36. Award of 4 May 2017, para 70; RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain. ICSID Case No. ARB/13/30. Decision on Jurisdiction of 6 June 2016, para 20

31 RREEF Infrastructure v Spain. ICSID Case No. ARB/13/30. Decision on Jurisdiction of 6 June 2016, para 75

32 European Commission. Consultation Document: Prevention and amicable resolution of disputes between investors and public authorities within the single market, Directorate-General for Financial Stability, Financial Services and Capital Markets Union. p 3 Available: https://ec.europa.eu/info/consultations/finance-2017-investment-protection-mediation_en. [Accessed 10 September 2017] See also European Commission, Inception Impact Assessment: Prevention and amicable resolution of investment disputes within the single market. Ref. Ares(2017)3735364 - 25/07/2017, fn 3: “According to the European Commission, the ECT does not apply to intra-EU disputes, for similar reasons as why intra EU BITs are considered incompatible with EU law”.

33 See generally Jan Kleinheisterkamp, ‘Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty’. *Journal of International Economic Law* 15(1), 85–109 (2012); also Tjietje, *The Applicability of the Energy Charter Treaty* (2008); and M. Burgstaller, ‘European Law and Investment Treaties’, 26(2) *Journal of International Arbitration* 181 (2009), 184–93, 210

34 The Electrabel tribunal found that since the EU Treaties did not share the same subject matter with the ECT, Article 16 ECT did not apply. See *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.176

35 See Tjietje, *The Applicability of the Energy Charter Treaty* (2008), p 12: “... any *inter se* modification of the ECT with negative effects on an investor is also further confirmed by Art. 41(1)(b)(ii) of th. Herein, an *inter se* modification is precluded when it ‘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.’ This being premised on the fact that such a modification is not in the concerned treaty itself prohibited. In this sense, the central aims and objectives of the ECT must be determined through interpretation. In this regard and in accordance with contemporary developments in public international law, it is particularly important to consider if the respective treaty establishes individual rights. Any *inter se* modification is precluded once the respective treaty has an individual rights dimension.” See also Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*. Cambridge University Press, 2011, p 91-2

In *Electrabel v Hungary*, the Commission however argued that “All EU Member States... agreed in 2004 inter se not to apply the conflict rule contained in Article 16 ECT but the general supremacy rule of EU law in such situations.”³⁶ That agreement was ostensibly concluded in the Act of Accession Article 2, which provides:

“From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.”

Thus – argued the Commission – the rules of the ECT apply “only to the extent that they are compatible with the Act of Accession and thus with EU law”.³⁷

In a similar vein, the Commission and several Member States have argued that the ECT contains an “implicit disconnection clause” disapplying the ECT’s arbitration mechanism to intra-EU disputes.³⁸ As noted by Tietje, such “disconnection clauses” make it “exceptionally possible, under public international law, and in the context of the inter se relations of the EU Member States, to disregard the regulation of the respective public international law treaty, and in deviating from the previously mentioned principles, apply EC internal law”.³⁹ Such a clause can only be “implicit”, as there is no evidence in the text of the ECT of any “explicit” disconnection clause.

In *Blusun v Italy*, the Respondent and the Commission argued that, “even if the ECT had originally concerned inter se matters, this was modified by the fact that the Member States of the EU subsequently entered into other agreements that covered both the investment and dispute resolution aspects of the ECT”; the Commission points to subsequent EU treaties – the Treaty of Amsterdam, the Treaty of Nice, and the Treaty of Lisbon – as *implicitly repealing* the earlier ECT “under the lex posterior rule in Article 30 of the VCLT, whereby ‘successive treaties relating to the same subject-matter’ will prevail over the earlier to the extent that the treaties are not compatible”.⁴⁰

Under Article 46 ECT, no reservations may be made to the Treaty. It is plainly apparent elsewhere in the ECT that some limitations *have* been agreed; for example in Annex 2, it is provided that, “in the event of a conflict between the Svalbard Treaty and the ECT, the Svalbard Treaty shall prevail to the extent of the conflict”.

In practice, no tribunal has been convinced by these arguments. It was recently submitted by claimants in the *RREEF* case that “the disconnection clause argument is nothing more than an ex post invention of the European Commission”.⁴¹

Several decisions notably point to the *lack* of incompatibility between EU law and the ECT in their analysis of the issue. The *AES* tribunal for instance ruled that Article 16 “only requires to be analysed in the event the ECT contains a provision that conflicts with EC law” and that “the dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or Community competition law and the ECT”. The *RREEF* tribunal also holds the view that the question is irrelevant: “given that there is no disharmony or conflict between the ECT and EU... there was simply no need for a disconnection clause,

36 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras 5.16-7

37 Although the effect is the same it is interesting to note that the Commission did not – in *Achmea v Slovakia* – “discern in the 2003 Act of Accession any intention of the parties to abrogate earlier intra-EU BITs”, but rather agreed that “the entire Dutch-Slovak BIT has not been implicitly terminated or suspended by virtue of Article 59(1) of the Vienna Convention.” Instead, the Commission simply argued that “EU law prevails, which means that private parties are not entitled to rely on EU-inconsistent provisions of this agreement.” See *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*) Award on Jurisdiction, Arbitrability and Suspension of 26 Oct 2010, para 187

38 For example *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*. SCC Case No. 062/2012. Final Award issued on 21 January 2016 (Unofficial English translation of Mena Chambers) paras 433-9. See also Luke Eric Peterson, “INVESTIGATION: In recent briefs, European Commission casts doubt on application of Energy Charter Treaty to any intra-EU dispute” *International Arbitration Reporter*. Sep 08, 2014. <http://tinyurl.com/o4h4woo> [Accessed 14 Nov 2017]

39 Christian Tietje, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*. Institute of Economic Law Transnational Economic Law Research Center (TELC) School of Law, Martin Luther University Halle-Wittenberg, 2008, p 10

40 *Blusun S.A., Jean-Pierre Lecorquier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, award of 27 December 2016, para. 285

41 *Ibid.* para 66

implicit or explicit”.⁴² Spain – the respondent state in that case – argued that due to the fact that it is not possible for the EU and its Member States to subscribe to a treaty that is incompatible with EU law, the ECT must be interpreted as having an implicit disconnection clause with regard to intra-EU application.⁴³ This argument rather suggests that such a clause exists simply because it is required to preserve the coherence of EU law.

ii) *The status of the EU under the ECT*

The EU has the status of Regional Economic Integration Organisation (REIO) as a contracting party to the ECT.⁴⁴ The definition of “Regional Economic Integration Organisation” is given under Article 1(3) ECT as meaning “an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.”

The *Electrabel* Tribunal acknowledged the fact that EU Member States are legally bound by certain decisions of EU organs under EU law and thus concluded that ‘the possible interference with a foreign investment through the implementation by an EU Member State of a legally binding decision of the European Commission was and remains inherent in the framework of the ECT itself.’⁴⁵ Any expectations of investors concerning the consequences of implementation of a decision of the Commission cannot therefore be legitimate. The tribunal further acknowledged that “it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary”.⁴⁶

However, the tribunal was unconvinced that the measure being challenged was attributable to the EU. Rather, the claimant’s challenge concerned the manner in which Hungary implemented the relevant Decision⁴⁷ of the European Commission and not the Decision itself. Subsequent tribunals have also declined to attribute liability to the EU.

In their respective arguments, both the Commission and the tribunal refer to the EU’s 1997 Statement⁴⁸ submitted to the Secretariat of the Energy Charter. Under Article 26(3) ECT, there is the option for Contracting Parties to limit their “unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of [Article 26]”, where an investor has previously submitted said dispute to “the courts or administrative tribunals of the Contracting Party party to the dispute” or “in accordance with any applicable, previously agreed dispute settlement procedure”.⁴⁹ This is an optional “fork-in-the-road” clause. To make such a reservation, the Contracting Parties listed in Annex 1D are required to provide a “written statement of its policies, practices and conditions in this regard” for “the sake of transparency”.

The EU’s 1997 Statement asserts that the EU and its Member States are “internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences” and “will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party”. The statement then elaborates on the competence of the CJEU “to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the [EU]”:

“Any case brought before the [CJEU] by an investor of another Contracting Party in application of the forms of action provided by the constituent treaties of the [EU] falls under Article 26(2)(a) of the Energy Charter Treaty. Given that the [EU]’s legal system provides for means of such action, the [EU has] not given [its] unconditional consent to the submission of a dispute to international arbitration or conciliation.

42 RREEF *Infrastructure v Spain*. ICSID Case No. ARB/13/30. Decision on Jurisdiction of 6 June 2016, para 82

43 *Ibid.* para 51

44 Article 1(3) ECT acknowledges: “A “Regional Economic Integration Organization” means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.”

45 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.142.

46 *Ibid.* para 6.72.

47 Decision on “State aid N 691/2009: Hungarian stranded costs compensation scheme” issued on 27 April 2010

48 Statement submitted by the European Communities to the Secretariat of the Energy Charter, pursuant to Article 26(3)(b)(ii) ECT, 9 March 1998, OJ L 69/115

49 Articles 26(3)(b) and 26(2)(a) and (b) ECT

As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the [EU] to become party to it. The provisions of the ICSID Additional Facility also do not allow the [EU] to make use of them. Any arbitral award against the [EU] will be implemented by the Communities' institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty.”

The Statement does not therefore exclude the possibility of a case against the EU, but merely excludes investors from bringing under Article 26 any claims which have previously been submitted to the courts or administrative tribunals of the EU or under another agreed dispute settlement procedure.

Interpreting this Statement, the *Electrabel* Tribunal proposed that, should the measure challenged have been attributable to the EU, “the European Union *could* have been a disputing party in these proceedings...”⁵⁰ Accordingly, the only caveat to such a dispute would be that the proceedings be brought under UNCITRAL Arbitration Rules or before the Arbitration Institute of the Stockholm Chamber of Commerce,⁵¹ since the EU is not (and cannot become) a contracting party to the ICSID Convention.⁵²

However, it would seem logical that an arbitration claim under Article 26 ECT *cannot* be made against the EU by an EU investor, who is by definition then not “of another contracting party”. The *Electrabel* Tribunal’s conclusion seems rather to ignore the requirement for “diversity of territory”.

iii) The EU is “one legal space”

The Commission has argued that there is no diversity of territory when EU investors bring ECT-based claims within the EU.⁵³ Therefore, the provisions of the ECT would only be available to be invoked by investors in claims brought before the CJEU; the 1997 Statement above makes clear that the ECT may “under certain conditions... be invoked before the Court of Justice”.

However, this argument hinges on whether the measures at issue are attributable to the EU, rather than the individual Member State. In the former instance, the investor should therefore bring its claim against the EU as the correct Respondent. As noted above, no claim has ever been brought against a measure that was found to be attributable to the EU – and no investor has ever even requested for such a determination – and the “diversity of territory” argument has therefore not succeeded.

The 1997 Statement is unhelpful to this issue in several respects. Firstly, although the Commission has referred to the Statement in support of its “one legal space” argument, it is doubtful whether it even addresses the question of intra-EU disputes, since in it no reference is made to any intra-/extra-EU distinction.

Secondly, the Commission has argued in its *amicus* submissions that the EU’s “diversity of territories” collapses into “one legal space” when the measure at issue is attributable to the EU – a seemingly logical proposition. The 1997 Statement suggests however that allocation of responsibility is contingent upon a non-mandatory request from the claimant investor for the determination of the appropriate respondent in any given case; a footnote further elaborates that – in any case – that decision is non-binding and that claimants reserve the right to initiate claims against both the Member States and the EU.⁵⁴ Some scholars have further noted that the proposed allocation of responsibility between the EU and its Member States

50 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 3.21

51 As alternatively provided for under Article 26(4) ECT

52 The ICSID Additional Facility established in 1978 provided for the possibility of disputes to be administered by ICSID even if one of the relevant States (either the host State or the investor’s home State) is not a Contracting Party to the ICSID Convention. However, this extension of dispute settlement proceedings administered by ICSID to cases involving a non-Contracting State to the ICSID Convention cannot apply to the EU, as the Rules refer only to *States*. See Article 2, Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules) (2006)

53 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 5.20. The concept of a “Community/EU investor”, who cannot therefore be considered an investor of “another” contracting party within the territory of the EU – is also argued (unsuccessfully) by the Respondent states in *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*. SCC Case No. 062/2012. Final Award issued on 21 January 2016 (Unofficial English translation of Mena Chambers), para 427-432

54 “In such case, *upon the request of the Investor*, the Communities and the Member States concerned will make such determination within a period of 30 days” (emphasis added). Footnote 1 states: “This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States.”

“in accordance with their respective competences” is “plainly wrong” under international and EU law, and the only legitimate interpretation is one of “joint liability”.⁵⁵

With respect to attribution of financial responsibility between the EU and Member States in the future, Regulation 912/2014 was introduced to provide a clear framework for this purpose by making joint responsibility a matter of internal EU allocation. The Regulation applies also to the ECT.

While the objective of the Regulation is clear, its future application may be problematic. Firstly, it is limited to arbitral proceedings initiated on or after 17 September 2014 and concerning treatment which occurred after that date – excluding its application to (probably all of the) pending intra-EU ECT cases, the vast majority of which concern reforms to renewable energy policies undertaken before that date.⁵⁶ Secondly, for the Regulation to be applied, it would seem necessary for a corresponding provision to be included in the relevant investment agreement.⁵⁷ The corresponding provision in the ECT – the above 1997 Statement – however accords investors the discretion to prompt a determination of responsibility, meaning that allocation is seemingly out of the EU’s hands. Finally, as the EU cannot become a party to the ICSID Convention, a claim submitted for arbitration with ICSID automatically precludes any such determination.

C. The EU’s “Brainchild”

The present lack of clarity concerning the ECT’s intra-EU application and potential incompatibility with EU law is remarkable after it has been in force for two decades. At the present time, the EU is embarking on exercising its post-Lisbon competences by initiating significant bi- and multi-lateral reforms of the international investment protection system. As noted, the Commission has put itself at the forefront of EU investment policy, amidst significant controversy.

In this context, for the Commission to label as “unlawful” the intra-EU application of an agreement that the institution itself designed is striking. The ECT was – to use the term coined in the *Electrabel* dispute – the “brainchild of the European Union”,⁵⁸ initiated and drafted by the European Commission.⁵⁹

It is worth reiterating that the existing intra-EU ECT cases account for nearly 10% of all known ISDS claims globally. The 50 pending intra-EU ECT claims constitute nearly 20% of all known pending treaty-based ISDS claims worldwide (278).

The arguments submitted by the Commission in individual cases seem to suggest that such intra-EU application of the ECT was unintended by its drafters. On a plain reading of the text of the agreement such application appears to be a manifestly obvious consequence of the agreement’s coming into force – and thus it is difficult to consider such arguments as anything other than disingenuous. But the Commission’s position is no more satisfactory even if it is sincere: the failure to expressly limit such application constitutes a profound error of judgement and a manifestly negligent approach to the task at hand. It should raise critical questions about what lessons have been learned from their ECT initiative for their current activities and future investment treaties.

55 Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*. Cambridge University Press, 2011, p 175: “Parties to a treaty generally undertake to observe all the obligations contained therein, unless the treaty itself provides otherwise or the party has made a valid reservation. This is usually seen as based upon the duty of good faith which parties to treaties undertake.”

56 See discussion in Francesco Montanaro, “Ain’t No Sunshine”: Photovoltaic Energy Policy in Europe at the Crossroads Between EU Law and Energy Charter Treaty Obligations’ in *International Economic Law: Contemporary Issues*, edited by Giovanna Adinolfi et al. Springer 2017.

57 This seems to have been achieved in CETA. See discussion in Stephan Wittich, ‘International Investment Law’ in *The Practice of Shared Responsibility in International Law* edited by André Nollkaemper, Ilias Plakokefalos. Cambridge University Press, 2017. p 848

58 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.60

59 “The Commission initiated the negotiation process by drafting the text of the Charter.” See ‘Energy Charter Treaty - Europa EU, Press release database’: http://europa.eu/rapid/press-release_MEMO-94-75_en.htm?locale=EN [Accessed 14 Nov 2017]

II. POTENTIAL AREAS OF CONFLICT

A. Parallel administration of justice

At the heart of this analysis lies a highly contentious issue: whether a parallel legal regime for certain economic actors undermines the common judicial system of the EU that governs the relations between the Member States, the EU institutions and natural and judicial persons residing within the EU.

Early on, the CJEU established the fundamental premise of the EU constituting a new and specific legal order.⁶⁰ In order to ensure the preservation of the specific characteristics and the autonomy of the EU legal order, the Treaties establish a judicial system intended to ensure coherence and unity in the interpretation of EU law. Part of the judicial system is the exclusive jurisdiction of the CJEU (Article 344 TFEU), the preliminary reference procedure (Article 267 TFEU), mutual trust between the Member States in each other judicial systems, the supremacy of EU law, direct effect of certain EU laws and the substantive core of fundamental freedoms, fundamental rights and the principle of non-discrimination.⁶¹

Civil society organisations, legal experts, as well as several Member States have voiced concern that the availability of ‘fast-track’ justice for investors through the investment arbitration system is in breach of these fundamental pillars of the EU legal order. As observed by AG Wathelet in his opinion on the *Achmea* case, those Member States that support the compatibility of this system with the Treaties are usually the countries of origin of investors; those that increasingly reject this system are those Member States that have been sued, often on multiple occasions.⁶² The fact that only investors protected by the relevant agreement have access to ISDS mechanisms has also raised the prospect of violation of the principle of non-discrimination – particular in relation to intra-EU ISDS disputes.

It is important to note that the regulation of the EU judicial system is based on primary EU law. As an international agreement to which the EU is also a party, the ECT becomes an integral part of the EU legal order and enjoys primacy over secondary EU law.⁶³ Nevertheless, such international agreements cannot derogate from primary law even if they are concluded by the EU itself. This position is unchanged by the recent clarification of the CJEU regarding the competence to establish ISDS mechanisms – which does not fall under exclusive EU competence.⁶⁴ Member States remain bound to the fundamental principles of the EU even in fields of retained or shared competence.⁶⁵ Therefore, the question of whether the arbitration clause in the ECT is compatible with the judicial system as established by primary law – namely Article 19 TEU, and Articles 344 and 267 TFEU – remains critical.

The following assessment focuses first on potential incompatibilities with Articles 344 and 267 TFEU. We then discuss compatibility with the principles of mutual trust and non-discrimination.

a) Article 344 TFEU

Article 344 TFEU provides that ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.’

It is far from settled whether ISDS in the framework of the ECT (or any other agreement) is compatible with Article 344 TFEU. Both affirmative and negative answers seem possible. As the BGH rightly notes in its CJEU referral, there is neither case-law on these questions, nor do these questions constitute an *acte claire*.⁶⁶ However decisions of the CJEU on similar cases do suggest possibilities for an analogous application.

In our analysis, the ISDS clause in the ECT may well be covered by Article 344 TFEU– and therefore in breach of this provision – if the following elements are established:

60 *Van Gend & Loos*, Case 26/62, ECLI:EU:C:1963:1 and *Costa/ENEL*, Case 6/64, ECLI:EU:C:1964:66.

61 See Article 19(1) TEU and settled case, e.g., *Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123, paras. 65 – 67, *Accession to the ECHR*, Opinion 2/13, ECLI:EU:C:2014:2454, paras. 166 – 168.

62 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, paras 34 – 35.

63 See Article 216 TFEU and *Intertanko and Others*, C-308/06, EU:C:2008:312, paras 42, 53.

64 Opinion 2/15, ECLI:EU:C:2017:376, para. 293.

65 E.g. Opinion 2/15, ECLI:EU:C:2017:376, para. 107.

66 *Achmea*, Bundesgerichtshof (BGH), I ZB 2/15, 3 March 2016, para. 22.

- i) *an ISDS claim under the ECT constitutes a dispute that is covered by Article 344, and*
- ii) *such a dispute concerns the interpretation and application of EU law, and*
- iii) *there are other methods of settlement provided for in the Treaties that would cover investor claims against EU Member States*

As is made clear in our discussion, the interpretation of Articles 344 and 267 is interconnected; in particular the question of whether an ISDS tribunal falls under Article 267 may be regarded as a determining factor in addressing potential compatibility with Article 344.

i) Do ISDS claims constitute disputes within the terms of Article 344 TFEU?

In *MOX Plant*, the CJEU concluded that an arbitration between two Member States pursuant to the dispute-settlement system provided for under the United Nations Convention on the Law of the Sea (UNCLOS) was in breach of Article 344 TFEU.⁶⁷

In Opinion 1/09, the CJEU was asked to determine the compatibility of the envisaged Patent Court with EU law. The CJEU excluded disputes between private parties from the scope of Article 344 TFEU, but did not say anything about disputes between Member States and private parties.⁶⁸

In Opinion 2/13 concerning the agreement on the accession to the ECHR, the CJEU included disputes between the EU and Member States in the scope of Article 344 TFEU.⁶⁹ However it did not enter into a discussion on disputes between private parties and EU Member States before the ECtHR in the context of Article 344 TFEU, although these were also covered by the agreement in question.⁷⁰

In its referral to the CJEU on the Netherlands-Czechoslovakia BIT, the BGH makes very clear that it does not regard an investor-state dispute to be a dispute in the terms of Article 344 TFEU, and that ISDS is therefore not incompatible with the purpose of Article 344 TFEU. The BGH claims to find support in Opinion 2/13, in which Article 344 TFEU was found to also cover disputes between the EU and the Member States, because the EU is essentially the union of the Member States.⁷¹

The recent Opinion of AG Wathelet concurs with many of the points made by the BGH and similarly dismisses any incompatibility of the BIT with Article 344 TFEU. In particular, he infers from the CJEU's *omission* of any discussion on disputes between individuals and Member States in the framework of the ECHR accession that even the CJEU understands such disputes as outside of the remit of Article 344 TFEU.⁷²

In *amicus curiae* submissions filed in ISDS proceedings based on the ECT and intra-EU BITs, the Commission has made clear that it is convinced that Article 344 TFEU applies to *all* disputes that partially cover EU law and therefore may include dispute between private parties and EU Member States.⁷³ In its *amicus* brief in *US Steel*, the EU Commission added that Article 344 TFEU is applicable because the proceeding presupposes an agreement between two Member States.⁷⁴ Notably AG Wathelet rejects this argument, by claiming that that it is widely accepted in international and especially in international investment law that international agreements may directly confer rights to individuals so that the dispute cannot be attributed only to the treaty makers.⁷⁵

67 *MOX Plant*, Case C-459/03, ECLI:EU:C:2006:345, para. 152.

68 *Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123, para 63.

69 *Accession to the ECHR*, Opinion 2/13, ECLI:EU:C:2014:2454, para. 202; See also Opinion 1/91 (EEA Agreement — I), EU:C:1991:490, para. 35.

70 This fact is also pointed out by AG Wathelet, see Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 151.

71 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 29.

72 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 151.

73 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 4.151.; *Eureko v Slovakia*, PCA Case No. 2008-13, 26 October 2010, para. 178; Letter from the European Commission to Permanent Court of Arbitration, (PCA Case N° 2010-17), European American Investment Bank AG (Austria) v the Slovak Republic, 13 October 2011, p.4 accessible via (https://www.italaw.com/sites/default/files/case-documents/italaw4243_0.pdf) (case based on Austria-Slovak Republic BIT).

74 EU Commission, *Amicus Curiae Brief, U.S. Steel v Slovakia*, PCA case No. 2013-6, 15 May 2014, para. 44.

75 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 155 – 156.

To date, no investment tribunal has accepted the argument that the ISDS arbitration may violate Article 344.⁷⁶ They claimed that neither the principles established in *Mox Plant* case nor the wording of Article 344 TFEU covers such disputes. Therefore, it has been argued that the CJEU does not have jurisdiction ‘let alone the capacity’⁷⁷ to decide all such cases.

In our view, one cannot simply infer from the above CJEU case law that disputes between Member States and private parties are not covered. Neither the provision nor the relevant case law appear to resolve this question. Clearly disputes between private individuals are excluded since Member States are explicitly the addressee of Article 344 TFEU, so that at least some involvement of a Member State should be required.⁷⁸ Comparison to the ECHR accession should however be treated with caution, as such accession is a constitutional obligation according to Article 6 TEU. The Treaties have therefore foreseen that the ECHR will become part of the EU legal and judicial order, which makes the ECHR a fundamentally unique case, distinguishable from other international agreements that establish parallel judicial regimes. We therefore consider more convincing the conclusion that disputes between Member States and private parties – such as under the ECT’s ISDS clause – are indeed disputes within the meaning of Article 344.

ii) Do investment tribunals apply or interpret EU law?

In the UNCLOS dispute that gave rise to the *MOX Plant* case, Ireland had submitted EU law instruments ‘for purposes of their interpretation and application’.⁷⁹ The CJEU found that this dispute created a ‘manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected’ – which was sufficient for the dispute to be incompatible with EU law.⁸⁰ Such a risk already exists merely when EU law is invoked, and even when a breach of EU law is not directly the subject of the decision.⁸¹

This situation would not appear to be significantly different to the situation in an intra-EU investment arbitration, in which an EU member state bases its defence on compliance with EU laws regarding, state aid or movement of capital. This situation can similarly arise under the ECT.⁸²

Notably the BGH has argued in its reference to the CJEU, that the *Achmea* tribunal did not apply or interpret EU law. The BGH infers from *Mox Plant* that it would be compatible with Article 344 TFEU if an arbitration tribunal deploys EU law to interpret the underlying agreement provided that EU law is not the subject of the decision.⁸³ Accordingly, the BGH argues that the dispute in question is based on the BIT and not on EU law.⁸⁴ Such an understanding seems to diverge from the position of the CJEU in *Mox Plant*. As the BGH itself recognizes, Slovakia invoked Article 63 TFEU in the *Achmea* case; EU law was explicitly part of the applicable law.⁸⁵ The BGH still denies the applicability of EU law in that case, on the basis that the tribunal declared the obligations stemming from the BIT *compatible* with the EU treaties and based its decision ultimately on the BIT alone.⁸⁶ Similarly the *Electrabel* tribunal was convinced that it would not need to interpret EU law or the validity of an EU measure – although while doing so it engaged in a lengthy discussion on the interpretation and application of EU law.⁸⁷

In reaching a conclusion that there is no incompatibility with EU law, ISDS tribunals are necessarily required to address the compatibility of obligations arising under the BIT and EU law. In such considerations, they are therefore necessarily required to *apply or interpret* EU law vis-à-vis the relevant agreement’s standards of investment protection. This is indeed applicable for *any ISDS tribunal* hearing an intra-EU case which touches upon the Member State obligations under EU law. To date, many such tribunals have made explicit declarations of compatibility between

76 *Eureko v Slovakia*, PCA Case No. 2008-13, Award, 26 October 2010, para. 276, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 4.151 – 4.153.

77 *Eureko v Slovakia*, PCA Case No. 2008-13, Award, 26 October 2010, para. 276.

78 This aspect is also supported by the BGH, in *Achmea*, BGH, I ZB 2/15, 3 March 2016, para 28.

79 *MOX Plant*, Case C-459/03, ECLI:EU:C:2006:345, paras. 150 – 153.

80 *Ibid.*, para. 154.

81 *Ibid.*, para. 152 – 154.

82 Examples are discussed in Part II b).

83 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 32 with reference to *MOX Plant*, Case C-459/03, ECLI:EU:C:2006:345, paras. 140, 149 – 151.

84 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 30.

85 Art. 8 Abs. 6 BIT Netherlands-Czechoslovakia-BIT.

86 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 31.

87 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para 4.157.

EU law and the respective agreements; in the context of the ECT, such discussions can be found in *Electrabel*.⁸⁸ In our analysis, all such declarations of compatibility must also entail the “manifest risk” – described in *MOX Plant* – that the “jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected”.

Furthermore, since the ECT became *part of EU law* by virtue of Article 216 TFEU, tribunals hearing intra-EU disputes *must* – by definition – apply and interpret EU law when addressing the intra-EU application of the ECT. While the tribunals once constituted cannot avoid doing so, since their jurisdiction is mandated exclusively by the ECT, this application and interpretation of EU law falls within the scope of Article 344 TFEU. This point is in fact raised in the Opinion of AG Wathelet, which notes that if the EU is also party to the international agreement, the provisions of the agreement become an integral part of EU law, and the tribunal will necessarily interpret and apply EU law within the terms of Article 344 TFEU, in accordance with the CJEU’s interpretation in *MOX Plant* and Opinion 2/13.⁸⁹

iii) Is there a method of settlement for EU investors provided for in the EU Treaties?

Under EU law, there exists a comprehensive system of judicial remedies for every judicial and natural person, which includes investors and is also used by investors. One case in point is Vattenfall. Next to pursuing compensation on the basis of the ECT, the Swedish company also partly successfully sued Germany before its constitutional court (*Bundesverfassungsgericht*), while basing its claim in the constitutional right to property.⁹⁰ The lack of a special or ‘fast track’ judicial remedy specifically established for investors is not an ‘extraordinary omission’ as it was termed by the *Electrabel* tribunal.⁹¹ Rather, as stated by the CJEU in Opinion 1/09, ‘[t]he judicial system of the European Union is moreover a complete system of legal remedies and procedures.’⁹²

In its arguments concerning the *Achmea* arbitration however, the BGH disputes this, stating that there is no judicial mechanism at EU level available that covers a dispute between a private investor and a Member State based on a BIT.⁹³ According to the BGH, the option or even the obligation of Member States under Article 267 TFEU to submit a preliminary reference is not a ‘method of settlement’ as provided in the Treaties in the terms of Article 344 TFEU but rather an ‘intermediate proceeding’ in order to decide a ‘preliminary question’.⁹⁴ The tribunal in *Blusun v Italy* drew a similar conclusion.⁹⁵

The BGH further submits a teleological interpretation of Article 344 TFEU, according to which it can be understood as a specific expression of the principle of loyal cooperation (Article 4(3) TEU).⁹⁶ The CJEU, in particular to *MOX Plant* and Opinion 2/13, ruled that Article 344 TFEU is supposed to guarantee the autonomy of the EU legal order, the allocation of powers as well as the exclusive jurisdiction of the CJEU for the interpretation and application of EU law.⁹⁷ The BGH contends that this cannot mean however that Article 344 TFEU protects the exclusive jurisdiction of the CJEU in relation to *any* dispute in which EU law may be interpreted or may be applicable but only in relation to those that are provided for in the Treaties. According to the BGH, the latter is not the case; there is no specific judicial remedy for investors provided for in the Treaties.⁹⁸

88 Although in *Electrabel*, the tribunal states that EU law will not be decisive for the issue in question; it does engage with analyses of EU state law at several points, e.g. para. 113. Also see *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)* (*AES v Hungary (II)*), ICSID Case No. ARB/07/22, Award, para 769.

89 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 165 – 167; See *MOX Plant*, Case C-459/03, ECLI:EU:C:2006:345, paras. 126 – 127; *Accession to the ECHR*, Opinion 2/13, ECLI:EU:C:2014:2454, paras 205 – 214.

90 See, BVerfGE, Urteil des Ersten Senats vom 6. Dezember 2016, 1 BvR 2821/11, 1 BvR 321/12, 1 BvR 1456/12.

91 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 4.151.

92 *Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123, para. 70.

93 *Achmea*, BGH, I ZB 2/15, 3 March 2016, 3 March 2016, para. 35.

94 *Ibid.*

95 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3. Award of 27 December 2016, para 303: “No such system for investor-State arbitration exists in EU law, and it would be incorrect to characterise such disputes as inter-State disputes such that Article 267 of the TFEU could be said to preclude jurisdiction.”

96 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 37 with reference to *MOX Plant*, Case C-459/03, ECLI:EU:C:2006:345, para. 169.

97 *Ibid.*, para. 37 with reference to *MOX Plant*, Case C-459/03, ECLI:EU:C:2006:345, paras. 123, 152 and 154 and to *Accession to the ECHR*, Opinion 2/13, ECLI:EU:C:2014:2454, para. 201.

98 *Ibid.*, paras. 38 – 39.

In practice, the determination of this question with respect to the ECT will probably need to take into account the EU's status as a contracting party to the agreement. The 1997 statement submitted to the Secretariat of the Energy Charter (discussed in Part I) provides further clarification with regard to the respective obligations of the EU and its Member States; this explicitly refers to the possibility of the ECT being invoked "under certain conditions... before the Court of Justice". As the ECT forms a part of EU law, a Member State's violation of the ECT would also constitute a breach of EU law, and "since the ECT is a mixed agreement, the [CJEU] would have jurisdiction to rule on whether a Member State has breached it".⁹⁹

Given that the CJEU has previously found the EU's judicial system to consist of 'complete system of legal remedies and procedures,' and the fact that the ECT forms part of EU law by virtue of Article 216 TFEU, it therefore seems unlikely that the Court would not consider there to be a method of settlement provided for in the EU Treaties.¹⁰⁰

iv) Relation to Article 267 TFEU

Finally, this issue of compatibility with Article 344 is arguably not complete without addressing Article 267 – the preliminary reference procedure. As noted by the *Electrabel* tribunal with reference to CJEU case law, private arbitration is only compatible with EU law if Member States' courts are not deprived of their obligation to review the compliance of EU law of the awards and request a preliminary reference when necessary.¹⁰¹

In the opinion of AG Wathelet, this interconnection is made explicit. He argues that investment tribunals would not fall under Article 344 TFEU, precisely *because they are eligible* to make a preliminary reference according to Article 267 TFEU, which also requires them to respect the principles of EU law such as primacy of EU law and direct effect.¹⁰² In contrast, the BGH has argued that compatibility with Article 267 is a separate question and the Court does not regard the question of applicability of Article 267 TFEU as determinative of whether the purpose of Article 344 TFEU is undermined.

While we disagree with Wathelet's conclusions, we concur with the assessment that the availability of the preliminary reference procedure – at various stages of an ISDS case – does impact on the functioning and autonomy of the EU's judicial system. However, this availability is not assured, as discussed in detail in the following section.

b) Article 267 TFEU

The preliminary reference procedure is one of the main pillars of the EU judicial system and allocation of powers.¹⁰³ According to Article 267 TFEU, courts or tribunals of a Member States have the *possibility*, and in the case of a court of last instance the *obligation*, to call upon the CJEU to give a ruling on uncertain questions of interpretation of primary and secondary EU law as well as of validity of secondary EU law.

In the following discussion, we identify three questions which need to be addressed to determine the compatibility of intra-EU investment arbitration with Article 267 TFEU:

i) Are ISDS tribunals themselves eligible to make a preliminary reference to the CJEU?

99 Andrés Delgado Casteleiro, 'Disconnecting from the Energy Charter Treaty: Disconnection clauses and normative conflicts between European Union law and the Energy Charter in Treaty' forthcoming in *The EU and investment arbitration under the Energy Charter Treaty*, edited by A Dimopoulos, Cambridge University Press. p 13. Available here: https://www.academia.edu/32822278/Disconnecting_from_the_Energy_Charter_Treaty_Disconnection_clauses_and_normative_conflicts_between_European_Union_law_and_the_Energy_Charter_Treaty p Andrés Delgado Casteleiro.

100 *Patent Court*, Opinion 1/09, ECLI:EU:C:2011:123, para. 70.

101 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras 4.153 - 4.156 with reference to Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 40 and *Opinion 1/09*, para. 78. In *Opinion 1/09*, the CJEU ultimately denies the compatibility of the envisaged Patent Court, because it would interpret and apply EU law. In *Eco Swiss*, the CJEU made clear that the application of EU law in commercial arbitration is legitimate, but only conditional upon the existence of the possibility for Member States to review the compatibility with EU law during the proceedings for recognition and/or enforcement and declaring that the New York Convention must be interpreted in that way, para. 38 – 39.

102 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, paras. 133 – 134

103 Settled case-law; see, e.g., *Accession to the ECHR*, Opinion 2/13 (ECHR accession), ECLI:EU:C:2014:2454, para. 176

- ii) *Is the possibility of review of awards sufficient to guarantee that the preliminary reference procedure is available to the Member States own courts?*
- iii) *Can infringement proceedings initiated by the Commission ensure compatibility with Article 267 TFEU?*

No definitive answer to these questions is found in the EU Treaties or CJEU case law. The opinions of Member States, the Commission, legal experts and AG Wathelet appear divided on these issues. We find grounds to seriously doubt that any of these questions should be answered in the affirmative. Hence, the arbitration clause in the ECT in its application between the EU Member States is – as it now stands – not compatible with Article 267 TFEU.

i) Are ISDS tribunals themselves eligible to make a preliminary reference to the CJEU?

According to the CJEU private arbitration tribunals cannot be considered a court or tribunal of a Member State as required by Article 267 TFEU and therefore do not have the right to refer questions to the CJEU.¹⁰⁴ The requirements for a tribunal to be considered a court or a tribunal in the terms of Article 267 TFEU are the following: a) the tribunal must be established by law, b) it must be permanent, c) its jurisdiction must be compulsory, d) its procedure must be *inter partes*, e) it must apply rules of law and f) it must be independent.¹⁰⁵

Where a tribunal fulfils the requirement of settling a dispute according to the law, in the CJEU's view a private arbitration tribunal still fails to meet the requirements of Article 267 TFEU if there is no obligation to settle the dispute through arbitration, but instead both parties gave their free consent to arbitration (even if provided for as part of a contract), and there is no possibility for Member States to intervene.¹⁰⁶ On these grounds, the CJEU concluded in the *Nordsee* case, that the 'link between the arbitration procedure in this instance and the organization of legal remedies through the courts in the Member State in question is not sufficiently close for the arbitrator to be considered as a court or tribunal of a Member State'.¹⁰⁷

The BGH is convinced – 'without any doubt' – that the *Achmea* tribunal does not fulfil these requirements for being eligible for preliminary reference,¹⁰⁸ because an ISDS tribunal constituted under the Netherlands-Czechoslovakia BIT is not permanent, not compulsory and only leaves limited role for the respondent Member State.¹⁰⁹ The BGH however points to the other avenues that could guarantee the compliance with Article 267 TFEU. For example – in theory – a Member State court can initiate a preliminary reference 'on behalf of' the ISDS tribunal.¹¹⁰ However, although it is possible under German law for an ISDS tribunal to call upon a German Court to refer certain questions to the CJEU, this option is excluded according to the applicable UNCITRAL rules.¹¹¹

The recent Opinion of AG Wathelet argues strongly in favour of regarding an ISDS tribunal that is constituted under the Netherlands-Czechoslovakia BIT a court or tribunal of a Member State in the terms of Article 267 TFEU. Wathelet considers all the requirements established by CJEU case law as fulfilled in this case, and further claims to identify a trend in the CJEU case-law towards applying these requirements more generously.¹¹² This position therefore requires a closer analysis with reference to the ECT in particular.

a) the tribunal must be established by law

In case of an intra-EU ISDS tribunal, this requirement is easily satisfied, since it is established by international treaty.¹¹³ In *Nordsee*, the CJEU even deemed a contract between private parties

104 Case 102/81 *Nordsee v Reederei Mond*, ECLI:EU:C:1982:107, paras. 10-13; See also Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, paras 34 and 40.

105 Opinion of Advocate General Wathelet, Case C284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 86 with reference C-394/11, *Belov*, EU:C:2013:48, para. 38 and the case-law cited.

106 Case 102/81 *Nordsee v Reederei Mond*, ECLI:EU:C:1982:107, paras. 10-12.

107 Case 102/81 *Nordsee v Reederei Mond*, ECLI:EU:C:1982:107, para. 13.

108 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 46 – 47, with reference to *Nordsee*.

109 *Ibid.*, para. 49.

110 *Ibid.*, para. 52 with reference to Case 102/81 *Nordsee v Reederei Mond*, ECLI:EU:C:1982:107, para. 14.

111 *Ibid.*, para. 52.

112 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para 88 with reference to C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark*, EU:C:1989:383; C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, EU:C:2014:1754 and C-555/13, *Merck Canada*, EU:C:2014:92. This case-law is commented on below.

113 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para 96.

sufficient.¹¹⁴ An ISDS tribunal established under the ECT is established by law, namely by the ECT in conjunction with the applicable arbitration rules and therefore international law.

b) *it must be permanent*

AG Wathelet maintains that according to previous case law, permanence may be assessed with regards to the arbitration institution and not with regards to the single arbitration tribunal.¹¹⁵ In the given case, the reference to the Stockholm Center of Commerce was therefore sufficient.

If one accepts that the requirement of permanence is evaluated with a view to the arbitration institution, this requirement could also be considered met by the arbitration clause in the ECT. According to Article 26 ECT, ISDS disputes may be submitted to ICSID (Article 26 (4)(a)(i) ECT), to an *ad hoc* tribunal under UNCITRAL Arbitration rules (Article 26 (4)(b) ECT) or to the Stockholm Center of Commerce (Article 26 (4)(c) ECT).

However, since each individual tribunal is established anew with a unique composition of arbitrators, applying the requirement of permanence to the arbitration institution seems less convincing. In the cases of UNCITRAL and the SCC, these institutions only provide rules for the constitution of tribunals; the tribunals themselves are rather clear examples of *ad hoc* courts or tribunals.

c) *its jurisdiction must be compulsory*

Wathelet considers the jurisdiction of the ISDS tribunal compulsory, with reference to previous CJEU case law. However, in doing so he equates the arbitration clause in the underlying BIT with national laws providing for arbitration.¹¹⁶ In the two cases referred to, arbitration is provided for by national law; in one case there was a choice between ordinary courts and arbitration. In *Handels- og Kontorfunktionærernes Forbund i Danmark*, the Industrial Arbitration Board was established by Dutch labour law; one aspect that led the CJEU to find this tribunal to constitute a court was that '[t]he composition of the industrial arbitration board [was] thus not within the parties' discretion'.¹¹⁷ Similarly, the jurisdiction of the private arbitration body in *Merck Canada* was compulsory according to Portuguese law and thus did not depend on the agreement of the parties.¹¹⁸ The arbitration tribunal dealing with taxation in question in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* was considered a national court by virtue of the Portuguese constitution – although in this case the claimant could have opted for ordinary courts as well.¹¹⁹

The meaning of compulsory according to the CJEU therefore seems to require that jurisdiction is not merely 'subject to the prior expression of the parties' will to submit their dispute to arbitration';¹²⁰ instead in all cases, the route to arbitration originated in national law. Precisely this aspect led the CJEU in *Nordsee* to reject commercial arbitration as a court of a Member State in the terms of Article 267 TFEU.¹²¹ The Court stated that 'when the contract was entered into [in 1973] the parties were free to leave their disputes to be resolved by the ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract.'¹²²

Therefore, the compulsory jurisdiction requirement for an ISDS tribunal established under the ECT is arguably not met. This may depend on whether one regards – as Wathelet does – an international treaty as analogous to national law,¹²³ or as analogous to a contract, which at the time it was entered into left it up to the contracting parties to decide whether they would opt for arbitration or for ordinary courts. However, the former interpretation would mean that this compulsory jurisdiction

114 Case 102/81 *Nordsee v Reederei Mond*, ECLI:EU:C:1982:107, para. 10.

115 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, paras. 100 – 109, with reference to C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, EU:C:2014:1754, paras. 25 – 26 and C-555/13, *Merck Canada*, EU:C:2014:92, paras. 24.

116 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, paras. 110 – 115.

117 C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark*, EU:C:1989:383, para. 8.

118 C-555/13, *Merck Canada*, EU:C:2014:92, paras. 18 – 19, 24 – 25.

119 C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, EU:C:2014:1754, paras. 24 – 34).

120 In *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, para. 29; Also referred to by Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 113.

121 Case 102/81 *Nordsee v Reederei Mond*, ECLI:EU:C:1982:107, para. 10.

122 *Ibid.* para. 11.

123 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, paras 110 – 119.

requirement adds nothing which is not already covered by the ‘established by law’ requirement. A final interpretation of this requirement is elusive, because of the unique architecture of investment agreements, to which the claimants who initiate disputes are not contracting parties.

d) *its procedure must be inter partes*

Wathelet maintains that the *inter partes* principle is respected by numerous provisions of the UNCITRAL rules, and this would appear to be met by the ECT arbitration clause.¹²⁴

e) *it must apply rules of law*

Clearly an ECT based investment tribunal applies rules of law.

f) *it must be independent*

Wathelet contends that the ISDS tribunal suffices the independence and impartiality requirements.¹²⁵ However, in light of the recent extensive debate – and widespread concern – about the impartiality of ISDS tribunals, one may question whether they would suffice the impartiality threshold for being considered a tribunal or a court of a Member State. Ultimately, such an assessment depends on whether one accepts that the respective rules ensuring independence suffice to fulfil rule of law standards which are applied to courts.

Finally, as to the question of whether the ISDS tribunal can also be considered a court *of a* Member State, Wathelet compares the tribunal to the Benelux Court that gave rise to the judgment in *Dior*. In that case, the CJEU accepted the Benelux Court as constituting a court *of a* Member State because it was common to several EU Member States.¹²⁶ This comparison seems questionable even for tribunals under the Netherlands-Czechoslovakia BIT. Under the ECT, each ISDS tribunal is established as an individual tribunal and not ‘common to several Member States’. Further, one should note that according to Article 350 TFEU the Benelux states enjoy a special status in the EU Treaties. An additional problem emerges if the investment tribunal is located outside the EU.¹²⁷ This problem can only be circumvented if one refers again to the arbitration institution instead of to each tribunal.

To conclude, the requirements of compulsory jurisdiction, permanence and impartiality appear not to be met. An ISDS tribunal under the ECT (or even the Netherlands-Czechoslovakia BIT) cannot therefore be regarded as a court or a tribunal of a Member State in the terms of Article 267 TFEU.

It also seems somewhat implausible to accept investment tribunals automatically as courts in the terms of Article 267 TFEU.¹²⁸ None of the investment arbitration tribunals constituted to date appear to have considered themselves eligible to make a preliminary reference (partly based on CJEU case-law).¹²⁹ To the knowledge of the authors, no investment tribunal has ever attempted to initiate this procedure, nor can we see any incentive for them doing so. In order to make such an avenue credible and reliable, an agreement to that end between the arbitration institution or between the ECT Members would seem to be required, at the very least.

In practice, the *Electrabel* tribunal rather argued that the inability to make such a reference does not undermine the allocation of powers within the EU judicial system or threaten the uniformity of interpretation of EU law for two main reasons. Firstly, the tribunal pointed to the discretion that is inevitably anyway left for judicial bodies under Article 267 TFEU: the *acte clair* doctrine grants national courts a degree of discretion as to whether they want to refer a question to the CJEU, and many courts outside the EU interpret EU law without having the option of preliminary reference.¹³⁰

124 *Ibid.* paras. 121 – 122.

125 *Ibid.*, paras. 124 – 125.

126 *Ibid.*, paras. 128 – 129 with reference to C-337/95, *Parfums Christian Dior*, EU:C:1997:517, para. 21.

127 Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016), 3, 11.

128 Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), p. 426.

129 See, e.g. *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 4.153 with reference to Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 40.

130 *Ibid.* para. 4.148 - 4.149.

Secondly, based on *Eco Swiss*, the tribunal noted that if ISDS tribunals do not fall under Article 267 TFEU, this is not a problem provided that Member States remain in control over the interpretation of EU law through enforcement proceedings.¹³¹ However, as discussed below, such control is far from guaranteed.

ii) Is the possibility of review of awards sufficient to guarantee that the preliminary reference procedure is available to the Member States own courts?

In *Eco Swiss*, the CJEU stated that if tribunals are not eligible to make a preliminary reference, unified interpretation of EU law must be ensured through annulment proceedings by the Member States.¹³² According to the principles established in *Eco Swiss*, if annulment of awards is possible on grounds of public policy or *ordre public*, such annulment grounds must be interpreted as covering EU law public policy.¹³³ An award must therefore not necessarily be annulled because of a violation of EU law, but only if the rules violated or in question are fundamental to the EU legal order.¹³⁴

AG Wathelet argues that recognition and enforcement proceedings before domestic courts would suffice to ensure uniform interpretation of EU law and the compatibility with EU public policy objectives and therefore ensure the effectiveness of Article 267 TFEU.¹³⁵ In his opinion, the Netherlands-Czechoslovakia BIT is deemed not capable of undermining the effectiveness of the EU's judicial system – even if its ISDS tribunals are not eligible to use the preliminary reference procedure¹³⁶ – precisely because “the awards made by the arbitral tribunals *cannot avoid review* by the national courts”:

That review may be carried out in the context of an action to set aside the arbitral award before the courts of the seat of the arbitration *or* in the context of an objection to a request for recognition and enforcement of the award before the courts of the country in which recognition and enforcement of the award are sought in accordance with the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958 (‘the New York Convention’).¹³⁷

It should first be emphasised that the architecture of the ECT’s arbitration clause is fundamentally distinct from the Netherlands-Czechoslovakia BIT, because that BIT does not allow investors to submit a dispute for arbitration to ICSID.

As noted above, disputes under the ECT may be submitted to ICSID (Article 26 (4)(a)(i) ECT), to an *ad hoc* tribunal under UNCITRAL Arbitration rules (Article 26 (4)(b) ECT) or to the Stockholm Center of Commerce (Article 26 (4)(c) ECT). Accordingly, arbitral awards can be enforced according to the New York Convention (Article 26 (5)(a)(i) ECT) or according to the ICSID Additional Facility rules (Article 26 (5)(a)(ii) ECT). Awards in Additional Facility cases are also subject to the recognition and enforcement regime of the New York Convention.¹³⁸ If a dispute is settled according to the ICSID Convention as Article 26 (4)(a)(i) ECT provides, however, the award will also be enforced according to the ICSID Convention.

Secondly, the ECT’s arbitration clause does not ensure that the seat of arbitration is located in an EU member state. Indeed, there is still nothing to *ensure* that the seat of the arbitration is located within a member state even if only the UNCITRAL rules apply – as under the Netherlands-Czechoslovakia BIT.¹³⁹

131 *Ibid.*, para. 4.153.

132 Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 40

133 *Ibid.*, para 35.

134 *Ibid.*, para. 36. The BGH also points to the ability to initiate a preliminary reference during recognition and enforcement proceedings as guaranteeing the effectiveness of Article 267 TFEU provided that the *Eco Swiss* principle is applied, *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 53.

135 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, paras. 238 – 244.

136 *Ibid.*, paras 232-3.

137 *Ibid.*, para 239.

138 According to Article 3 of ICSID Additional Facility Rules, the ICSID Convention does not apply.

139 Advocate General Wathelet relies on the fact that “Article 8 of the BIT entrusts the President of the SCC Arbitration Institute, established in a Member State, with the appointment of the arbitrators” and that in the specific case “by its procedural order of 19 March 2009, the arbitral tribunal fixed the seat of the arbitration on the territory of a Member State, namely in Frankfurt am Main”, see, Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, para 247. As a result and in accordance with Article 1059 of the German Code of Civil Procedure, the tribunal’s award would be “amenable to an action for annulment before the German courts, which will therefore be able, in that context, to ensure the uniformity of interpretation of EU law and compliance with the European public policy rules”, see *ibid.* paras 246-7. However, the *Achmea* tribunal chose to fix the seat of the arbitration on the territory of a Member State, the law of which permitted review of its award - but they

a) *Avenues to review awards*

It is widely accepted that the grounds for annulment under the ICSID arbitration rules are considerably more limited than those under the New York Convention.

The New York Convention permits national courts to refuse to recognise and enforce an award on the grounds that this would be contrary to the public policy of that country.¹⁴⁰ Therefore in the case of a non-ICSID award, a State might invoke Article 5(1)(a) of the New York Convention, arguing that the tribunal did not have jurisdiction under the ECT. Second, a State might try to resist enforcement on the basis of Article 5(2)(b) of the New York Convention, with the argument that enforcing the award would violate EU public policy. If enforcement is sought in an EU Member State, the enforcing court would have to apply the principle established in *Eco Swiss*.¹⁴¹

ICSID provides no such equivalent for review. Even the *Electrabel* tribunal admitted that the Member States will have considerably less control over for ICSID awards due to the very limited grounds for annulment.¹⁴² Under the ICSID convention, States are obliged to recognize and enforce any award 'as if it were a final judgment of a court in that State', Article 54 (1) ICSID Convention. Art. 53(1) provides that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention. The dominant opinion in the literature accepts that there is hardly room for review of awards including on grounds of *ordre public* under the ICSID convention.¹⁴³ An ICSID awards can only be challenged on grounds of sovereign immunity outside the ICSID annulment proceedings.¹⁴⁴ However, a minority opinion in the literature asserts that domestic rules of recognition and enforcement apply because of the similarities of awards with domestic judgments. However, so far this has not been tested by any domestic court.¹⁴⁵

The *Electrabel* tribunal argued in this respect that, because the EU ratified the ECT, the absence of review of ICSID awards with regard to EU compatibility must be in compliance with Article 267 TFEU.¹⁴⁶ This is not a valid argument under EU law, because even the EU legislator cannot derogate from EU primary law and secondly because the ICSID convention itself cannot form part of EU legal order, since the EU is not and cannot be party to the ICSID convention.¹⁴⁷

In the literature, it has therefore been suggested that either only the reference to ICSID in the ECT should be inapplicable between EU Member States, or that Member States could feel compelled by the threat of potential infringement proceedings to follow the minority opinion in the literature and nevertheless review an ICSID award in light of EU *ordre public*.¹⁴⁸ The two latter options have to be considered as rather hypothetical as they stand in contrast with the dominant opinion and practice.

In any case, if an ICSID award is enforced outside the EU, there are no legal means to ensure EU law compatibility,¹⁴⁹ or chance for a review on grounds of EU public policy. Non-EU courts are

were not *obliged* to do so under UNCITRAL rules. See discussion in *Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II* (2014) p 73, 78-9, 150-3.

140 The Convention for the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958 (189) ('the New York Convention'), Article V.

141 Hanno Wehland, 'The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond' (2016) 17 *The Journal of World Investment & Trade* 942, 953.

142 *Electrabel S.A. v. Republic of Hungary ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability*, 30 November 2012, para. 4.158 – 4.159.

143 See, Hanno Wehland, 'The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond' (2016) 17 *The Journal of World Investment & Trade* 942, 957; Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, 'Article 54 – Enforcement', *The ICSID Convention*, (Cambridge University Press, 2009), 1115-1150, para. 40.

144 According to Article 55 of the ICSID Convention; Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *Common Market Law Review* 383 (2009), 427.

145 Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, 'Article 54 – Enforcement', *The ICSID Convention*, (Cambridge University Press, 2009), 1115-1150, para. 91.

146 See *Electrabel S.A. v. Republic of Hungary ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability*, 30 November 2012, para. 4.159, 4.163 – 4.164.

147 See, Hanno Wehland, 'The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond' (2016) 17 *The Journal of World Investment & Trade* 942, 958 – 959.

148 Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *Common Market Law Review* 383 (2009), 428; Hanno Wehland, 'The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond' (2016) 17 *The Journal of World Investment & Trade* 942, 959, 961 – 962.

149 As seen in US District Court for the Southern District of New York in the *Micula* case; See Court of the Southern District of New York, *Ioan Micula and Others v Romania*, Opinion and Order (5 August 2015), p. 7, referenced by Wehland, p. 962; This

neither eligible under Article 267 TFEU to request a preliminary reference, nor can they be obliged to do so under international law.¹⁵⁰ EU Member States are therefore only in a limited number of cases in the position to initiate preliminary reference procedures, that is in non-ICSID awards that are being enforced before an EU court. Whether such a case occurs depends entirely on the arbitration institution the investor chooses, on the state in which the arbitration tribunal will be located, and on the state in which enforcement is sought.

b) Limits to review

In *Eco Swiss*, the CJEU made clear that public policy exception must be interpreted as including EU public policy.¹⁵¹ The CJEU thereby obviously implied that a breach of “not so fundamental” EU law through an award is legitimate and will therefore not undermine the judicial system of the EU. The CJEU accepted this limitation in private arbitration for reasons of efficiency.¹⁵² The BGH raises the question whether it is problematic in the terms of Article 4(3) TEU that the Member States established such an arbitration regime in the first place, but answers this question in the negative because of the previous case law accepting limited review in private arbitration.¹⁵³

However, in the literature it has been questioned whether this conclusion can be transposed to investment arbitration, as – in contrast to private parties – Member States are under a direct obligation to obey all EU law.¹⁵⁴ Furthermore, in the case cited by the BGH (i.e. *Renault*), the CJEU did not find the limited review problematic because the State in which the enforcement was sought had to ensure that the State in which the judgment originated complied with the preliminary reference procedure.¹⁵⁵ Therefore, this case rather concerns the recognition and enforcement of judgments between different Member States’ courts and is therefore a matter of mutual trust, which is discussed in the next section.

Even in the case of non-ICSID awards that undergo review by the EU Member States, it is therefore questionable whether the limitation of possible grounds for review is legitimate.

Notably, Wathelet responds to the above concerns by encouraging EU Member States to avoid relying on the ICSID Convention, meanwhile insisting that these risks are overstated and merely hypothetical.¹⁵⁶ He concludes that that “the effectiveness of the EU judicial system would remain intact” because the Commission may bring an infringement action against any Member State which failed to pursue such review in its national courts.

iii) Can infringement proceedings initiated by the Commission ensure compatibility with Article 267 TFEU?

It has been argued in the literature and by the AG Wathelet, that the Commission can still bring infringement proceedings under Article 258 and 260 TFEU against any Member State which failed to pursue such review in its national courts, as well as in cases of non-reviewability.¹⁵⁷ The tribunal in *Electrabel* also relied on this argument.¹⁵⁸

argument is supported by the Commission, see Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 251.

150 See, also Hanno Wehland, ‘The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond’ (2016) 17 *The Journal of World Investment & Trade* 942, 956

151 In *Eco Swiss*, the CJEU decided that when annulment can be granted to national rules of public policy, this must include EU rules of public policy, Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 37. The New York Convention must be read in this way, *ibid.*, para. 38 – 39.

152 As in Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 33 and Case C-38/98 *Renault*, ECLI:EU:C:2000:225, paras. 33 et seq. as referenced by the BGH in *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 56.

153 *Achmea*, BGH, I ZB 2/15, 3 March 2016, paras. 64 – 65.

154 Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016), 3, 10.

155 Case C-38/98 *Renault* ECLI:EU:C:2000:225, para. 35.

156 Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, paras 251-253.

157 *Ibid.* para 255. The retention of this power of the EU institutions to police Member States fulfillment of their obligations to ensure this effectiveness is also highlighted by *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.162.

158 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.160; Also Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 406.

Although such infringement proceedings might function as a last resort, they are not reliable means for ensuring the uniform interpretation and application of EU law or the allocation of judicial powers. Rather, they create a situation of legal uncertainty that might force EU Member States into an illegal situation only to wait for an infringement proceeding to resolve EU law conflicts or interpretation questions. Such a situation is neither desirable for the EU Member States' courts nor for the investors or any party involved in the dispute.

It is also highly questionable what would be the practical purpose of bringing such infringement proceedings against a Member State which is first hauled into an investment arbitration and, having failed to defend its case, is then subsequently hauled into enforcement proceedings in a third state, the courts of which are neither bound to recognise the issue of uniformity of EU law, nor under the control of the Member States in question.

The on-going *Micula* enforcement may be a case in point. In January 2017, the UK High Court stayed enforcement of the Award pending the CJEU's ruling on annulment of the Commission Decision – on the basis of the “principle of sincere cooperation” in Art. 4(3) TEU.¹⁵⁹ The UK Court however refused the request submitted by Romania and the EU Commission to set aside a 2014 court order registering the ICSID Award.

The *Micula* claimants are also seeking enforcement in the US. The EU Commission intervened in February 2016 as *amicus curiae* in support of Romania's appeal pending before the US Court of Appeals for the Second Circuit, stating that “as a matter of E.U. law, Romania is squarely prohibited from complying with the Award”.¹⁶⁰ The Commission therefore argued that a decision in the US ordering Romania to pay the awarded compensation “renders ineffective — and thus invalidates — an official E.U. act ordering Romania not to pay that compensation”.¹⁶¹ The Commission urged the court to “avoid unnecessary interference with the enforcement and efficacy of the E.U. legal order” by having regard to “three long-standing doctrines of judicial restraint designed for instances where important interests of foreign sovereigns are squarely implicated: the doctrine of international comity, the act of state doctrine, and the foreign sovereign compulsion doctrine”.¹⁶² Notwithstanding the merits of these arguments, ensuring that the Commission's prohibition of Romania from complying with the Award is duly respected by Courts in all jurisdictions where such enforcement might be sought would seem to be a practical impossibility.

Even if the US Courts are successfully persuaded to “avoid unnecessary interference with the enforcement and efficacy of the E.U. legal order”, this cannot lay to rest the widely held concerns about ensuring the effectiveness of the EU's judicial system in the face of the ISDS system. If the CJEU upholds the Commission Decision and finds that the *Micula* Award does violate EU law, *but* the Commission fails in its attempt to block enforcement of that Award in the US, there can no longer be any illusions. The ostensible “supremacy” of EU law is reduced to little more than rhetoric in the world of international investment law.

The major strength of this system of international investment arbitration is precisely the capacity for enforcement in third states which are not bound by the law of the host state. Therefore, no matter what incompatibilities can be found between EU law and any treaty to which the EU is a party and which provides recourse to ISDS, such proceedings *do* and *will* impose practical limitations on the EU law mechanisms available to ensure that the CJEU can fulfill its role as ultimate guardian of EU law. This is all the more so – but not exclusively – when proceedings are initiated under ICSID. And in the case of the ECT, these risks are unambiguous.

c) Mutual Trust

In determining whether intra-EU investment arbitration based on the ECT can be considered part of Article 267 TFEU and therefore compatible with Article 344 TFEU, the principle of mutual trust should be taken into account when assessing the purpose of those provisions.

159 VIOREL MICULA et al v Romania, Case No: CL-2014-000251. [2017] EWHC 31 (Comm).

160 See Brief for Amicus Curiae, The Commission of the European Union in support of defendant-appellant, (15-3109-cv) in Ioan Micuca, European Food S.A., v Government of Romania, United States Court of Appeals for the Second Circuit, 4 Feb 2016, p 10.

161 *Ibid.* p 13-14

162 *Ibid.* p 6, 12

The CJEU has declared mutual trust a fundamental principle of the EU legal order.¹⁶³ According to this principle, EU Member States are ‘required to presume that fundamental rights have been observed by the other Member States’.¹⁶⁴ Although, this principle applies *in particular* to the area of freedom, security and justice, the formulation ‘in particular’ indicates that it is in principle relevant for all fields of EU law. Further, the CJEU made clear in *West Tankers*, that also in the field of civil and commercial disputes, the EU legal order aims at strengthening the ‘the trust which the Member States accord to one another’s legal systems and judicial institutions’.¹⁶⁵ The CJEU also found the fact that the ECHR accession agreement would have led in practice to the establishment of a mechanism for double checking the compliance of other Member States with fundamental rights was sufficient to declare the agreement incompatible with the autonomy of EU law.¹⁶⁶

If the principle of mutual trust compels Member States to refrain from submitting to national judicial review such sensitive concerns as the protection of the fundamental rights in other Member States, why should they be allowed to expand a parallel system of justice for certain economic actors? Kokott and Sobotta ask: ‘If Member States trust each other sufficiently to support the free movement of judgments or arrest warrants, why do they need a special system of legal protection for investors?’¹⁶⁷ They further argue that the fact that investors enjoy an additional avenue for judicial remedy that can even be pursued in parallel with proceedings before domestic courts – as the *Vattenfall II* case demonstrates – may ultimately undermine the rule of law principle of equal access to justice.¹⁶⁸ Such parallel claims are prohibited for everyone else within the EU legal order.

In *Eureko*, the Commission raised the argument that intra-EU investment arbitration also undermines the mutual trust between EU Member States. The Commission points out that ‘[m]utual trust in the administration of justice in the European Union is one of the principles regarded as necessary by the European Court of Justice for the sound operation of the internal market’.¹⁶⁹

The *Binder v. Czech Republic* tribunal – deciding an intra-EU BIT dispute – rejected this argument, declaring mutual trust a ‘soft-law’ principle.¹⁷⁰ AG Wathelet also rejects an infringement of the principle of mutual trust, because – so he argues – there is no guarantee that an individual could rely on an international treaty before national courts and that therefore ‘recourse to international arbitration is the only means of giving full practical effect to the BITs by creating a specialized forum’¹⁷¹

However, in the case of the ECT, Member States courts are obliged to apply the ECT rules as an integral part of EU law. Further, according to EU law, individuals can rely on international treaties when ‘the nature and the broad logic of the latter do not preclude [such a review] and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise’.¹⁷² This is likely to be the case for investor protection provisions, since this is their very purpose. Investment arbitration is therefore not a necessity but an additional benefit. If mutual trust is understood as a fundamental principle of EU law, the mere fact that the EU is party to the ECT does not diminish its effect.¹⁷³

As Kleinheisterkamp rightly points out, deficiencies in the judicial systems of other Member States are general problems that ‘that every merchant, service provider, or worker faces’.¹⁷⁴ Therefore, in order to remedy such deficiencies, the EU is maintaining several programmes such as capacity building, training for judges or technical assistance to domestic judiciaries with the aim of ultimately guaranteeing equivalent standards of judicial protection EU-wide. The parallel system of investment protection and arbitration arguably does not fit into this picture but rather contributes to fuelling mistrust.¹⁷⁵

163 Opinion 2/13, ECLI:EU:C:2014:2454, para. 191.

164 Opinion 2/13, ECLI:EU:C:2014:2454, para. 192.

165 Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, ECLI:EU:C:2009:69, para 30.

166 Opinion 2/13, ECLI:EU:C:2014:2454, para. 194.

167 Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016), 3, 10.

168 *Ibid.*, 12 – 13.

169 *Eureko v Slovakia*, Award on Jurisdiction, PCA Case No. 2008-13, 26 October 2010, para. 185.

170 *Binder v. Czech Republic*, Award on Jurisdiction, UNCITRAL, 6 June 2017, para. 43.

171 Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699. para. 261 – 267.

172 *Intertanko*, Case C-308/06 ECLI:EU:C:2008:312, paras. 44 – 45.

173 Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016), 3, 10.

174 Jan Kleinheisterkamp, ‘The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European Law Perspective’ *LSE Law, Society and Economy Working Papers* 7/2011, p. 13.

175 *Ibid.*, p. 14.

This parallel system of investment arbitration appears to be hardly reconcilable with the principle of mutual trust and creates an imbalance of judicial protection.

d) Non-Discrimination

Article 18 TFEU prohibits ‘any discrimination on grounds of nationality’. The Commission has argued that ISDS claims brought under intra-EU BITs are incompatible with Article 18 TFEU.¹⁷⁶ It has been argued that ISDS may violate the principle of non-discrimination because it constitutes a privilege only accorded to certain investors.¹⁷⁷ According to the CJEU case law, such a privilege is only discriminatory if the non-privileged person is in an objectively comparable situation.¹⁷⁸

AG Wathelet recently relied on a comparison between BITs and double tax conventions to dismiss any potentially discriminatory effect of an ISDS clause.¹⁷⁹ The CJEU has made clear in its case law on double tax conventions that if the benefit is considered an integral part of a bilateral agreement and contributes to the overall balance of the agreement and cannot be separated from it, such difference in treatment is legitimate.¹⁸⁰ The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is then to be understood as an inherent consequence of bilateral double taxation conventions.¹⁸¹

Others, including the Commission,¹⁸² are sceptical about the validity of this comparison. The BGH points out, that in contrast to the double taxation convention, the remainder of a BIT agreement would still make sense without the arbitration clause; an absence of such would not undermine the overall balance.¹⁸³ The same can be said to be true for the ECT.

The purpose of a double tax convention is to avoid double taxation for individuals that could otherwise occur in cross-border trade. The exemptions from tax only function on reciprocal terms. Tax exemptions or benefits are therefore indeed an integral part of such a reciprocal agreement. However, in the case of the ECT, judicial remedy can be sought before national courts and is not indispensable for the remainder of the ECT.¹⁸⁴ Whereas a double taxation convention does not make sense without the reciprocity, the possibility of submitting a claim to investment arbitration is clearly an additional benefit, which is only granted to the investor because it is a national of the other state party. Moreover, prior to the Lisbon treaty double tax conventions were specifically encouraged by the Treaties if not even required (Article 293 EC Treaty), which is not the case for intra-EU investment arbitration.¹⁸⁵

On first sight, this does not apply to the present question. Under the ECT, the EU and all Member States are contracting parties and therefore all EU investors enjoy equal protection under the ECT on a reciprocal basis.¹⁸⁶

However, this has changed due to Italy’s recent withdrawal from the ECT, as a result of which Italian investors will lose any such protection when they invest in other contracting parties to the ECT.¹⁸⁷ The

176 *Eastern Sugar BV (Netherlands) v The Czech Republic*, UNCITRAL, SCC Case No 088/2004, Partial Award of 27 March 2007, para 126. The possibility of investment arbitration infringing the non-discrimination principle has also been addressed by Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 402.

177 As analyzed in detail by the BGH in *Achmea*, BGH, I ZB 2/15, 3 March 2016, para 72.

178 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para 73 with reference to C-374/04, *Test Claimants in Class IV of the act group Litigation*, ECLI:EU:C:2006:773, para 83.

179 Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 73 – 76 with reference to C-376/03, *D.*, EU:C:2005:424.

180 C-374/04, *Test Claimants in Class IV of the act group Litigation*, ECLI:EU:C:2006:773, para 88 – 91.

181 *Ibid.*, para. 91.

182 *Achmea*, BGH, I ZB 2/15, 3 March 2016, paras. 78 – 79.

183 *Ibid.*, para 74.

184 See Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016) 3, 9.

185 *Ibid.*, 9.

186 *Ibid.* 10.

187 Notably, Advocate General Wathelet also relies on the *voluntary* nature of withdrawal as grounds for ignoring any implications resulting from Article 18. See Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, paras 63-65: “If there is thus a difference in treatment of Czech and Italian investors, that is because their Member States decided to withdraw from them the benefit which the BITs specifically conferred on them. Nonetheless, Estonian, Irish, Cypriot and Lithuanian investors do not benefit from a provision equivalent to Article 8 of that BIT vis-à-vis the Slovak Republic, except for investments in the field of energy, where the Energy Charter Treaty affords them such an opportunity. In my view, even in the case of those investors there is no discrimination prohibited by EU law.” Following this logic, gradual fragmentation of ECT membership should not provoke any violation of Article 18.

complete effect of withdrawal is not imminent because the “sunset” clause of the ECT¹⁸⁸ provides for investment protection – including the consent to arbitration – to be maintained for investments made before the withdrawal coming into effect (i.e. January 2016) for another 20 years (i.e. January 2036). Nonetheless the breach of the principle of non-discrimination has now become a distinct possibility as regards the intra-EU application of the ECT. This could lead to the arbitration clause being void. However, opinions on the legal consequences differ.

In the literature it has been proposed that such an arbitration clause would either have to be eliminated, or expanded by applying the Most-Favored-Nation (MFN) approach.¹⁸⁹ The case law in this regard has been interpreted differently. AG Wathelet maintains that Article 18 TFEU does not contain a MFN principle.¹⁹⁰ The BGH on the other hand reads the CJEU case law in precisely this way. Accordingly, the consequence of discriminatory treatment is that the party discriminated against can claim access to the same treatment.¹⁹¹ If one follows the BGH, the arbitration clause has to be expanded to all EU investors, including Italian investors or investors of any EU Member State that withdraws from the ECT. Article 18 TFEU will not have the effect of making the arbitration clause inapplicable to any intra-EU arbitration between an EU Member State and an EU investor where both home and host states remain members to the ECT. On the other hand, one can also find support in the literature for the elimination of an arbitration clause on grounds of the principle of non-discrimination.¹⁹²

B. Substantive Incompatibilities

In this section, we briefly outline the main concerns about the substantive incompatibility of the ECT’s investment protection standards with EU law. As a preliminary point it is important to note that for the purposes of determining if the ECT’s arbitration mechanism is compatible with EU law, it is *not crucial* to determine the substantive compatibility of the ECT with EU law.¹⁹³ This is because, from an EU law perspective, a finding of substantive incompatibility regarding standards of investment protection is not strictly necessary to establish the incompatibility of the arbitration clause with EU law. Article 344 TFEU does not concern substantive compatibility, but the *maintenance of the allocation of judicial powers within a judicial system*. The CJEU has made clear that the fact that procedural rules of an ‘external’ court or tribunal pose a risk of undermining the exclusive jurisdiction is sufficient for declaring a breach of Article 344 TFEU; no actual substantive compatibility is required.¹⁹⁴

This question of conflict has however arisen in the legal arguments of various tribunals tasked with deciding intra-EU ISDS cases. There are a number of possible reasons for this. One is that, in attempting to show that Article 344 TFEU is not violated by intra-EU ISDS cases, tribunals have sought to demonstrate that their arbitral award need not concern the interpretation or application of EU law (which would be prohibited by Article 344 TFEU) precisely *because* the applicable investment law is compatible with EU law. In this very reasoning however, tribunals have ultimately applied or interpreted EU law.¹⁹⁵

Another reason, specific to the ECT is that its Article 16 expressly prohibits the lowering of the standards of investment protection established by the agreement. Therefore the Commission has itself had occasion to claim that the substantive standards of protection within the EU are equivalent to those provided for in the ECT.¹⁹⁶ The Commission’s position requires a delicate balancing act, as there is an obvious tension in

188 ECT Article 47 (3).

189 Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 402.

190 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v. Achmea*, ECLI:EU:C:2017:699, para. 76.

191 *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 77 with reference to Case 235/87, *Mattenca*, ECLI:EU:C:1988:460, para 23 and C-85/96, *Martinez Sala*, ECLI:EU:C:1998:217, para. 63.

192 Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 402.

193 Also, the Commission has argued that substantive incompatibility is a matter of jurisdiction: In *Isolux v. Spain*, the Commission in its amicus brief recommended to stay proceedings until the Commission has decided over potentially illegal state aid as requested by Spain while citing the *Micula* saga, see *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain (SCC Case No. 2013/153)*, Award, 21 January 2016, paras. 622. See, also Advocate General Wathelet, who is analysing the compatibility of the underlying BIT with EU law to determine whether a tribunal would interpret EU law, paras. 179 et. seq.

194 Also noted by the BGH in *Achmea*, BGH, I ZB 2/15, 3 March 2016, para. 44 with reference to with reference to Opinion 2/13, ECLI:EU:C:2014:2454, para. 207.

195 See, e.g. *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 para. 4.165, citing *Maffezini v. Spain* (ICSID Case No. ARB/97/7) (Argentina/Spain BIT), Award of 13 November 2000, para. 69 in which the arbitration tribunal interpreted EU law.

196 *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.104-5, summarising the European Commission’s arguments: “EC State aid law cannot be regarded as a violation of the Energy Charter Treaty, as long as the EC is considered to protect investor’s rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that

simultaneously insisting that there is potential for conflict with standards in IIAs and that the EU law already guarantees adequate and equivalent protection.

The case of the ECT is therefore comparable to the *MOX Plant* case, discussed above.¹⁹⁷ As far as an area is covered by EU competence, the international treaty is an integral part of EU law. In such a case the ISDS tribunal would decide upon EU law.

For the purposes of this discussion, it is important to highlight the probability of material conflict between these two legal regimes, as awards rendered by arbitral tribunals may raise issues of incompatibility with EU law, and Member States have an obligation to eliminate incompatibilities in *posterior* treaties (prior to their accession to the Union – see Section III.A below). Potentially, clashes between these regimes may occur when either the legal environment that is specifically protected under the ECT changes due to developments in EU law, or when specific guarantees or benefits given by the host state to the investor are in breach of EU law.¹⁹⁸

It is clear from the case law of the CJEU, that the primacy of the EU Treaties over international agreements will prevail in the case of any conflict between those agreements and the Treaties.¹⁹⁹ However, international agreements to which the EU is a party form a part of EU law by virtue of Article 216 TFEU. As such the ECT enjoys precedent over EU secondary law, and the ECT provisions would not necessarily be in breach of EU law if incompatible with secondary law. The CJEU has ruled that “the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements”.²⁰⁰

In the case of the ECT, conflict with EU primary law is possible, even likely. On a general level, fundamental differences between these regimes are clearly evident. The EU’s legal system concerns the comprehensive regulation, facilitation and protection of economic activity and public policy objectives. TFEU’s Articles on freedom of capital movement (63 – 65), covering market access, and on the freedom of establishment and services (49 and 56), covering national treatment, pursue largely similar aims to those of IIAs, as they are also essentially aimed at the liberalization of cross-border investments.²⁰¹ However, EU law functions according to fundamentally different premises. Besides a general prohibition of restrictions imposed by the Member States, the EU relies on harmonization at EU level, i.e. regulation, as a tool to facilitate economic integration. The development of EU law – in contrast to the rigid commitments of IIAs – therefore has to remain responsive to political developments within the EU Member states. Restrictions on capital movement and freedom of establishment are subject to assessments of necessity and proportionality. Furthermore, there is a comprehensive and elaborate jurisprudence on fundamental rights protection, including the right to property, and the grounds on which restrictions on economic rights might be justifiable.

In contrast, the investment protection regime – of which the ECT forms an important part – promotes broad standards of protection, which may be aptly summarized as ‘comparatively more ambivalent and thus susceptible to a more investor-friendly interpretation, [and leading to] potentially more lucrative remedies’.²⁰² The ECT itself guarantees fair and equitable treatment, national treatment, the protection of specific guarantees and full protection and security.²⁰³ It further requires full compensation for direct and

provided by the relevant ECT standards”... The European Commission then develops at length the equivalence in substantive protection between EU law and the ECT under different standards of treatment: fair and equitable treatment, encouragement and creation of stable, equitable, favourable and transparent conditions, constant protection and security, no impairment by unreasonable or discriminatory measures, no treatment less favourable than that required by international law, national treatment and most favoured nation treatment, and expropriation. The European Commission adds that there is also, in its submission, an equivalent procedural protection under the ECT and EU law on State aid, thereby equating what it describes as a “comprehensive EC system of judicial review” with the settlement of investor-state disputes by international arbitration.’

197 Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 404.

198 See, also *ibid.* 413.

199 Case 10/61, *Commission v. Italy*, EU:C:1962:2, para. 23; Case 235/87, *Matteucci*, Opinion 2/13, EU:C:2014:2454, para. 193; Case C-28/12, *Commission v. Council*, EU:C:2015:282, para. 40. *Opinion 2/13* further underlines that Member States are obliged to resolve any such conflicts between their international commitments and the Treaties in favour of the latter.

200 Case C-61/94 *Commission v Germany*, ECL:EU:C:1996:313, para 52.

201 See, also, Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016), 3 and Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009).

202 Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 407.

203 ECT Article 10 (1) and Article 12 ECT.

indirect expropriation.²⁰⁴ As highlighted below, these standards are not subject to the same limitations as may be possible under EU law.

This also illustrates the likelihood of further infringement proceedings. AG Wathelet has recently argued that there is only a single example of incompatibility – the Micula case – and that therefore the fear of a systemic risk posed by awards being incompatible with EU law is ‘greatly exaggerated’.²⁰⁵ In fact the potential for clashes between substantive provisions of EU law and the ECT (as well as other IIAs) seems quite significant. To date, only two ECT-based cases were won by investors: *Eiser v Spain* and *EDF v Hungary*. But with 50 cases pending – 32 of which seem to be based on similar breaches to those in the *Eiser* case – fears of a systemic incoherence that might threaten the function of the two parallel legal systems are not at all ‘exaggerated’.

If infringement proceedings are required to address issues of substantive incompatibility, this undermines not only legal certainty for investors, Member States, and other affected parties, but also other fundamental pillars of EU legal order such as mutual trust and loyal cooperation.

Against this background, we seek to highlight below the nexus of potential incompatibilities with regard to three areas: public policy, capital transfers and state aid.

i) Public Policy

Public policy measures that interfere with the ECT’s investment protection standards are only legitimate under limited circumstance. Article 24(3) ECT only allows for restrictions that are necessary for the protection of essential security interests, for the respect of non-proliferation policies and ‘for the maintenance of public order’. Article 24(2)(b) ECT permits measures necessary to protect human, animal or plant life or health explicitly in the context of investment protection. However, these exceptions do not apply to full security and protection (Article 12) and protection against expropriation (Article 13).

The regulation of public policy is organized fundamentally different under EU law. A number of public interest issues enjoy particular weight under EU law. As Kleinheisterkamp elaborates, “actually all fundamental freedoms of the internal market (i.e. also the free movement of goods, workers, and capital) are subject to such public policy exceptions in the Treaty, by which the member states reserved the right to suspend those freedoms to take regulatory measures for the sake of safeguarding national interests in exceptional circumstances even at the expense of discriminating against nationals of other EU member states.”²⁰⁶

Environmental protection is an important example. The EU is explicitly committed to attain a high level of protection (Article 114(3) and Article 191 TFEU); to that end the EU endorses the “precautionary” and the “polluter pays” principles and has enshrined the protection of the environment into the Charter of Fundamental Right (Article 37 of the Charter of Fundamental Rights).

The CJEU has also found certain provisions of competition law as fundamental to the EU and therefore an *ordre public* reason that could prevent enforcement of awards.²⁰⁷ As noted above, it was established in *Eco Swiss* that grounds for the annulment of awards must be interpreted as covering EU law public policy.²⁰⁸

For the investment tribunals, the EU’s approach to the protection of public interests is of little note. At most, EU law public policy justifications have played a role for the assessment of the general reasonableness of the state measures.²⁰⁹ Deference to such objectives, or the doctrine of “margin of appreciation” have been inconsistently applied – and often rejected – by arbitral tribunals. Therefore, it is

204 ECT Article 13.

205 Opinion of Advocate General Wathelet, Case C-284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, para. 45.

206 Jan Kleinheisterkamp, ‘Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty’. *Journal of International Economic Law* 15(1), 85–109 (2012), 91

207 Case C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, para. 36.

208 *Ibid.*, para 35.

209 See, for example, *AES v Hungary (II)*, ICSID Case No. ARB/07/22, Award, para 769: ‘[The behaviour of Hungary] must be analysed in light of the ECT, to determine whether the measures, or the manner in which they were introduced violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by the Tribunal when determining the “rationality”, “reasonableness”, “arbitrariness” and “transparency”. Arguing that EU law should not play a role as a justification, Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *Common Market Law Review* 383 (2009), 417.

rather likely that investment tribunals constituted pursuant to the ECT continue to determine the legitimacy of public interests without regard for public policy objectives legitimate under EU law.

In practice, variances over the balance of environmental policy and investment protection in EU law and the ECT may not lead to any systematic resolution based on either legal method or political choice. Rather – as the *Vattenfall I* ECT case clearly demonstrates – the economic threat of having to bear lengthy and costly arbitration proceedings and exorbitantly high sums of compensation is likely to induce the environmental authorities with limited resources to opt for the cheapest option: quick settlements that satisfy the investor.²¹⁰ Critics and academics, as well as the UN High Commissioner for Human Rights have long warned of such ‘regulatory chill’.²¹¹ In the recent infringement case against Germany as a consequence of the settlement in the *Vattenfall I* arbitration, the CJEU reproached Germany for breaching the EU Habitats Directive by authorizing the operation of a coal-fired power plant despite a flawed environmental impact assessment.²¹²

In this specific case, Kokott and Sobotta doubt “whether the Commission could obtain a finding of the Court of Justice that there has been an infringement of EU law if the original environmental conditions of the permit were not allowed under the Energy Charter”, where the infringement concerns the Habitats Directive – secondary EU legislation – over which the obligations of the ECT would prevail.²¹³

ii) Capital transfer

The ECT’s capital transfer provisions²¹⁴ are equivalent to provisions in extra-EU BITs which have already been subject to infringement proceedings. In 2009, the CJEU found three member states – Austria, Sweden and Finland – liable for failing to eliminate incompatibilities between the TFEU Articles concerning restrictions on capital movements and the capital transfer provisions of their extra-EU BITs.²¹⁵

Indeed capital transfer guarantees – which in most IIAs are unqualified – potentially “collide with the powers of the Council, partially in co-decision with the European Parliament, to impose restrictions on the free transfer of capital to and from third countries in exceptional circumstances”.²¹⁶ This collision concerns Article 64(2) TFEU which aims to ensure reciprocity of treatment of financial operators in third countries; Article 66 TFEU concerning restrictions in case of serious difficulties for the operation of the economic and monetary union; and Article 75 TFEU which permits freezing funds, financial assets, or economic gains relating to terrorist or similar activities.

In the ECT, Articles 14 and 24(3) may be compatible with the latter of these objectives, as a public policy exception to the capital transfer guarantee. But the first two are not permitted under the ECT exceptions.

However, some experts argue that the ECT should be distinguished as a mixed agreement to which the EU is itself a party: “although Article 14 of the ECT on capital transfers is similar to the BIT provisions held to be inconsistent with EU law in these cases, as the EU, as well as its member states, has entered into the ECT, it can be seen as having limited its own competence to restrict capital movements in the Energy Sector.” The authors note for instance, that the relevant articles of TFEU “*permit, but do not require*, the EU to enact restrictions on capital movements.”²¹⁷

210 See, Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016), 3, 12.

211 Report of the High Commissioner for Human Rights on Human Rights, Trade and Investment to the UN Economic and Social Council, Commission on Human Rights, Economic, Social and Cultural Rights’ (2003) UN Doc. No. E/CN.4/Sub.2/2003/9, 22.

212 Case C-142/16, *Commission v Germany*, ECLI:EU:C:2017:301; see also Laurens Ankersmit, ‘Case C 142/16 *Commission v Germany*: the Habitats Directive meets ISDS?’, September 6, 2017. European Law Blog: <https://europeanlawblog.eu/2017/09/06/case-c-14216-commission-v-germany-the-habitats-directive-meets-isds/> [Accessed 14 Nov 2017]

213 Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’, *Cambridge Yearbook of European Legal Studies*, 18 (2016) 3, 21.

214 ECT Articles 14 and 24(3).

215 Cases C-205/06, *Commission v Austria*, ECLI:EU:C:2009:118; C-249/06, *Commission v Sweden*, ECLI:EU:C:2009:119; C-118/07, *Commission v Finland*, ECLI:EU:C:2009:715.

216 Jan Kleinheisterkamp, ‘The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European Law Perspective’ LSE Law, Society and Economy Working Papers 7/2011, p 89.

217 Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*. Cambridge University Press, 2011, p 89; see also see Thomas Eilmansberger, ‘Bilateral Investment Treaties and EU Law’ (2009) 48 *Common Market Law Review* 383 at 411–12.

A similar line of argument has been raised on the basis of the ECT's priority over secondary legislation. Graham Coop – writing while in his capacity as General Counsel to the Energy Charter Secretariat – submits that even though the “Communities’ powers to restrict freedom of movement of capital emanates from an EU primary treaty... any exercise of those powers must be made via – at the most – EU secondary legislation”.²¹⁸ Coop therefore argues that the ECT should prevail, at least with regard to third countries.

iii) State Aid

Member States have an obligation under Article 107 TFEU not to distort the internal market through state aid. This issue has been central to several key ECT cases decided to date, namely the *AES*,²¹⁹ *Electrabel*,²²⁰ and *EDF*²²¹ arbitrations (each concerning Hungary's termination of so-called Power Purchasing Agreements), as well as the intra-EU BIT *Micula* case.²²² The latter two cases (*EDF* and *Micula*) were won by the investors. Even in *AES* and *Electrabel* however, the tribunals were unwilling to demonstrate deference to the threat that an award of compensation would perpetuate a breach of EU state aid law.²²³ Rather both tribunals stressed the lack of any incompatibility between the ECT and EU law.

The issue of state aid in these cases arose from the “deal-sweeteners” made by Central and Eastern European states’ to investors prior to their accession to the EU and their obligations under intra-EU BITs and the ECT to honour those deals.²²⁴ While EU accession brought the requirement to abolish unauthorised state aid, litigation under the investment agreement threatened severe penalties for doing so. As one scholar notes, when it comes to state aid, “a Member State's dilemma is manifest”:

“At the same time that it is responsible under EU law for ensuring the recovery of an unauthorised state aid (and is subject to Commission prosecution, fines and private damages actions if it fails to do so), a Member State may be enjoined from doing so under international investor protection law principles. A State that proceeds with such a revocation will likely face an investment arbitration, and possibly an award in damages that the courts of that State, like other countries' courts, have an international obligation to enforce.”²²⁵

Perhaps more than in any other context, the potential conflict with EU state aid rules illustrates the central tension between ISDS and the EU judicial system, as this goes to the core of the issues of enforcement highlighted above. The Commission has long argued that a Member State's compliance with an arbitration award ordering compensation to the investor may *in itself* be a breach of EU state aid rules, where the measure challenged was the abolition of unauthorised state aid “since the damages would de facto re-

218 Graham Coop, ‘Energy Charter Treaty and the European Union: Is Conflict Inevitable?’, *Journal of Energy & Natural Resources Law*, 27:3, 404-419, (2009) p 418

219 *AES v Hungary (II)*, ICSID Case No. ARB/07/22, Award, Award, para 7.3.10. In its defence, Hungary suggested that any finding by this Tribunal that Hungary should be held accountable for its violations of international law would “seriously undermine the integrity of EC State aid law.”

220 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19. Notably, the Commission's amicus submission outlined a history of the evolving relations between Hungary and the EU, “recounting that the 1993 Europe Agreement between the European Union and the Respondent already contained specific rules on State aid similar to those later applicable to the Respondent under the EC Treaty, particularly Article 62(1)(iii) of the Europe Agreement, which provided as follows: “1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Hungary: ... (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods” See Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.94

221 *Electricite de France (EDF) International S.A. v. Republic of Hungary* (2009, UNCITRAL, PCA) - Award dated 3 December 2014. Brought under the UNCITRAL rules, no Award in this case is publically available. It is known that the EU Commission intervened in proceedings (see a24) and that investors were awarded 107 million EUR. In 2015, Hungary unsuccessfully appealed to the Swiss courts to annul the decision, arguing that the EDF's claim was in fact precluded by Hungary's reservation under Art. 26(3)(c) ECT, to not give unconditional consent to the submission to an international arbitration of any dispute falling within the scope of this umbrella clause (Art. 10(1) ECI) See Swiss International Arbitration Decisions, “Swiss Supreme Court addresses the difference between treaty claims and contract claims”: <http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims> [Accessed 14 Nov 2017].

222 *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award 11 Dec 2013

223 As well as the above cases, see Commission Decision C (2008) 2223 final of 4 June 2008 on the State Aid Award by Hungary through Power Purchase Agreements in Case C-41/2005; EU Commission, Amicus Curiae Brief, *U.S. Steel v Slovakia*, PCA case No. 2013-6, 15 May 2014, para. 37.

224 Jan Kleinheisterkamp, ‘The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European Law Perspective’ LSE Law, Society and Economy Working Papers 7/2011, p 91

225 George A. Bermann, ‘Navigating EU Law and the Law of International Arbitration’, *Arbitration International*, Vol. 28, No. 3 (2012), p 422.

allocate to the enterprise the forbidden economic benefit and thus perpetuate the illegal distortion of the market”.²²⁶

The issue of state aid therefore concerns as much the possibility that *enforcement* of awards violates EU law, as it does *substantive conflict* between EU law and investment protection. Kleinheisterkamp suggests that the court of an EU member state “would be under the obligation to refuse recognition and enforcement of such an award to the degree that it contradicts European competition law”, but that “the situation may, however be different if the colliding international obligation is covered by (what is now) Article 351 TFEU”.²²⁷ As detailed below, the application of this Article to the ECT is fraught with complexities, and the closest analogous case²²⁸ concerns the Swiss–Slovak BIT, an extra-EU agreement.

In the current wave of ECT cases concerning solar energy, EU state aid rules may also soon come into play. One scholar has recently argued that these cases reveal “new possible conflicts between the ECT and EU law” since the “policy changes seem to be required or, at least, encouraged by EU law”.²²⁹ The Commission’s 2014-issued “Guidelines on State aid for environmental protection and energy”, aim at the integration of the concerns of environmental protection, energy security, and competition:

“To this end, they introduce new rules concerning State aid for renewable energy that urge Member States to transit to more market friendly measures in support of renewable energy. More specifically, they provide, amongst others, that the (1) price of green certificates systems should be established by demand and supply in the market, (2) all aids should be granted through a competitive bidding process from 2017, and (3) operating aid should take the form of a premium in addition to the market price.”²³⁰

Insofar as these guidelines may amend rules governing the Commission’s assessment of State aid granted to renewable energy producers under Article 107, it is however apparent that the present solar energy ISDS claims concern measures which pre-date the new Guidelines. The suggestion that such measures were required by EU law has therefore been given short shrift in the available decisions to date.

In *Charanne v Spain*, the tribunal acknowledged that the European Commission had indeed initiated “a process of preliminary review of state aid, which has extended to the compensation regime for renewable energy”, but pointed out that “this initiative has not led to any decision so far,” so the challenged measures could hardly be characterised as pursuant to such a decision – as was the case with Hungary’s PPAs.²³¹ In the *RREEF* decision on jurisdiction, the tribunal noted that the fact that the European Commission had “criticized the measures adopted by the Kingdom of Spain suggests that these were not taken at the direction of the European Commission nor were they required by EU law”.²³²

However, as the EU continues to develop such policy approaches in the future, the potential for future clashes with the ECT is clear indeed.

226 Jan Kleinheisterkamp, ‘The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European Law Perspective’ LSE Law, Society and Economy Working Papers 7/2011, p 92.

227 See discussion in Jan Kleinheisterkamp, ‘Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty’. *Journal of International Economic Law* 15(1), 85–109 (2012) p 92.

228 Case C-264/09, *Commission v Slovakia*, ECLI:EU:C:2011:580.

229 Francesco Montanaro, “Ain’t No Sunshine”: Photovoltaic Energy Policy in Europe at the Crossroads Between EU Law and Energy Charter Treaty Obligations in *International Economic Law: Contemporary Issues*, edited by Giovanna Adinolfi et al. Springer 2017, p 224.

230 *Ibid.*

231 *Charanne B.V. and Construction Investments S.A.R.L. v Kingdom of Spain*. SCC Case No. 062/2012. Final Award issued on 21 January 2016 (Unofficial English translation of Mena Chambers), para 449.

232 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain*. ICSID Case No. ARB/13/30. Decision on Jurisdiction of 6 June 2016, para 59.

III. IMPLICATIONS OF INCOMPATIBILITY WITH EU LAW

In the foregoing discussion, a number of potential incompatibilities between the ECT and EU law have been outlined. To conclude, we briefly outline examine what practical consequences of these incompatibilities arise.

As noted, it is widely acknowledged that international arbitral tribunals are bound to perceive the supremacy of EU law differently to both member states courts and the CJEU.²³³ Such tribunals may approach issues of EU law prudently and avoid open conflict, as many have to date. They are not however guaranteed to do so, nor is it clear that they are obliged to. Whether or not such an outcome is desirable, the position adopted by the *Achmea/Eureko* tribunal is unquestionably correct: the mere fact of substantive incompatibility between a BIT and EU law is not a reason for the tribunal itself to deny any 'wider rights' accorded to claimants under the BIT, as it is not for an arbitral tribunal to 'cancel rights created by a valid treaty'.²³⁴

It similarly cannot be expected of tribunals constituted to settle intra-EU disputes arising on the basis of the ECT (or a BIT) to decline jurisdiction on the basis of any of the above arguments regarding parallel administration of justice, and arguably less so in the case of the ECT, which the EU itself proposed, drafted, joined and of which it remains a member. Such was recently argued by the tribunal in *RREEF v Spain*: the tribunal asserted that the ECT is its "constitution", that it is not within the tribunal's jurisdiction to alter what the Parties to the ECT themselves agreed,²³⁵ and – with reference to Article 16 ECT – concluded that while it is obliged to seek a harmonious interpretation, if it is unable to do so the ECT must prevail over EU law.²³⁶ Divergences from the (more or less) harmonious approach adopted in *Electrabel*²³⁷ are already beginning to emerge.

The Commission's practice of raising objections over intra-EU disputes in *amicus* briefs therefore begins to appear rather futile. Relying on individual tribunals to navigate these tensions cannot be regarded as a satisfactory approach in the long-term.

It is also worth noting that the insistence on the supremacy of EU law in relation to intra-EU disputes is not necessarily conducive to a more satisfactory solution regarding some of the inconsistencies outlined above. For example, even if a tribunal accepted that EU law *necessitates* that the ECT be interpreted as to include an "implicit disconnection clause" – as argued by Spain in *RREEF* – this would do nothing to prevent ECT claims being brought by intra-EU investors who are able to claim extra-EU nationality by virtue of subsidiaries in the territory of an extra-EU party to the ECT.²³⁸ In the intra-EU cases pending, two claimants also identify Japan and Switzerland as "home states" on which to base their protection under the ECT. The survival of claims on this basis suggests that the exclusion of intra-EU disputes under the ECT could result – at best – in an arbitrary advantage to those multinational enterprises capable of claiming multiple (intra- and extra-EU) nationalities.

A. Duty of Sincere Cooperation

i) Article 4(3) TEU

233 Jan Kleinheisterkamp, 'Investment Protection and EU Law', p 108.

234 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*) Award on Jurisdiction, Arbitrability and Suspension of 26 Oct 2010 para 266-7. See also Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty', p 97.

235 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*. ICSID Case No. ARB/13/30. Decision on Jurisdiction of 6 June 2016, para 74.

236 *Ibid*, paras 75-77: According to the tribunal, the ECT must prevail "over any other norm (apart from those of *ius cogens*...)"

237 In *Electrabel*, the Tribunal found no general obligation under international law compelling a harmonious interpretation of the ECT and EU law; rather the ECT's "historical genesis" within European Union creates a "special" situation which obliges a harmonious interpretation of the ECT with EU law. See *Electrabel S.A. v. Republic of Hungary* ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.130.

238 Andrés Delgado Casteleiro for instance names CSP Equity Investment S.a.r.l. (with a pending case against Spain) in this regard. See 'Disconnecting from the Energy Charter Treaty: Disconnection clauses and normative conflicts between European Union law and the Energy Charter in Treaty' forthcoming in *The EU and investment arbitration under the Energy Charter Treaty*, edited by A Dimopoulos, Cambridge University Press. p 20. Available here: https://www.academia.edu/32822278/Disconnecting_from_the_Energy_Charter_Treaty_Disconnection_clauses_and_normative_conflicts_between_European_Union_law_and_the_Energy_Charter_Treaty p Andrés Delgado Casteleiro – names CSP Equity

Article 4(3) TEU sets out the principle of sincere cooperation among Member States of the EU, providing that the “Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. Member States are obliged to take ‘any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” and to “facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives”.

As Advocate General Maduro stated in relation to this principle in his Opinion in Cases C-205/06 and C-249/06, it is “not permissible for a Member State to frustrate any form of Community action.”²³⁹ It is not entirely clear what would amount to a “concerted strategy”, and whether the Commission’s position with regard to the ECT is at present consistent enough to constitute such a strategy.²⁴⁰ As discussed in Part I, the Commission has intervened as an *amicus curiae* in numerous ECT cases, but the content and even the frequency of those submissions is not public (see Annex 1). In references to Commission arguments made by individual tribunals, it is clear that the Commission has encouraged tribunals to avoid conflict through harmonious interpretation. More recently has the Commission explicitly characterised the intra-EU application of Article 26 ECT as incompatible with EU law.²⁴¹

Article 4(3) TEU may therefore become relevant in respect of ensuring coordination between the institutions and Member States with regard to future renegotiation or withdrawal from the ECT.

In respect of current practice, the issues raised above in Part II.A highlight significant practical limitations for Member States in the fulfilment of this duty of sincere cooperation. The *Micula* proceedings in the US may finally demonstrate that once consent to ISDS in an agreement has been given, there is little Member States can do to frustrate the enforcement of an Award, even one in breach of EU law.

AG Wathelet recently asserted, obiter dictum, that “in reality, even if the seat of the arbitration is fixed in a third country or recognition and enforcement of the award are requested in a third country, the investor could not avoid requesting recognition and enforcement of the arbitral award before the courts of the respondent Member State.”²⁴² This may provide an opportunity for the Member States to fulfil their obligation by either refusing to enforce or making a preliminary reference to the CJEU. However, Wathelet’s conclusion rather conflates the Member States’ duty to ensure the effectiveness of the EU judicial system, with *actually ensuring* that effectiveness. Therefore the capacity of Member States to ensure that the effectiveness of the EU’s judicial system is not undermined – and therefore their capacity to fulfil the duty of sincere cooperation – *is* hindered by the ECT.

ii) Article 351 TFEU

Article 351 TFEU is understood as an expression of the general duty of loyal cooperation.²⁴³ It preserves the status of “rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other”. So only *anterior* agreements are covered by Article 351 – agreements concluded by Member States before they joined the EU.

It further requires that “to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.” This may require the Member State to denounce the agreement.²⁴⁴ Failure to take appropriate steps could result in EU infringement proceedings.

239 Opinion of Advocate General Maduro in Cases C-205/06, *Commission v Austria*, ECLI:EU:C:2008:391; C-249/06, *Commission v Sweden*, ECLI:EU:C:2008:405.

240 See on Sweden’s divergence from a common EU strategy that was had not yet been formally adopted (in respect of the Aarhus Convention Committee), Case C-246/07, *Commission v Sweden (PFOS)*, EU:C:2010:23, para. 6 with reference to Opinion 1/03 ECLI:EU:C:2006:81, para 119, and Case C 459/03, *Commission v Ireland*, ECLI:EU:C:2006:345, para 174.

241 *Busun S.A., Jean-Pierre Lecorvier and Michael Stein v Italian Republic*. ICSID Case No. ARB/14/3. Award of 27 December 2016, para. 288

242 Opinion of Advocate General Wathelet, Case C–284/16, *Slovakische Republik v Achmea*, ECLI:EU:C:2017:699, footnote 200.

243 Opinion of Advocate General Maduro in Cases C-205/06, *Commission v Austria*, ECLI:EU:C:2008:391; C-249/06, *Commission v Sweden*, ECLI:EU:C:2008:405, para 17.

244 See Case C-264/09, *Commission v Slovakia*, ECLI:EU:C:2011:580, para 37 et seq; Case C-62/98 *Commission v Portugal* ECLI:EU:C:1999:509.

Just such infringement proceedings were brought against Austria, Sweden and Finland in 2009 in relation to the capital transfer provisions of their extra-EU BITs. The CJEU found the three member states liable for failing to eliminate these incompatibilities and therefore to fulfil their obligations under Article 351(2).²⁴⁵ As noted in the discussion above, the ECT's capital transfer provisions²⁴⁶ also potentially conflict with Articles 64(2), 66 and 75 TFEU. The CJEU regards this obligation to extend to eliminating even hypothetical incompatibilities contained in BITs.²⁴⁷

However, the application to the ECT presents a very complex case. This is partly due to the varying entry dates to membership of the EU, and the fact that the EU itself is a party to the ECT. It is unclear precisely how (or if) Article 351 should apply to the ECT at all, although the *Electrabel* Tribunal certainly attempted to apply it in its reasoning.²⁴⁸

Prior application in other contexts further complicates this question. Firstly the CJEU has ruled that Article 351 preserves rights or obligations *only* in respect of third countries, and not in their intra-EU application.²⁴⁹ A Member State could not rely on the first paragraph of Article 351 to derive any rights with respect to the intra-EU dimension of the ECT, but only to *honour obligations* owed to third countries.²⁵⁰ Consistent with this, the Commission does not refer to Article 351 in its public announcement concerning pilot infringement proceedings initiated in June 2015 against five Member States – Sweden, Austria, the Netherlands, Romania and Slovakia – over the failure to terminate their *intra*-EU BITs.²⁵¹

Secondly, the CJEU has also established that the Article 351(1) ‘does not have the effect of conferring upon individuals... rights which the national courts of the Member States must uphold’, nor does it ‘adversely affect the rights which individuals may derive from such an agreement.’²⁵² This limitation is due to the fact that the Article does not refer to individuals’ rights, but only those of States.²⁵³ Therefore what survives under Article 351(1) should be only the ECT’s provisions containing obligations to be honoured with respect to non-EU States (i.e. trade-related provisions or state-state dispute settlement). However, the obligation to eliminate incompatibilities (in the Article’s second paragraph) is seemingly not limited in the same way: the provisions in the extra-EU BIT infringement cases against Austria, Sweden and Finland clearly afford *rights to individuals* (investors).

One might therefore conclude that for the thirteen Member States for whom the ECT is an *anterior* agreement, Article 351 may impose an obligation to eliminate incompatibilities arising from the ECT. However this would result in a rather arbitrary outcome, due to the fact that all Member States (now excluding Italy²⁵⁴) and the EU itself are contracting parties to the ECT. Of the 60 known intra-EU ECT cases to date, 43 have been brought against states that were already EU members as of their ratification of the ECT (Spain, Italy, Germany); 38 of these are still pending. In these cases, there is no consequence from Article 351, since for the original Member States the ECT agreement is not *anterior* but *posterior* their EU membership. Similarly – as noted above – the distinction between the ECT’s extra- and intra-EU

245 Cases C-205/06, *Commission v Austria*, ECLI:EU:C:2009:118; C-249/06, *Commission v Sweden*, ECLI:EU:C:2009:119; C-118/07, *Commission v Finland*, ECLI:EU:C:2009:715.

246 ECT Articles 14 and 24(3).

247 Cases C-205/06, *Commission v Austria*, ECLI:EU:C:2009:118; C-249/06, *Commission v Sweden*, ECLI:EU:C:2009:119.

248 As noted above the existence of substantive inconsistency may be determinative for the lawful application of the ECT’s Article 16, but not necessarily of compatibility with EU law. Article 16 makes clear that where the ECT conflicts with another Treaty concerning the same subject matter the provisions which are “more favourable” shall apply. Substantive inconsistency is therefore more of a concern for the ECT’s arbitral tribunals than for the European judicial system. The (probably erroneous) interpretation of Article 351 TFEU by the *Electrabel* tribunal, leads to the conclusion that “between EU Member States, EU law prevails *in case of inconsistency* with another earlier treaty”; furthermore “if any inconsistency existed between the ECT and EU law, the ECT would apply in relations between EU Members and Non-EU Members, but that EU law would prevail over the ECT in relations between EU Members themselves”. (*Electrabel v Hungary ICSID Case No. ARB/07/19*. Decision on Jurisdiction, paras 4.178-4.187 - emphasis added)

249 Case 10/61, *Commission v Italy*, ECLI:EU:C:1962:2.

250 Case C-158/91 *Levy* (1993) ECR I-4287.

251 With regard to the intra-EU aspect of the ECT, the inapplicability of 351(2) would be consistent with the Commission’s position that – in any case – there is no incompatibility since all Member States have agreed *inter se* that the ECT’s ISDS procedure does not have any intra-EU application.

252 Case 812/79, *Attorney General v Burgoa*, ECLI:EU:C:1980:231, para 10 (emphasis added).

253 As noted in the Opinion of AG Jääskinen in *Commission v Slovakia*, albeit in a case concerning an extra-EU (Swiss-Slovak) BIT: ‘Article 307(1) EC does not have the effect of conferring upon individuals who rely upon a pre-accession agreement rights which the national courts of the Member States must uphold and it does not adversely affect the rights which individuals may derive from such an agreement either.’ Case C-264/09 *Commission v Slovakia*, Opinion of AG Jääskinen of 15 March 2011, ECLI:EU:C:2011:150, paras 75-7. In the decision of the CJEU, the Court ultimately abstained from addressing the ECT specifically and focused on Slovakia’s international obligations under the Swiss-Slovak BIT. Those were deemed to survive the obligations contained in Directive 2003/54/EC on liberalisation of the electricity market, by virtue of Article 351 TFEU.

254 Noteworthy is that Italy – for whom the ECT is not anterior and therefore not covered by Article 351 – is the only Member State to have taken any action.

dimensions is also somewhat arbitrary in the context of ISDS claims, given the fluidity of some investors' "home" states.

B. Withdrawal or Renegotiation

Kleinheisterkamp proposes that "a declaration of incompatibility by the CJEU in a preliminary ruling in the *Eureko* [now *Achmea*] procedure would facilitate things for the Commission as the pressure would be on the member states also to address the intra-EU element of the ECT".²⁵⁵ With the ruling of the CJEU pending, it may clearly have a significant strategic impact on the future of this issue; if the CJEU finds the ISDS mechanism of the intra-EU BIT compatible, the "Commission would have to recur to infringement procedures against member states that do not wish to touch the ECT". To not act would – for Kleinheisterkamp – "hardly be acceptable... in terms of consistency", while the Commission proceeds with demands for member states to address incompatibilities with their extra-EU BITs and to terminate their intra-EU BITs.²⁵⁶ However, Kleinheisterkamp also regards it as "unlikely" that the CJEU would find the ECT specifically inapplicable in its intra-EU dimension, "let alone because the ECT is the only investment treaty which from the beginning bound states that were originally members of the European Community (now Union) and because it was actually proposed and designed by the European Commission itself".²⁵⁷

Whatever the outcome of the *Achmea* ruling, possible actions are somewhat limited. As is common to IIAs, any withdrawal from the ECT by individual contracting parties is in effect limited by the so-called "sunset" clause, and is not immediately effective. In respect of investments covered by the ECT which were made prior to the date of a contracting Party's effective withdrawal, the ECT's investment protection provisions will apply for a further 20 years.

To date the only Member State to have taken this step is Italy, which withdrew from the ECT effective from 1 January 2016. The sunset clause means that any investments in Italy by investors of other EU member states – as well as Italian investments in other member states – which were made as of 1 January 2016, are to remain covered by the relevant ECT provisions until 1 January 2036 (Article 47(3) ECT). In public, the EU Commission has remained ambivalent about Italy's decision – neither discouraging nor endorsing the step.

As regards other intra-EU BITs, some Member States have developed strategies to circumvent sunset clauses – by bilateral termination of the agreements by mutual consent and with immediate effect on investment protection provisions. A two-step procedure has already been successfully deployed by Member States in this respect.²⁵⁸ In April 2016, Austria, Finland, France, Germany and the Netherlands presented a proposal ("non-paper") to the EU Council's Trade Policy Committee with a compromise solution for resolving the issue of intra-EU BITs, by gradually phasing them out.²⁵⁹ Instead of the intra-EU BITs, the respective Member States propose a single, multilateral investment agreement between all 28 EU Member States. Such an agreement could of course be extended to cover disputes over investments in the energy sector if the ECT should be terminated.

The multilateral nature of the ECT including the fact that non-EU members are contracting parties means that such bilateral strategies cannot be easily adapted to the case of the ECT. Hypothetically, if all Member States withdrew from the ECT, and only the EU remains party to the ECT, EU investors would in relation to another EU State not qualify as an investor of 'another Contracting party' in the terms of Article 26 ECT, which would end intra-EU ISDS on the basis of the ECT.

However, following Opinion 2/15, the EU does not have the exclusive competence over ISDS in its extra-EU dimension. Any agreement including ISDS will have to be a mixed agreement. That means that the Member States will have to remain parties to the ECT in order to preserve the EU's capability to conclude the ISDS part of the ECT in relation to non-EU Member States. While withdrawal of Member States *en masse* might in theory then end the application of Article 26 ECT between the Member States, from an EU

255 Jan Kleinheisterkamp, 'Investment Protection and EU Law', p 104.

256 *Ibid.* p 106.

257 *Ibid.* p 108.

258 As reported in the Investment Arbitration Reporter, several Member States have agreed to terminate their intra EU BITs as well as the sunset clause, Luke Eric Peterson 'Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments', 1 February 2011.

259 Available at <https://www.bmwfw.gv.at/Aussenwirtschaft/investitionspolitik/Documents/Intra-U%20Investment%20Treaties.pdf> [Accessed on 15/11/2017].

law perspective a renegotiation of the ECT seems unavoidable if one wishes at the same time to maintain the effects of Article 26 ECT in relation to non-EU Member States. Such a renegotiation would then need to specify that EU investors will be excluded from invoking Article 26 against any other EU-Member State.

It is however widely acknowledged that such a renegotiation of ECT is likely to prove politically arduous. The non-paper on the gradual phase-out of intra-EU BITs referred to above illustrates that even in its intra-EU dimension ISDS receives considerable support by the Member States. Negotiating the required level of consent within the EU is likely to prove challenging.²⁶⁰ As noted, at least with regards to EU Member States, one can argue that these states are under an obligation to support renegotiations aiming for eliminating incompatibilities with EU law following Article 4(3) TEU.²⁶¹ However, as Article 16 ECT would appear to effectively prohibit any inter se agreement, renegotiation will necessarily have to be with the consent of *all* ECT contracting parties, not just Member States. There is no immediately apparent benefit for other contracting parties of the ECT to support its renegotiation on these terms.

Failure to renegotiate leaves the ECT in a state inconsistent with the EU's current trade and investment strategy. Furthermore, the Commission is attempting to spearhead reforms to both the procedural and substantive aspects of investment protection in its international agreements. The only such agreement (provisionally) in force is CETA – which, as a result of the CJEU ruling on the EU-Singapore FTA, does not include the coming into force of its investment provisions. Nevertheless CETA's Investment Protection Chapter contains provisions on the right to regulate, limitations to the scope of “fair and equitable treatment” and the definition of “indirect expropriation”, and a permanent court system. Although the efficacy of these reforms to actually contribute to the rebalancing of the ISDS system remains to be tested in practice, on paper they represent a significant development from the vague language contained in the ECT – very much a product of its time.

The outcome of being stuck with the ECT is that – as this reform process develops – the ECT and the cases brought under it will remain increasingly out of step with any new standards and approaches to investment law that the EU aspires to adopt and promote. Such incoherence in standards cannot be meaningfully addressed by focusing on the intra-EU dimension of the ECT in isolation.

260 Jan Kleinheisterkamp, 'Investment Protection and EU Law', p 107.

261 Kleinheisterkamp, 'The Next 10 Year ECT Investment Arbitration', p. 17.

CONCLUSION

The pending decision of the CJEU in the *Achmea* case may shed light on many of the unanswered questions related to the compatibility with EU law of the ECT's arbitration clause. In the meantime, we submit that there are plenty of grounds to question this compatibility.

In the foregoing analysis we point in particular to how the ECT's arbitration mechanism threatens to undermine the effectiveness of the EU's judicial system in relation to the TFEU Articles 344, 267 and 18. Despite emphasis on the issue of substantive (in)compatibilities between EU law and the ECT's standards of investment protection, such questions need not be determinative of whether the EU's judicial order is undermined. Ultimately, the ECT's arbitration clause creates a parallel administration of justice sufficient for finding an incompatibility with EU law.

The ECT presents a uniquely complex case, but the issues raised are in many respects not unique to the ECT. Analysis of ISDS provisions in other IIAs may lead to similar conclusions. Nor is the ECT's application only problematic in its intra-EU dimension – although it is only this aspect that the Commission has sought to challenge.

The lessons to be learned from this may prove costly. The recent explosion in intra-EU cases brought under the ECT should finally provide the impetus to initiate actions to remedy incompatibilities, but any action may take decades to be effective, unless efforts towards renegotiation with all ECT parties are begun immediately. In the meantime, the ECT will become increasingly out of step with newer IIAs. As a result, the EU's approach to its trade and investment agreements risks being undermined by incoherence and inconsistency – a character inherent in the approach adopted by the Commission even its current piecemeal negotiation strategy.

These risks have however been long identified. Since at least 2009, the Commission has highlighted that the threat to the EU's judicial order posed by the ECT (and intra-EU BITs) might force it to refer to the CJEU the question of the compatibility of recognition and enforcement provisions contained in Article 54 of the ICSID Convention. In his recent Opinion, AG Wathelet points to a central contradiction in the Commission's position: such concerns were not sufficient to “prevent the EU institutions from choosing the ICSID as the arbitral institution in Article 9.16 of the EU-Singapore Free Trade Agreement”,²⁶² which was concluded in 2013. New Commission proposals for a Multilateral Investment Court might appear to be encouraging in respect of producing a consistent and permanent institution beyond the fragmented universe of ISDS, but the historical role of the EU in designing and developing such innovations is best illustrated by the case of the ECT.

Now claimed by the Commission to be “unlawful” in its intra-EU application, this “brainchild of the EU” has resulted in a situation of profound legal uncertainty, huge economic risk and political stalemate.

262 Opinion of Advocate General Wathelet, Case C-284/16, *Slowakische Republik v Achmea*, ECLI:EU:C:2017:699, footnote 199.

Annex 1. European Commission's participation as amicus curiae in ECT cases

The Commission has neither made public its amicus curiae submissions to ISDS tribunals, nor even released information on when such submissions have been made. However the following can be deduced with regard to intra-EU ECT cases. A full list of all known cases is included in Annex 2.

On the basis of known and reported submissions, the following tribunals **accepted** the Commission as an amicus curiae:

- *AES Summit v. Hungary (II)*
- *Blusun v. Italy.*
- *Charanne v. Spain*
- *Electrabel v. Hungary*
- *Isolux v. Spain*

The tribunals in the following cases are **known to have rejected** the Commission as an amicus curiae:

- *Eiser Infrastructure v. Spain*
- *RREEF Infrastructure v. Spain*

The tribunals in the following cases are **reported to have rejected** the Commission as an amicus curiae:

- *I.C.W. Europe Investments Limited v. Czech Republic*
- *Photovoltaic Knopf Betriebs-GmbH v. Czech Republic*
- *Voltaic Network GmbH v. Czech Republic*
- *WA Investments-Europa Nova Limited v. Czech Republic*

The Commission is understood to have applied as amicus curiae, but it is **unknown whether permission was granted**, in the following cases:

- *Antaris Solar v. Czech Republic*
- *Electricite de France (EDF) v. Hungary*
- *InfraRed Environmental Infrastructure GP Ltd. v. Kingdom of Spain*
- *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*
- *Natland Inv. Grp. NV v. Czech Republic*
- *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*
- *RENERGY S.à r.l. v. Kingdom of Spain*
- *Vattenfall v. Germany (II)*

Annex 2. Intra-EU disputes invoking the Energy Charter Treaty²⁶³

Table 1. Respondent State in intra-EU disputes

Respondent State	Total	Pending Cases	Closed Cases		
			<i>Decided +investor</i>	<i>Decided +State</i>	<i>Settled</i>
Bulgaria	3	3			
Croatia	2	2			
Czech Republic	6	6			
Germany	2	1			1
Hungary	4	1	1	2	
Italy	9	8		1	
Poland	1			1	
Slovakia	1				1
Spain	32	29	1	2	
<i>Total</i>	60	50	2	6	2

Table 2. Home State of investor in intra-EU disputes

Home State of investor	Total	Pending Cases	Closed Cases		
			<i>Decided +investor</i>	<i>Decided +State</i>	<i>Settled</i>
Austria	2	2			
Belgium	3	1		2	
Cyprus	3	2		1	
Czech Republic	2	2			
Denmark	2	2			
France	4	2	1	1	
Germany	19	17		1	1
Hungary	1	1			
Ireland	1	1			
Luxembourg	17	14	1	1	1
Malta	1	1			
Netherlands	17	14		2	1
Portugal	1	1			
Sweden	2	2			1
UK	9	7	1	1	

²⁶³ Based on data from UNCTAD's Investment Policy Hub: <http://investmentpolicyhub.unctad.org> [Accessed 14 Nov 2017]

List of Intra-EU ECT Cases

Pending (50):

Initiated 2017 (2):

- Portigon AG v. Kingdom of Spain (ICSID Case No. ARB/17/15)
Home State of investor: Germany
- Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic (ICSID Case No. ARB/17/14)
Home State of investor: UK

Initiated 2016 (9):

- Amlyn Holding B.V. v. Republic of Croatia (ICSID Case No. ARB/16/28)
Home State of investor: Netherlands
- Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd and Sun-Flower Olmeda GmbH v. Kingdom of Spain (ICSID Case No. ARB/16/17)
Home State of investor: Germany, United Kingdom
- ČEZ, a.s. v. Republic of Bulgaria (ICSID Case No. ARB/16/24)
Home State of investor: Czech Republic
- Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain (ICSID Case No. ARB/16/18)
Home State of investor: Luxembourg, Netherlands
- CIC Renewable Energies Italy GmbH, Enernovum Asset 1 GmbH & Co. KG, Enernovum GmbH & Co. KG and others v. Italian Republic (ICSID Case No. ARB/16/39)
Home State of investor: Germany, United Kingdom, Luxembourg
- Cordoba Beheer B.V., Cross Retail S.L., Sevilla Beheer B.V., Spanish project companies v. Kingdom of Spain (ICSID Case No. ARB/16/27)
Home State of investor: Netherlands
- ENGIE International Holdings BV, ENGIE SA and GDF International SAS v. Hungary (ICSID Case No. ARB/16/14)
Home State of investor: France, Netherlands
Amount claimed: 642 million EUR
- ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (ICSID Case No. ARB/16/5)
Home State of investor: Austria, Germany
- Eurus Energy Holdings Corporation and Eurus Energy Europe B.V. v. Kingdom of Spain (ICSID Case No. ARB/16/4)
Home State of investor: Japan, Netherlands

Initiated 2015 (21):

- 9REN Holding S.a.r.l v. Kingdom of Spain (ICSID Case No. ARB/15/15)
Home State of investor: Luxembourg
- Alten Renewable Energy Developments BV v. Kingdom of Spain (2015, Stockholm Chamber of Commerce)
Home State of investor: Netherlands
- BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/16)
Home State of investor: Germany
- Belenergia S.A. v. Italian Republic (ICSID Case No. ARB/15/40)
Home State of investor: Luxembourg
- Cavalum SGPS, S.A. v. Kingdom of Spain (ICSID Case No. ARB/15/34)
Home State of investor: Portugal
- CEF Energia BV v. Italian Republic (2015, Stockholm Chamber of Commerce)
Home State of investor: Netherlands
- Cube Infrastructure Fund SICAV and others v. Kingdom of Spain (ICSID Case No. ARB/15/20)
Home State of investor: France, Luxembourg
- E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/35)
Home State of investor: Germany

- ENERGO-PRO a.s. v. Republic of Bulgaria (ICSID Case No. ARB/15/19)
Home State of investor: Czech Republic
- Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50)
Home State of investor: Belgium
- Greentech Energy Systems and Novenergia v. Italy (2015, Stockholm Chamber of Commerce)
Home State of investor: Denmark, Luxembourg
- Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain (ICSID Case No. ARB/15/42)
Home State of investor: Luxembourg, Sweden
- Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain (ICSID Case No. ARB/15/23)
Home State of investor: Germany
- KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/25)
Home State of investor: Germany
- Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain (ICSID Case No. ARB/15/45)
Home State of investor: Germany
- OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain (ICSID Case No. ARB/15/36)
Home State of investor: Malta, Switzerland
- Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37)
Home State of investor: Netherlands
- SolEs Badajoz GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/38)
Home State of investor: Germany
- Stadtwerke München GmbH and others v. Kingdom of Spain (ICSID Case No. ARB/15/1)
Home State of investor: Germany
- STEAG v. Spain STEAG GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/4)
Home State of investor: Germany
- Watkins Holdings S.à r.l. and others v. Kingdom of Spain (ICSID Case No. ARB/15/44)
Home State of investor: Luxembourg, Netherlands

Initiated 2014 (5):

- InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12)
Home State of investor: UK
- Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1)
Home State of investor: Netherlands
- NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11)
Home State of investor: Netherlands
Amount claimed: 342 million USD
- RENERGY S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18)
Home State of investor: Luxembourg
Amount claimed: 600 million EUR
- RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34)
Home State of investor: Germany
Amount claimed: 82 million EUR

Initiated 2013 (11):

- Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic (2013, UNCITRAL)
Home State of investor: Germany
Amount claimed: 70 million EUR
- Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain (ICSID Case No. ARB/13/31)
Home State of investor: Luxembourg, Netherlands
- CSP Equity Investment v. Spain (2013, SCC / PCA)
Home State of investor: Luxembourg

Amount claimed: 60 million EUR

- WA Investments-Europa Nova Limited v. The Czech Republic (2013, UNCITRAL)
Home State of investor: Cyprus
- EVN AG v. Republic of Bulgaria (ICSID Case No. ARB/13/17)
Home State of investor: Austria
- I.C.W. Europe Investments Limited v. The Czech Republic (2013, UNCITRAL)
Home State of investor: UK
- MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (ICSID Case No. ARB/13/32)
Home State of investor: Hungary
- Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic (2013, UNCITRAL)
Home State of investor: Cyprus, Luxembourg, Netherlands
- Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic (2013, UNCITRAL)
Home State of investor: Germany
- RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/30)
Home State of investor: UK, Luxembourg
(Decision on Jurisdiction dated 6 June 2016)
- Voltaic Network GmbH v. The Czech Republic (2013, UNCITRAL)
Home State of investor: Germany

Initiated 2012 (1):

- Vattenfall AB and others v. Federal Republic of Germany (II) (ICSID Case No. ARB/12/12)
Home State of investor: Sweden

Amount claimed: 4.7 billion EUR

Initiated 2011 (1):

- The PV Investors v. Spain (2011, UNCITRAL)
Home State of investor: Denmark, Germany, Ireland, Luxembourg, Netherlands, UK

Closed (10):

Decided in favour of investor (2):

- Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36) - Award dated 4 May 2017
Home State of investor: Luxembourg, United Kingdom
Amount awarded: 128 million EUR
- Electricite de France (EDF) International S.A. v. Republic of Hungary (2009, UNCITRAL, PCA) - Award dated 3 December 2014
Home State of investor: France
Amount awarded: 107 million EUR

Decided in favour of State (6):

- Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3) - Award dated 27 December 2016
Home State of investor: Belgium, France, Germany
Amount claimed: 187.80 million EUR
- Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain (SCC Case No. 2013/153) - Award dated 21 January 2016
Home State of investor: Netherlands
- Charanne B.V. and Construction Investments S.a.r.l. v. Spain (SCC Case No. 062/2012) -Final Award dated 21 January 2016
Home State of investor: Luxembourg, Netherlands
Amount claimed: 17 million EUR
- Mercuria Energy Group Limited v. Republic of Poland (2008, SCC)- Final Award dated December 2011
Home State of investor: Cyprus

Amount claimed: 400 million USD

- AES Summit Generation Limited and AES-Tisza Erözü Kft. v. Republic of Hungary (II) (ICSID Case No. ARB/07/22) - Award dated 23 September 2010
Home State of investor: UK

Amount claimed: 230 million USD

- Electrabel S.A. v. The Republic of Hungary (ICSID Case No. ARB/07/19)
Award dated 25 November 2015
Home State of investor: Belgium

Amount claimed: 147 billion HUF (679.70 million USD)

Settled (2):

- Slovak Gas v. Slovakia Slovak Gas Holding BV, GDF International SAS and E.ON Ruhrgas International GmbH v. Slovak Republic (ICSID Case No. ARB/12/7) - Settlement deed dated 14 December 2012
Home State of investor: France, Germany, Netherlands
- Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (ICSID Case No. ARB/09/6)
Award embodying the parties' settlement agreement dated 11 March 2011
Home State of investor: Sweden

Amount claimed: 1.4 billion EUR