PART 4 – REGIONAL DEVELOPMENTS

Chapter 4.1
The European Union and International Investment Law

by Julian Scheu & Petyo Nikolov

A. INTRODUCTION

The relationship between international investment law and the law of the European Union (EU) is a complex issue. It illustrates the challenges of an international legal order in which specialized sub-systems interact. The aim of the present chapter is to shed light on the intersection of both legal regimes and to put recent developments into a broader context. To this end, the distribution of competencies between the EU and its Member States is addressed as a starting point (B). On this basis, the different types of European investment treaties are explained (C) before addressing the compatibility of investment treaties with EU law (D). The Chapter closes with an outlook on how the European approach to international investment law might develop in the future (E).

B. COMPETENCE OF THE EU FOR FOREIGN INVESTMENTS

The competence of the EU for foreign investments is based on the division of competencies between the Union and the Member States as provided for in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This system is guided first and foremost by the principle of conferral, which is legally defined in Art. 5(2) TEU. According to this provision, the Union shall act only within the limits of the competencies conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Consequently, areas not covered by the conferred competencies remain with the Member States.

The different categories of competencies are regulated in the TFEU. For foreign investments, the difference between exclusive and shared competencies is relevant. Art. 2(1) TFEU determines how the exclusive competencies of the EU operate. When the Treaties confer on the Union exclusive competence in a specific area, only the EU may legislate and adopt legally binding acts. Exclusive competencies have preclusive effect on Member States' regulative actions in these areas, unless they are explicitly empowered by the Union. In contrast to exclusive competencies, shared or concurring competencies empower the Member States to take action in the areas covered by them to the extent that the Union has not exercised its competence, Art. 2(2) TFEU. However, the exercise of shared competencies by the Union is limited by the principal of subsidiarity, which is anchored in Art. 5(3) TEU. According to this principle, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level.

I. Before the Lisbon Treaty

For several decades, the European Commission tried to initiate an EU investment protection policy. As early as 1972, the Commission of the then European Economic Community submitted to the Council a proposal for an EU Regulation establishing a Community guarantee system for private investments in third countries.[1] Ex Art. 113 of the EEC Treaty, now Art. 207 TFEU, was considered to be a sufficient legal basis for the adoption of such an EU Regulation. Eventually, the proposal failed due to fiscal uncertainties and Member States' satisfaction with national investment insurance. Then, in the final version of the draft Treaty establishing a Constitution for Europe, foreign direct investments (FDIs) were included in the EU's sphere of competence for the first time. Even though this treaty was rejected by French and Dutch voters in 2005 and never came into force, the agreed transfer of competence for FDIs from the Member States to the EU was subsequently adopted in the Treaty of Lisbon.

Although there was no explicit EU competence for FDIs before the Lisbon Treaty, the chapter on capital and payment transactions (Art. 63 ff. TFEU) contained provisions relating to competencies for regulations in areas which have traditionally been the subject of bilateral investment treaties (BITs) between Member States and third countries. Despite being not explicitly mentioned in Art. 63(1) TFEU, direct investments are considered to be a subcategory of capital movements and are thus covered by the scope of the free movement of capital, which applies to third-country situations. Based on this, the Court of Justice of the European Union (CJEU) found BITs concluded by Member States with third countries incompatible with EU law in 2009.[2] The CJEU ruled that Member States must refrain from taking measures that may thwart the adoption of restrictions by the Council on capital movements and payments under Art. 64(2), 66, 75(1) TFEU.

II. After the Lisbon Treaty

As a result of the entry into force of the Treaty of Lisbon, the European Union's foreign trade law, and in particular the common commercial policy, has undergone a significant expansion of regulatory areas and thus has reached a new, more pronounced dimension. Especially, the newly added competence for FDI was expected to pave the way for the European Commission to negotiate comprehensive trade and investment agreements, which are of paramount importance for the economic interests of the EU. However, the scope of the competence for foreign investments had been vehemently disputed between the European Commission and the Council of the European Union for a considerable period of time, before the CJEU shed light on all issues regarding the

---

1 See https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51974AC0217 and https://dserver.bundestag.de/btd/07/001/0700145.pdf.

2 CJEU, C-205/06, *Commission v Austria* (2009) ECLI:EU:C:2009:118; CJEU, C-249/06, *Commission v Sweden* (2009) ECLI:EU:C:2009:119; CJEU, C-118/07, *Commission v Finland* (2009) ECLI:EU:C:2009:715. For an extensive analysis of these cases see Markus Burgstaller, *The Future of Bilateral Investment Treaties of EU Member States*, in Marc Bungenberg, Jörn Griebel and Steffen Hindelang (eds), *Internationaler Investitionsschutz und Europarecht,* Nomos 2010, pp. 113-138, at pp. 120-123.

competence in its *Opinion 2/15*.[3] On the one hand, the European Commission has taken the view that the EU is empowered to negotiate and conclude comprehensive trade and investment agreements single-handedly, i.e. without the involvement of the Member States (so-called EU-only agreements), since the EU Treaties confer on the Union exclusive competence for all subject matters being typically stipulated in trade and investment agreements.[4] On the other hand, the Council of the European Union, which represents national governments in the Union's institutional system, has considered such agreements as mixed, i.e. they can only be concluded jointly by the EU and its Member States because of the EU's lack of competence in some areas such as portfolio investments and investor-State dispute settlement (ISDS).[5]

1. Direct Investments

Determining the notion of direct investment assumes crucial importance with regard to understanding the scope of the EU competence and is the linchpin for all subsequent issues. The uncertainty about the exact meaning of foreign direct investment within the meaning of Arts. 206, 207 TFEU results from the fact that it is not defined in the context of the common commercial policy or elsewhere in the TFEU. Nonetheless, the CJEU has already dealt with the interpretation of the term in the context of Art. 64(1) TFEU:

> *the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity.*[6]

With regard to shareholdings in new or existing undertakings, the CJEU emphasises two criteria that can be attributed constitutive character for the existence of a direct investment: "lasting economic links" and effective participation "in the management of that company or in its control"[7]. Following international practices,[8] which are not binding for EU institutions due to the autonomy of EU law but provide valuable guidance, the requirement of effective participation is fulfilled if the investor acquires at least 10% of the assets of the company. However, this percentage number

---

[3] CJEU, Opinion C-2/15, *EU-Singapore Free Trade Agreement* (2017) ECLI:EU:C:2017:376.

[4] Commission Communication, *Towards a Comprehensive European International Investment Policy*, 7 July 2010, COM(2010)343 final.

[5] CJEU, *supra*, note 3, paras. 25 ff.

[6] CJEU, C-446/04, *Test Claimants in the FII Group Litigation v IRC* (2006) ECLI:EU:C:2006:774, para 181.

[7] *Ibid*. at para 182. The Court also refers to these standards when interpreting the term in the context of the common commercial policy. CJEU, *supra*, note 3, para. 80.

[8] International Monetary Fund, *Balance of Payments and International Investment Position Manual*, 6th ed. 2009, BPM6, p. 100 f.; Organisation for Economic Co-operation and Development, *Benchmark Definition of Foreign Direct Investment*, 4th ed. 2008, p. 48 ff.

should not be seen as a strict threshold, but rather as a legal presumption that could also be disproved in individual cases by exceptional circumstances.

2. Portfolio Investments

Portfolio investments are also of great practical importance since both direct and portfolio foreign investments are covered by the scope of the vast majority of investment protection treaties. They constitute the opposite term to direct investment, as portfolio investments delineate such investment as bonds, shares or other financial assets that do not give the investor control over a company. The unambiguous wording of Art. 207 TFEU mentioning only FDI, however, leaves no room for the inclusion of portfolio investment into the new competence of the EU.

Nevertheless, it was widely discussed whether the EU can conclude investment treaties also regulating portfolio investments based on competence provisions other than Art. 207 TFEU. First, Arts. 63 ff. TFEU were taken into consideration as the scope of application of the freedom of capital movements encompasses portfolio investments. However, Art. 63(1) TFEU classifies as a protective standard that confers individual subjective rights and cannot serve as a competence norm. In addition, Art. 64(2) TFEU provides only internal competences, which do not entitle the EU to conclude external agreements. Second, some assumed that the EU could claim the competence over portfolio investments based on Art. 3(2) TFEU,[9] which codifies the case law of the CJEU on implicit exclusive external competences. According to this assumption, Arts. 63 ff. TFEU constitute common rules in the sense of Art. 3(2) TFEU, which are affected by international investment treaties and, thus, the alleged EU exclusive competence to conclude such treaties regarding portfolio investments is implied. However, the CJEU did not agree on such an interpretation of Art. 3(2) TFEU arguing that *common rules* amount to “provisions of secondary law which the […] European Union, has progressively laid down”[10]. The Court stated further that the EU and the Member States share the competence for investment protection treaties regarding portfolio investments, as their conclusion is necessary pursuant to Art. 216(1) TFEU in order to achieve the full realisation of the free movement of capital and payments, which is one of the objectives set out in the EU Treaties.[11]

3. ISDS

Another controversially debated topic in the context of Art. 207 TFEU was whether the competence provided therein suffices to cover ISDS provisions since they are not mentioned explicitly. The aim of ISDS provisions is to ensure the effectiveness of the treaty’s substantive rights and obligations. Therefore, the competence for ISDS derives from the competence for the underlying substantive provisions. Following this, ISDS provisions cannot pertain to the exclusive competence of the EU

9 Especially, the European Commission, *supra* note 4, p. 8.

10 CJEU, *supra* note 3, para. 233.

11 *Ibid*. at paras. 239 ff.

insofar as they relate not only to direct investments but also – which is highly likely to be the case – to portfolio investments. However, the CJEU decided to derogate from this rule due to the exceptional nature of ISDS provisions. According to the Court, the right granted to investors to initiate proceedings against EU Member States by the ISDS provisions means that the investment dispute may be removed from the jurisdiction of the concerned Member State.[12] Therefore, the ISDS provision cannot bear on the competence of the underlying substantive provisions, but rather needs a competence norm of their own. Since the EU is not competent to determine the administrative or judicial organisation of the Member States, it might be concluded that the competence for ISDS provision remained entirely with the Member States.

4. Mixed Agreements

Since the EU is not exclusively competent for all areas typically covered by international investment treaties, they can only be designed as mixed agreements. While EU-only agreements can be concluded by the EU alone, the conclusion of mixed agreements requires the involvement of the EU and the Member States within the scope of their competences. Thus, the Commission's long-standing demand to be the EU's sole actor in the field of international investment law was not met by adding competence for FDI in Art. 207 TFEU. This would require Member States to explicitly confer new competences to the EU for areas not covered by Art. 207 TFEU. Until then, successful foreign investment policy requires close and loyal cooperation between the EU and the Member States.

C. EUROPEAN INVESTMENT TREATIES AFTER THE LISBON TREATY

With the entry into force of the Lisbon Treaty and the transfer of competence for FDI, the legal landscape of European investment protection has changed considerably. It has become necessary to differentiate between three types of European investment agreements: First, newly concluded treaties by the EU and its Member States on the one hand, and third countries on the other hand (EU investment agreements); second, the remaining BITs concluded earlier by a Member State and a non-EU-State (extra-EU-BITs); and third, BITs concluded between two EU Member States (intra-EU-BITs).

I. EU Investment Agreements

After the transfer of competencies for FDI under Art. 207 TFEU, the EU Commission started to develop a new EU legal framework for investment policy. From 2009 onwards, this complex process has undergone significant developments.

1. Implementation of EU Investment Agreements

Canada was the first country the EU entered into treaty negotiations with. These negotiations resulted in the EU-Canada Comprehensive Economic and Trade Agreement (CETA). The CETA

12 Ibid. at paras 290 ff.

agreement follows the model of the treaty establishing the North American Free-Trade Area (NAFTA) which has meanwhile been substituted by the United States-Mexico-Canada-Agreement (USMCA). It combines rules on international trade law, investment liberalisation, and investment protection. Under the CETA-model, the content of what used to be regulated in a BIT is integrated as a separate chapter into a comprehensive agreement (see Chapter 8 of the CETA) and comprises substantive investment protection standards (Chapter 8 - Sections A-E) and provisions on ISDS (Chapter 8 - Section F).

In parallel, the Commission started negotiations with Singapore on a Free Trade Agreement modeled after the CETA. In both cases, the EU Commission expected to conclude the treaties as EU-only agreements. However, with regard to the Singapore agreement, the CJEU rendered its Opinion 2/15 which shed light on the scope of Art. 207 TFEU. As outlined above, the consequences of the Opinion were significant. On the one hand, the competence for trade and foreign direct investments falls under the exclusive competence of the EU. On the other hand, foreign portfolio investments and ISDS fall outside the scope of Art. 207 TFEU and are thus part of the shared competence. As a result, EU investment agreements like CETA contain elements falling under the exclusive and the shared competence. Accordingly, treaties like CETA must be concluded as mixed agreements, meaning that the EU and each of its Member States become parties to the treaty. This affects the agreement's ratification process. While EU-only agreements must be ratified at the Union level, mixed agreements must additionally go through the parliamentary ratification process within each EU Member State. In practice, the ratification of mixed EU investment agreements is politically much more sensitive, and the risks of significant delay or deadlock are much higher.

To minimize the impact of Opinion 2/15, the EU-Commission adapted its implementation strategy. Comprehensive economic and trade agreements such as CETA were therefore split up into two separate agreements. Accordingly, the Singapore agreement was divided into a Free Trade Agreement (FTA) and a separate Investment Protection Agreement (IPA) to better reflect the distribution of competencies between the Union and the Member States. Due to the separated structure, all matters falling under the shared competence are carved-out from the FTA to speed up the ratification process. FTAs are thus concluded as EU-only agreements, whereas IPAs are concluded as mixed agreements. All future EU negotiations on investment protection will be based on this separated FTA/IPA model.

There is, however, a third type of EU investment agreements limited to provisions on trade and investment liberalization. Investment liberalization is to be distinguished from investment protection. Investment liberalization is about creating equal opportunities and a level playing field for investors in third country markets by guaranteeing market access and non-discrimination, whereas investment protection is about setting an objective minimum standard for the treatment of foreign investors by the host State. Investment protection therefore goes beyond mere investment liberalization in the sense of market access and non-discrimination. In terms of procedure, investment liberalization does typically not contain ISDS provisions. Instead, rights and obligations under investment liberalization provisions are subject to an inter-State dispute settlement mechanism. An example is the EU-UK Trade and Cooperation Agreement (TCA) or the Draft EU-China Comprehensive Agreement on Investment (CAI). Given that such treaties do neither provide for investment protection, nor ISDS, they fall under the exclusive competence of the Union and are concluded as EU-only agreements. Due to their limited substantive and procedural scope, they are less relevant to foreign investors.

2. Innovations in EU Investment Agreements

New EU investment agreements such as Chapter 8 of the CETA or the EU-Vietnam IPA reflect the future of European investment protection policy. In comparison to traditional BITs, EU agreements incorporate several noteworthy innovations. These innovations must be seen in light of the ongoing debate about the legitimacy of ISDS and concern both substantive and procedural issues.

With regard to substantive investment protection, the EU agreements contain significantly more precise and comprehensive substantive protection standards. Vague terms such as *fair and equitable treatment* (FET) are one of the main reasons for unpredictable or contradicting outcomes of investment arbitrations. Therefore, substantive investment protection standards are now complemented by conclusive enumerations and description of categories. The treaty language typically reflects arbitral practice, but adds specifications such as the terms *“fundamental, manifest, targeted”* in Art. 2.5-2 of the EU-Vietnam Investment Protection Agreement (EVIPA) with respect to FET. To ensure that the host State’s right to regulate remains intact, EU agreements put a much stronger focus on the protection of public interests. Provisions such as Art. 2.2 EVIPA therefore set out in principle that host State regulation enacted to protect public interests does not violate investment protection standards. In addition, restrictions and limitations are added “for greater certainty”. In the same sense, established investment law concepts are specified. For example, the concept of *full protection and security* is defined as “*a Party's obligations to act as may be reasonably necessary to protect physical security of the investors and the covered investments*” (Art. 2.5-5 EVIPA). Given that no EU investment agreement is yet in force, it remains to be seen how these new standards of protection will change the outcome of investment disputes. In any event, the additional precision promotes legal certainty and significantly limits the leeway of arbitral tribunals to define the substantive content of the treaty.

With regard to ISDS, the new EU agreements have adopted a very different approach in comparison to traditional BITs. As a reaction to the public backlash against investment arbitration, EU agreements have replaced *ad hoc* investment arbitration by a permanent two-tiered dispute settlement mechanism, the so-called Investment Court System (ICS). The ICS is supposed to respond to the concerns regarding the transparency of the proceedings, impartiality of the arbitrators, and inconsistencies of the decisions.

Against this background, the institutional structure of the ICS very much differs from arbitration. It comprises of a Tribunal of first instance and an Appeal Tribunal. Members of both bodies are exclusively appointed by the contracting Parties for a fixed (renewable) term. The Tribunal of first instance which is exclusively competent to settle disputes under the EVIPA, for example, has to consist of 9 members out of which 3 have to be nationals of EU Member States, Vietnam, and third States, respectively (Art. 3.38 EVIPA). The same principle applies to the composition of the Appeal Tribunal. Accordingly, cases are heard by divisions of 3 judges composed of a national of an EU Member State, a national of Vietnam, and a national of a third country as presiding member.

As of today, each EU investment agreement has its own standing ICS. Considering that the members of all ICS bodies must – as Art. 3.38(13) EVIPA for example clarifies – be "*available at all times and at short notice*", judges must either receive a salary or at least an adequate retainer fee. Maintaining these institutions on the long run is therefore no sustainable solution. In fact, the EU envisages the treaty-specific ICS bodies only as an intermediate solution. All EU agreements therefore contain a clause such as Art. 8.29 CETA, according to which the contracting parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the ICS established under the respective treaty shall be replaced by the multilateral ISDS body.

II. Extra-EU-BITs

In view of the new division of competencies, EU investment treaties are supposed to gradually replace the existing network of extra-EU BITs. This of course requires that a new EU investment treaty with the concerned third party has been concluded and entered into force. Accordingly, EU investment agreements contain a replacement clause such as Art. 4.20(4) EVIPA. It provides that

> *upon the entry into force of this Agreement, the agreements between Member States of the Union and Viet Nam … shall be terminated and cease to have effect, and shall be replaced and superseded by this Agreement.*

Once the replacement clause will be applied for the first time, its compatibility with the sunset clause in the replaced extra-EU BITs might become an issue. For instance, the 1993 Germany-Viet Nam BIT provides in its Art. 13.3 that "*in respect of investments made up to the date of expiry of this Treaty, Articles 1 to 12 shall continue to apply for a further period of twenty years from the date of expiry of this Treaty*." In view of this clause and despite Art. 4.20(4) EVIPA, European and Vietnamese investors might want to rely on the pre-existing BIT for at least two more decades. If a BIT-based investment claim is submitted, the arbitral tribunal would need to decide on the applicability of the sunset clause. Replacement clauses such as Art. 4.20(4) EVIPA reflect the mutual agreement of the BIT parties to terminate the treaty. Given that pursuant to Art. 54 lit. b Vienna Convention on the Law of Treaties (VCLT) States remain the masters of their agreement, good reasons suggest that the sunset-clause would also be terminated by mutual consent. As a result, the replacement clause should supersede the sunset-clause.

In absence of such a new agreement, extra-EU-BITs concluded before the Lisbon Treaty will remain in force pursuant to Art. 351 TFEU regardless of the new division of competencies. The EU Treaties do not contain a provision explicitly regulating the fate of extra-EU-BITs concluded before entry into force of the Lisbon Treaty. At the same time, Art. 351 TFEU has been considered suitable to settle this issue since it governs situations substantially similar to the one at hand. Therefore, Art. 351 TFEU applies analogously to the fate of extra-EU-BITs.

To provide for legal certainty during this transition period, the European Parliament and Council of the European Union adopted a regulation which confirms the continued validity of Member States' BITs and at the same time ensures their gradual replacement by EU investment treaties.[13]

III. Intra-EU-BITs

The phenomenon of intra-EU-BITs mainly emerged due to the fifth and largest round of EU enlargement. The majority of these treaties were concluded in the post-1989 period by Western Member States with Eastern European States that were not yet part of the EU at the time. Their aim was to stabilise economic and political relations with the former socialist States and to ensure attractive investment opportunities for Western European companies in the respective States. Once the Eastern European States joined the EU, the BITs became intra-EU-BITs. In contrast to the extra-EU BITs, intra-EU investment treaties are not a subject matter of Art. 207(1) TFEU, as the latter only concerns the common commercial policy regarding the EU's external economic relations with third countries. For the same reason, Art. 351 TFEU is not applicable to intra-EU BITs. Therefore, as a matter of division of powers between the EU and its Member States, the latter principally remain able to maintain their BITs with other EU Member States. However, since the CJEU found intra-EU BITs to be incompatible with EU law, the vast majority of Member States concluded a plurilateral agreement for the termination of their intra-EU-BITs.[14]

D. Compatibility of International Investment Agreements with EU Law

International investment treaties can have a considerable impact on a wide range of regulatory interests, including any kind of public policy regulation, and the national judicial systems. Therefore, the compatibility between investment treaties and EU law is an issue of high political sensitivity. As it concerns the interaction between two legal regimes forming part of the international legal order, the relationship between EU law and investment law is characterised by legal complexity. Since 2018, however, the dynamic jurisprudence of the CJEU has answered many of the highly disputed questions in this regard.

I. Intra-EU BITs

Around 2006,[15] the European Commission began to intervene as *amicus curiae* in intra-EU-arbitrations in order to object to the jurisdiction of arbitral tribunals. The Commission wanted to prevent

---

[13] Regulation 1219/2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries.

[14] See Section D. below.

[15] See *e.g. Eastern Sugar v. Czech Republic*, SCC Case 088/2004, Partial Award (27 March 2007), paras. 119 ff.

investment claims brought by an investor coming from one EU Member State against a host State that just had joined the Union from being decided outside the purview of the EU court system.

1. Pre-*Achmea* Objections by Respondent States

Before the CJEU declared ISDS-clauses contained in an intra-EU-BIT incompatible with EU law in the *Achmea* case, respondent Member States raised other arguments against the jurisdiction of the arbitral tribunals, mostly based on VCLT provisions.

First, it has been argued that intra-EU-BITs are not valid pursuant to the *lex posterior* principle contained in Art. 59(1) VCLT. The treaty would be invalidated from the moment the last of the parties to the BIT accessed the EU.[16] Intra-EU-BITs and the EU Treaties are accordingly considered as competing frameworks addressing the "same subject-matter" in the sense of Art. 59(1) VCLT. To our knowledge, no investment arbitration tribunal has ever accepted this argumentation. For instance, the tribunal in the *Eastern Sugar* case rejected it as the investors' rights guaranteed by the BIT, especially the arbitration clause, provide for more extensive investment promotion and protection than the EU Treaties do.[17] It also noted that no common intention of the parties to the BIT (Czech Republic and the Netherlands) to supersede it by accessing the EU was evident.

Second, respondent Member States object to arbitral jurisdiction based on Art. 30 VCLT. When the restrictive requirements for termination of the treaty pursuant to Art. 59(1) VCLT are not met, Art. 30(3) VCLT addresses conflicting treaty relationships. This provision gives priority to rights and obligations deriving from the latter treaty. However, in the case of intra-EU investment arbitration, the EU Treaties and the BITs – in similar vein as in regard to Art. 59(1) VCLT – do not cover the same subject-matter. Therefore, jurisdictional challenges brought forward by respondent EU Member States remained unsuccessful before arbitral tribunals.

2. Autonomy of the European Legal Order and the *Achmea* Judgment

On 6 March 2018, the Grand Chamber of the CJEU decided in its *Achmea* judgment that the ISDS clause contained in an intra-EU-BIT was incompatible with EU law, in particular with Arts. 267 and 344 TFEU.[18] From the very beginning of this ground-breaking decision, the Court precisely defined its broad scope by referring to:

> *a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State,*

---

[16] See *ibid*, at paras 100 ff.

[17] *Ibid*, at paras 158 ff.

[18] CJEU, C-284/16, *Slovak Republic v. Achmea BV* (2018) ECLI:EU:C:2018:158, para. 60. For an in-depth analysis of the judgment, see Scheu and Nikolov, *The Incompatibility of Intra-EU Investment Treaty Arbitration With European Union Law – Assessing the Scope of the ECJ's* Achmea *Judgment*, German YB of Int'l Law 2019 Vol. 62, pp. 475-504.

> *bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*[19]

By referring on multiple occasions to Member States and an investor from one of those Member States,[20] the CJEU made it clear that its reasoning in *Achmea* is meant to clarify the relationship between investment arbitration and EU law regarding intra-EU-BITs in general and was not limited to the specific ISDS clause applicable to the dispute at hand. In fact, the scope of the judgment defined by the CJEU is strikingly similar to what is generally described as the very nature of an ISDS clause.[21] This was recently confirmed by the Frankfurt Higher Regional Court in *Raiffeisen v. Croatia* by declaring the arbitration proceedings initiated by Raiffeisen against Croatia inadmissible based on the *Achmea* ruling.[22] The decision was upheld by the German Federal Court (*Bundesgerichtshof*, *BGH*).[23]

In order to examine whether an ISDS clause contained in an intra-EU-BIT is incompatible with EU law rather depends on "all the characteristics of the arbitral tribunal [...] set out in paragraphs 39 to 55 [of the judgment]".[24] Accordingly, the arbitral tribunal in question must first be capable of applying and interpreting EU law in order to pose a threat to the autonomy and consistency of the EU legal order. The concept of autonomy describes the role of the CJEU as the supreme and final court on any matter regarding the interpretation and application of EU law. This function ensures that no external judicial body threatens the consistency of EU law. Union law thus remains an autonomous legal system which is exclusively governed by the rules set out in the EU treaties.

According to the CJEU, an arbitral tribunal in intra-EU ISDS may apply EU law on a twofold basis: either "as forming part of the law in force in every Member State" or "as deriving from an international agreement between the Member States".[25] Thus, EU law may be applied in intra-EU investment disputes as the law of the host State or as relevant agreement of international law between the contracting Member States. Since all commonly applicable arbitration rules provide for the possibility of taking account of EU law on this twofold basis, the possibility of an intra-EU investment tribunal interpreting or applying EU law cannot be ruled out.

Second, the CJEU observed that the *Achmea* tribunal is of exceptional nature as it is "not part of the judicial system of the Netherlands or Slovakia" and therefore cannot be "regarded as a court

---

19 *Ibid*. at para 31.

20 *Ibid*. see *e.g.* at paras 55, 58, 60.

21 Reference to Chapter [jurisdiction].

22 Higher Regional Court Frankfurt, 26th Civil Senate, 26 SchH 2/20. An unofficial English translation can be accessed via: https://www.italaw.com/sites/default/files/case-documents/italaw12018.pdf.

23 The decision has so far only been published in German; see https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=125044&pos=25&anz=887.

24 CJEU, supra note 16, para. 56.

25 *Ibid*. at para 41.

or tribunal of a Member State within the meaning of Article 267 TFEU".[26] Any adjudicating body established by Member States needs to be "situated within the judicial system of the EU" so that "its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU".[27] Otherwise the consistency and uniformity in the interpretation of EU law, which are embodied in the principle of its autonomy, would be jeopardised. However, by stipulating ISDS, Member States provide access for investors to international arbitration without forcing them to rely on local courts or diplomatic protection. Thus, foreign investors can depart from *the normal* way of settling disputes, i.e. to bring a claim before the competent courts within the national legal order of that host State, and this makes investment disputes "exceptional". Undeniably, these aspects are not specific to the *Achmea* case, but concern fundamental characteristics of ISDS in general. Therefore, all arbitral tribunals based on intra-EU BITs are of exceptional nature and situated outside the judicial system of the EU.

Third, the CJEU expounded that arbitral awards made by exceptional tribunals need to be subject to sufficient judicial "review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling".[28] By referring to the final and binding force of such awards and to the tribunal's power to determine its own procedure and seat, the CJEU concluded that the review of the arbitration mechanism provided by the BIT in the *Achmea* case is insufficient and therefore unable to ensure the consistent and uniform application and interpretation of EU law. Both of these aspects are also not specific to the *Achmea* tribunal or its underlying treaty but rather reflect general features of intra-EU investment arbitration.

Finally, the CJEU emphasised that "arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings."[29] The former "derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts". By doing so, they act contrary to the principle of mutual trust between the Member States.

3. No Circumvention of the *Achmea* Ruling Possible

In its subsequent *PL Holdings* judgment,[30] the CJEU clarified the scope of the *Achmea* ruling and made clear that there is no way around it.

---

26 *Ibid*. at para 43.

27 *Ibid*. at para 43.

28 *Ibid*. at para 50. As is well-known, the CJEU had decided already in 1982 that arbitral tribunals are not courts or tribunals "of a Member State" within the meaning of Art. 267 TFEU and, therefore, neither entitled to request a preliminary ruling from the CJEU under Art. 267(2), nor required to do so under Art. 267(3). See CJEU, 102/81, *Nordsee*, ECR 1982, 1095, in particular paras. 13-15.

29 CJEU, supra note 16, at paras 55 ff.

30 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* (2021) ECLI:EU:C:2021:875.

The *PL-Holdings* case was brought to the CJEU as a request for preliminary ruling by the Supreme Court of Sweden (*Högsta domstol*) which had to decide whether to uphold a decision of the Svea Court of Appeal (*Svea hovrätt*) not to annul an arbitral award which obliged Poland to pay damages to the Luxembourg investor PL-Holdings S.à.r.l. With regard to the *Achmea* ruling, the Svea Court found that there was no valid arbitration agreement because of the inapplicability of the underlying ISDS clause contained in the intra-EU-BIT concluded between the Belgium-Luxembourg Economic Union (BLEU) and Poland in 1987. In the next step, however, it assumed the implied conclusion of an *ad hoc* arbitration agreement between Poland and the investor with the same content as the ISDS clause in the treaty. This assumption was based on the fact that both parties to the dispute had participated in the arbitration proceedings.

The CJEU declared that an *ad hoc* arbitration agreement concluded directly between an EU Member State and an EU investor is also incompatible with Art. 267 and 344 TFEU. However, this conclusion seems limited to situations where the arbitration proceedings were already initiated on the basis of an intra-EU-ISDS clause contrary to EU law and the function of the *ad hoc* arbitration agreement was only to continue the proceedings. As a result, legal constructs to circumvent the *Achmea* ruling are inadmissible.

4. The Termination Agreement

In order to implement the CJEU's ruling in *Achmea*, 23 Member States signed on 5 May 2020 the Agreement for the Termination of intra-EU-BITs ("termination agreement"). It explicitly addresses only BITs and does not cover the intra-EU application of Art. 26 of the Energy Charter Treaty (ECT), which is by far the most practically relevant ISDS clause in the context of intra-EU investment treaty arbitration.[31] Austria, Finland, Ireland, and Sweden are not parties to the Termination Agreement. Therefore, 32 intra-EU-BITs remained unaffected after its entry into force on 29 August 2020.[32] The agreement follows the declarations of the Member States from 15 and 16 January 2019 on the legal consequences of *Achmea*.[33] Recently, the European Commission has decided to open infringement proceedings against the Member States which did not sign the termination agreement (with the exception of Ireland[34]) or have not yet completed its ratification.[35]

The agreement not only terminates intra-EU-BITs, but also aims at eliminating the possible legal effects of sunset clauses (Art. 3). Furthermore, Arts. 5 ff. of the termination agreement regulate the

---

31 See below, section D. I. 5.

32 *Note on Intra-EU-BITs Not Covered by the Termination Agreement*, available at https://iilcc.uni-koeln.de/sites/iilcc/user_upload/IILCC_Note_on_Intra-EU_BITs_NOT_Covered_by_the_Termination_Agreement_05_2020.pdf

33 The declarations can be seen at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

34 Ireland has no intra-EU-BITs.

35 https://ec.europa.eu/commission/presscorner/detail/en/INF_21_6201.

fate of new, pending, and concluded arbitration proceedings based on the terminated intra-EU-BITs. Particularly close attention shall be paid to the agreement's temporal scope of application. According to Arts. 5 and 8(1), in conjunction with the definitions in Art. 1, arbitration proceedings that were not concluded prior to 6 March 2018 are covered by its scope. This regulation gives rise to concerns as to whether the termination agreement is compatible with the principle of non-retro-activity.

5. Intra-EU Application of the Energy Charter Treaty (ECT)

One of the main uncertainties left by the *Achmea* judgment was the question of whether the intra-EU application of Art. 26(2)(c) ECT is also affected by it. ISDS under the ECT is highly relevant to the protection of intra-EU investments. In 2018, about 45 per cent of all treaty-based intra-EU investment arbitrations were brought pursuant to the ECT.[36] In view of its high practical importance, the CJEU ruled on the intra-EU application of Art. 26(2)(c) ECT with EU law in the *Komstroy* judgment.[37] Given that the issue was not decisive for the outcome of the dispute, the findings were technically made *obiter dictum*.[38]

In *Komstroy*, the CJEU found that "Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[39] The Court has reached this conclusion by applying the criteria established in the *Achmea* case: capacity to take account of EU law, exceptional nature of the arbitral tribunal placing it outside the judicial system of the EU, and insufficient judicial review of the award.

Although the *Achmea* criteria are clearly fulfilled in the case of Art. 26 ECT, the transferability of the CJEU's reasoning from Art. 8 of the Netherlands-Slovakia BIT to Art. 26 ECT has been called into

---

36 See UNCTAD, *Fact Sheet on Intra-European Union Investor-State Arbitration Cases*, IIA Issue Note 3.2018, p. 1.

37 CJEU, C-741/19, *Republic of Moldova v. Komstroy LLC* (2021) ECLI:EU:C:2021:655.

38 The case concerns the setting aside of an ECT investment arbitration award before the Paris Court of Appeal. The underlying dispute between a Ukrainian investor and the Republic of Moldova relates to the purchase of electricity. In 2013, the Paris-seated tribunal in *Komstroy* (formerly known as *Energoalians*) *v. Moldova* rendered an award in favor of the investor in an arbitration conducted under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). Subsequently, the respondent State filed an action to set aside the award at the seat of arbitration. The Paris Court of Appeal referred three questions to the CJEU as to whether the claimant had a protected investment under Art. 26(1) ECT. However, neither the investor's home State nor the concerned host State are EU Member States, so that the compatibility of the intra-EU application of Art. 26(2)(c) ECT with EU law was not relevant for this case. See already with respect to the Opinion of the Advocate General: Scheu and Nikolov, *AG Szpunar's Opinion in Case C-741/19: Preparing the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty?*, Kluwer Arbitration Blog 2021, available at http://arbitrationblog.kluwerarbitration.com/2021/05/25/ag-szpunars-opinion-in-case-c-741-19-preparing-the-end-of-intra-eu-investment-arbitration-under-the-energy-charter-treaty/.

39 CJEU, C-741/19, *Republic of Moldova v. Komstroy LLC* (2021) ECLI:EU:C:2021:655, para. 66.

question because of the multilateral nature of the ECT, to which also non-EU countries are parties.[40] Therefore, the Court clarified that “despite [its] multilateral nature […] Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of [an intra-EU BIT]”.[41] By adopting this approach, the Court applies a general rule according to which obligations in multilateral treaties can be divided into bundles of bilateral relationships unless the obligation concerns the community of State parties as a whole. The bilateral nature of the obligation under Art. 26 ECT becomes apparent from the wording Art. 26(1) ECT: “disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former”.

6. Consequences of the Incompatibility of Intra-EU-BITs and ECT with EU Law

a. Consequences of Achmea for Tribunal Jurisdiction

To our knowledge, only one of the more than 70 intra-EU ISDS tribunals has declined its jurisdiction based on EU law objections, namely the tribunal in *Green Power v. Spain*.[42] In principle, as was shown in this section, all intra-EU tribunals established outside the Convention of the International Centre for Settlement of Investment Disputes (ICSID Convention) and seated within the EU should declare themselves not competent to decide on intra-EU investment disputes as a matter of law. However, pursuant to the principle of *Kompetenz-Kompetenz*, tribunals are judges of their own competence and thus decide on jurisdictional objections raised by respondent EU Member States. Therefore, no direct obligation for tribunals to decline their jurisdiction can be derived from any EU law provision.

In order to assess the *Achmea* ruling’s implications on jurisdiction, it should first be determined whether EU law is at all applicable to the arbitration which forms the basis for the jurisdiction of the tribunal. According to the doctrine of separability, we need to distinguish the law applicable to the arbitration agreement from the law applicable to the merits of the dispute. In most investment arbitration cases the disputing parties do not determine the law applicable to the arbitration agreement, as there is generally no direct agreement between the State and the investor (arbitration without privity).[43] Accordingly, identifying the law applicable to the arbitration agreement is fraught with a high level of complexity. It is therefore crucial to differentiate whether the tribunal is

---

40 See *e.g. Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the *Achmea* issue of 31 August 2018, para. 68.

41 CJEU, *supra* note 32, para. 64.

42 *Green Power K/S and Obton A/S v. Spain*, SCC Case No V 2016/135, Award of 16 June 2022. For an in-depth analysis of the consequences of the incompatibility of intra-EU treaty arbitration with EU law, see Scheu and Nikolov, *Jurisdiction of Tribunals to Settle Intra-EU Investment Treaty Disputes*, ICSID Review 2021, Vol. 36, No. 1, pp. 171–188.

43 Reference to Chapter [Jurisdiction].

established within the legal framework of the New York Convention (NYC)[44] or the ICSID Convention.

When proceedings are conducted according to arbitration rules governed by the NYC, a conflict of law rule in regard to the law applicable to the arbitration agreement has to be considered. In the absence of any party agreement, Art. V(1)(a) NYC stipulates that recognition of the award may be refused if the arbitration agreement is considered not valid under the law of the country in which the award was made. Consequently, the substantive validity of the arbitration agreement depends also on the law of the place of the arbitration (*lex arbitri*).[45] Even though the NYC concerns the recognition of foreign arbitral awards, ignoring the *lex arbitri* during the arbitration proceedings would significantly diminish the prospects of effective enforcement. Therefore, tribunals constituted within the legal framework of the NYC usually take account of the law of the place of arbitration in the context of their decision on jurisdiction.

Against this background, assessing the implications of *Achmea* in intra-EU investment treaty disputes governed by the NYC requires distinguishing between cases in which the tribunal is seated within or outside the EU. If the tribunal is seated in the territory of an EU Member State, the decision on arbitral jurisdiction will be, *inter alia*, subject to EU law. Pursuant to the hierarchy of norms within the EU, EU primary law – part of which is the *Achmea* ruling (Arts. 267, 344 TFEU) – directly prevails over norms of national law and international treaties such as intra-EU-BITs and the ECT applicable within the legal order of the Member States. Accordingly, a tribunal seated within the EU must conclude that it lacks jurisdiction to hear a claim based on an intra-EU investment treaty. By contrast, for tribunals seated outside the EU, the incompatibility of an ISDS clause contained in an intra-EU investment treaty with EU law will not be relevant to the tribunal's jurisdiction. EU law is not part of the applicable *lex arbitri* in non-EU Member States.

In contrast to arbitration governed by the NYC, the ICSID Convention provides for a more internationalized dispute settlement mechanism. It is also referred to as a delocalised system since it is legally detached from the law at the place of arbitration. According to Art. 53(1) ICSID Convention, an ICSID award "shall not be subject to any appeal or to any other remedy except those provided for in this Convention." Therefore, the *lex arbitri* is not the decisive factor when it comes to the tribunal's decision on jurisdiction. Instead, only international law matters in this regard. The foundational jurisdictional instruments of an ICSID arbitration tribunal are the ISDS clause contained in the investment treaty in conjunction with Art. 25 ICSID Convention. These provisions must be interpreted pursuant to the general principles of international law, in particular as set out in the VCLT. However, under those standards of interpretation, there is no room for the application of EU law. In fact, ISDS clauses are generally characterised by a clear wording so that a good faith

---

44 The NYC governs arbitrations conducted under the arbitration rules of UNCITRAL, the Stockholm Chamber of Commerce (SCC), or the International Chamber of Commerce (ICC). ???why not others???

45 Similarly, the tribunal in *Green Power K/S and Obton A/S v. Spain*, SCC Case No V 2016/135, Award of 16 June 2022, para. 447.

interpretation of the ordinary meaning does not leave much room for further interpretation. Especially, invoking Art. 31(3)(c) VCLT in order to interpret a clearly formulated ISDS clause in light of EU law would be contrary to the interpretation rules of the VCLT. As the *Vattenfall* Tribunal correctly emphasised, it "is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted, which would contradict the ordinary meaning of its terms."[46] Hence, EU law and respectively the *Achmea* ruling do not have any implications on the jurisdiction of intra-EU ICSID tribunals.

b. Consequences of Achmea for Setting Aside Proceedings and Enforcement of Intra-EU Awards

In regard to setting aside, recognition and enforcement of intra-EU-awards, we need to differentiate again between NYC-governed and ICSID awards, and also whether the action is taken within or outside the EU.[47]

An application to set aside an intra-EU-award governed by the NYC within the EU will be successful for the Member State. The legal basis would be, however, not directly the NYC, but the national arbitration law of the place of the arbitration. Pursuant to Art. 34 UNCITRAL Model Law on International Commercial Arbitration,[48] an arbitral award may *inter alia* be set aside if the arbitration agreement is "not valid under the law to which the parties have subjected it" or "the court finds that the award is in conflict with the public policy of this State." First, no valid arbitration agreement can be concluded based on intra-EU investment treaty after *Achmea*. The CJEU's ruling invalidates the offer from a Member State to an EU investor to conclude an arbitration agreement. Second, an intra-EU-award must be set aside due to a conflict with public policy. The *Achmea* judgment clearly suggests that giving legal effect to an ISDS clause contained in an intra-EU investment treaty would be in violation of most fundamental principles of EU law: the principle of autonomy of EU law and the principle of mutual trust between the Member States. Both provisions, i.e. valid arbitration agreement and the public policy rule, equally apply at the stage of recognition and enforcement pursuant to Art. V(1)(a) and Art. V(2)(b) NYC so that intra-EU-awards would not be recognised and enforced within the EU.

In regard to intra-EU ICSID awards, no setting aside proceedings are possible before domestic courts, given that the ICSID regime is legally detached from any national legal order (cf. Arts. 53,

46 Vattenfall tribunal, *supra* note 40, para. 154.

47 For an in-depth analysis of the setting aside, recognition and enforcement of intra-EU investment arbitration awards, see Scheu and Nikolov, *The Setting Aside and Enforcement of Intra-EU Investment Arbitration Awards after Achmea*, Arbitration International 2020, Vol. 36, pp. 253–274.

48 The UNCITRAL Model Law on International Commercial Arbitration has been adopted by 85 States so far, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. The text is available in Emmert (ed.), *International Business Transactions – Documents – Vol. II Dispute Settlement Documents*, CILP 3rd ed. 2020, pp. II-187-200.

54 ICSID Convention). Moreover, as a matter of public international law, such awards shall be recognised and are enforceable within the territory of all Member States of the ICSID Convention. However, from the perspective of EU law they remain – as decided by the CJEU in *Achmea* and confirmed in *Komstroy* and *PL Holdings* – incompatible with Arts. 267, 344 TFEU. Therefore, considering that primary EU law prevails not only over national law, but also over international treaties, domestic courts within the EU must disregard Art. 54 ICSID Convention in order to comply with the fundamental EU law principles such as the autonomy of the EU legal order and the mutual trust between Member States. If they nevertheless fulfil the obligations stipulated in the ICSID Convention and thus infringe EU primacy law, the Commission would not hesitate to launch official infringement procedures against the concerned EU Member State in order to prevent the awarded payments to be made or if the payments were made, to be reclaimed.

II. CETA's Investment Protection Chapter and Extra-EU-BITs

In 2019, the CJEU found in its Opinion 1/17 that the ICS contained in the CETA was compatible with EU law.[49] This landmark judgment paved the way for the implementation of the new EU investment policy. The Court thereby clarified that its *Achmea* jurisprudence does not apply to an EU investment agreement concluded with a third country such as the CETA. The reasons are twofold: First, the incompatibility of ISDS in intra-EU BITs with EU law are mainly based on a violation of the principle of mutual trust. But since mutual trust in the sense of EU law can only exist between EU Member States, it is not transferable to an extra-EU context. Second, the CJEU considered ISDS in intra-EU BITs to threaten the autonomy of EU law because an arbitral tribunal might end up interpreting and applying EU law without falling under Art. 267 TFEU. Under the CETA, however, the tribunal is explicitly precluded from doing so. Art. 8.31(2) CETA contains a complex provision on applicable law to the merits of the dispute. It provides that the CETA tribunal

> *shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.*

This provision is crucial for ensuring that an EU investment agreement does not infringe on the autonomy of EU law.[50] Accordingly, the CETA tribunal's lack of jurisdiction to interpret and apply

49 CJEU, Opinion C-1/17, *EU-Canada CET Agreement (CETA)*, (2019) ECLI:EU:C:2019:341.

50 For more details see: Scheu, *Article 8.31 - Applicable Law and Interpretation*, in: Bungenberg & Reinisch (eds.), *CETA Investment Law – Article by Article Commentary*, Nomos/Beck/Hart 2022, pp. 695 ff.

rules of EU law other than the provisions of the CETA was accepted by the CJEU and decisive for the compatibility of the ICS with EU law.[51]

With respect to extra-EU-BITs, it is currently unclear whether they would pass the test established by CJEU Opinion 1/17. To the extent that extra-EU-BITs may be incompatible with EU law, Member States are obligated to take all appropriate means to remedy the incompatibilities found. In that respect, the provision of Art. 351(2) TFEU serves as legal basis for renegotiations, and if such are not able to eliminate incompatibilities with EU law, it may even serve – from an EU law perspective – as a ground for the immediate termination of the respective treaty. Such solution seems, however, problematic from the perspective of international law – especially in regard to Art. 27 VCLT. Moreover, an immediate unilateral termination is not likely to be effective since most extra-EU-BITs contain sunset clauses, which guarantee long-term protection of the investments already made, even after the termination of the treaty. Since these BITs are anyway supposed to be replaced by new EU investment agreements, the issue is likely to be resolved by time.

E. FUTURE OF THE EUROPEAN APPROACH TO INTERNATIONAL INVESTMENT LAW

Starting from the transfer of competencies for FDI from the Member States to the Union with the entry into force of the Lisbon treaty in 2009, the European approach to investment law has undergone a remarkable evolution. So far, the interaction between investment law and EU law has been shaped by the jurisprudence of the CJEU, the activities of the EU-Commission, and the public debate about the legitimacy of *ad hoc* investment arbitration in European societies. At the same time, EU investors remain the most active users of investment arbitration worldwide.[52]

Internally, the jurisprudence of the CJEU has led to the termination of intra-EU investment protection by international treaties. Even though not all intra-EU-BITs are terminated yet, the EU-Commission seems determined to ensure that Member States implement the CJEU's jurisprudence. And even though investors continue to bring intra-EU investment treaty claims, awards resulting from such claims will not be enforceable within the EU.

Even more relevant than the fate of intra-EU BITs is the future of the ECT as the practically most used treaty for intra-EU investment claims. Arbitral tribunals will continue to establish their jurisdiction in accordance with the principles set out above. Consequently, new intra-EU ECT awards are likely to be rendered in the future. Respondent EU Member States will not pay the awarded damages given that the underlying arbitration agreement is incompatible with EU law. This evident clash of legal orders can only be resolved by an amendment of the ECT. The tribunal in *Kruck and others v. Spain* has therefore rightfully noted that even though the

---

51 CJEU, Opinion 1/17 (CETA), (2019) ECLI:EU:C:2019:341, paras 120-136.

52 Between 2011 and 2020, investors from the EU were by far the most frequent claimants worldwide with 283 known ISDS cases, followed by US investors initiating 84 cases. See UNCTAD, *Investor-State Dispute Settlement Cases: Facts and Figures 2020*, IIA Issues Note 2 September 2021, p. 3.

> *CJEU has its role and authority within the EU legal order […], this Tribunal has the duty to fulfil its mandate under the ECT, and has no legal right or capacity to do otherwise. The solution lies in the hands of the Contracting Parties to the ECT.*[53]

Since the ECT is currently under review, the EU and its Member States might convince the other contracting States to agree on a reservation clause which precludes the intra-EU application of the ECT.[54] Against this background, it is only a matter of time until intra-EU investment treaty arbitration will cease to exist.

Especially for large investments, however, investor-State contracts with an arbitration agreement directly concluded between the investor and the host State could become an attractive alternative to intra-EU investment treaty protection. Even though the CJEU dealt with *ad hoc* arbitration in *PL Holdings*,[55] it is unclear whether contractual ISDS would fall under the *Achmea* jurisprudence or rather under the Court's more liberal approach vis-à-vis commercial arbitration developed in *Eco Swiss*.[56] The findings in *Achmea* very much rely on the fact that the ISDS clause derives from a treaty concluded between EU Member States. It therefore seems likely that a contract between an EU investor and an EU Member State does not lead to the same conclusions as in *Achmea*.

The future of EU investment agreements with third countries will be shaped by developments on two issues. First, the outcome of the ISDS reform process at UNCITRAL will provide important impulses for the EU investment policy. As outlined above, the current approach which consists of establishing a separate ICS body for each EU investment agreement is not sustainable. Therefore, the EU and its Member States have significant interests in the creation of a multilateral investment court. Since the EU is among the strongest proponents of this idea, it is not unlikely that the discussions held at UNCITRAL will indeed lead to the establishment of such a permanent ISDS mechanism. Second, and probably even more important for the future of EU investment law is the issue of ratification. So far, none of the concluded investment agreements is in force yet. While the EU's third country partners such as Vietnam have already ratified the EVIPA, the outcome of the process within the Union remains unclear.

As a result, the challenges are twofold. Internally, the EU must gain the trust of investors even after putting an end to intra-EU investment arbitration. With regard to extra-EU investments, the EU must ensure its trading partners that concluded treaties will be ratified much more quickly and reliably than under the present practice. If these hurdles are overcome, the EU has excellent chances to position itself as a leading actor in the international investment regime of the future.

---

53 *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of 6 December 2021, para. 46.

54 The current status of the ECT modernization process is available at https://www.energychartertreaty.org/modernisation-of-the-treaty/.

55 CJEU, *supra* note 30.

56 CJEU, C-126/97, *Eco Swiss v Benetton International* (1999) ECLI:EU:C:1999:269.