Taking Investors' Rights Seriously: The *Achmea* and *CETA* Rulings of the European Court of Justice Do Not Bar Intra-EU Investment Arbitration

*Alexander Reuter**

* Prof. Dr. iur., Rechtsanwalt and Attorney-at-Law (New York). The author is a lawyer in Cologne, Germany, and partner of GÖRG Partnerschaft von Rechtsanwälten. The areas of emphasis of his practice comprise infrastructure transactions, project finance and state aid law as well as dispute resolution, including arbitration proceedings, both as counsel and as arbitrator.

ZaöRV 80 (2020), 379-427

Abstract

In its recent *Achmea* and *CETA* rulings the European Court of Justice (ECJ) has addressed aspects of the much debated compatibility of intra-European Union (EU) investment arbitration with EU law. Both rulings were concerned with internal EU governance issues. In contrast, the rulings did not address the rights of private investors who had made investments in reliance on the relevant investment treaties. This absence of consideration of

investors' rights may surprise as the protection of their position is at the heart of investment treaties. The article submits that such lack of consideration for the investors is both a result of the confines of the compatibility debate conducted so far, and a result of the procedural limitations of the relevant ECJ proceedings.

Against this background, the article analyzes how investors' rights impact the legality of intra-EU investment arbitration. It argues that investors' rights need to be taken seriously, and all the more so as it would be contradictory if state parties to investment treaties which have bestowed such rights on investors so as to solicit their privately financed investments would be allowed subsequently to renege on their commitments, in particular where investments have been made. The argument is based on public international law and the binding effects which public international law has within the EU. Correspondingly, the EU must not obstruct the enforcement of investors' rights. A violation of that obligation by EU institutions constitutes an Energy Charter Treaty (ECT) infringement in itself. In addition, the article undertakes to demonstrate that the two ECJ rulings lack precedent character for the described impact of investors' rights on the legal assessment. Alternatively, the article discusses how intra-EU arbitration under the multilateral Energy Charter Treaty is to be assessed if, contrary to the above, investors' rights were to be disregarded and the analysis to be confined to the criteria selected by the ECJ to arrive at its two rulings. It submits that even under the criteria developed by said rulings, EU law does not restrict intra-EU investment arbitration under the ECT.

I. Introduction

1. Intra-EU Arbitration and EU Institutions

In its preliminary ruling of 6.3.2018 in the *Achmea* case[1] the European Court of Justice found intra-EU investment arbitration under the bilateral investment treaty (BIT) between Slovakia and the Netherlands (Slovakia Netherlands BIT)[2] to violate EU law. Within its scope,[3] the ruling appears

[1] *Achmea*, ECJ, Case C-284/16, 6.3.2018.

[2] The Treaty had originally been concluded by the Czech and Slovak Federative Republic. On 1.1.1993 the Slovak Republic succeeded to the rights and obligations of that state under the BIT. Effective as of 1.5.2004, the Slovak Republic acceded to the European Union on the basis of the Accession Treaty with the EU of 16.4.2003.

[3] See Part III. 3. below.

to bereave EU investors having invested in other EU countries of essential rights. However, the affected investment treaties have bestowed the relevant rights upon these investors, and in many instances investors have relied on them when making their investments. At the same time, investments usually cannot be undone, or only at a substantial loss, once made and in many cases, notably in the area of renewable energy, the EU has even spurred the investments. The ECJ has, however, following the European Commission's arguments,[4] not dealt with *investors*' rights. Instead, it has based its ruling on the principles of "mutual trust and sincere cooperation" amongst EU member states, the supremacy of EU law and the protection of the ECJ's institutional competences, notably its supreme competence to ensure the uniform application of EU law. All of these principles concern the internal governance of the EU, its member states and its institutions. The same holds true about an opinion of the ECJ of 30.4.2019 on the compatibility of the investment arbitration rules of the "Comprehensive Economic and Trade Agreement" (CETA) between Canada on the one part and the European Union and its member states on the other part (*CETA* Opinion).[5]

On the other hand, in the last years a great many arbitral tribunals dealt with intra-EU investment arbitrations, most of which concerned the objections of investors against the reduction by EU member states of their support to renewable energy facilities. As these matters concern the energy sector, most of these proceedings have been initiated under the Energy Charter Treaty, a multilateral investment treaty to which the EU has acceded. As set forth in more detail in Part II. 4. below, *none* of these tribunals found the proceedings to be incompatible with EU law or considered itself prevented by EU law to adjudicate the matter.

The reason for this discrepancy between the findings of the ECJ and those of the arbitral tribunals can already be gleaned from the above: While the tribunals deal with investors' rights under the relevant investment treaties, the ECJ is concerned with intra-EU governance issues. However, individual rights are not alien to EU law. Thus, this article addresses the issue how intra-EU arbitration is to be assessed under EU law if one takes inves-

[4] See Part II. 2. a) below and the short recount of the Commission's submission's in the *Achmea* procedure in the Opinion of Advocate General *Wathelet*, 19.9.2017, Case C-284/16, paras. 39 et seq.

[5] The European Commission's and the ECJ's absence of consideration of the rights of EU citizens may be a consequence of their institutional perspective: Organizations innately tend to be conscious about inter-institutional governance and to protect and proliferate their competences. Such tendency may explain their decisions, but does not alter the legal situation or derogate the EU Treaties or rights bestowed upon of EU citizens, in particular where such rights are fundamental.

tors' rights into due regard. In the alternative, the article discusses the consequences on intra-EU arbitration under the ECT if one were to confine the analysis to the criteria selected by the ECJ for its assessments.

2. Propositions and Structure of the Article

To facilitate the overview, both the structure and the propositions of the article are set forth at the outset:

Part II sketches out that the ECJ has essentially based *Achmea* and *CETA* on principles concerning the governance of EU members and EU institutions. The ECJ has, in contrast, not dealt with investors' rights under investment treaties.

Part III sets forth that investment treaties, however, form part of public international law and bestow private investors with rights against the host states, notably the right that the host state complies with the treaty's protection standards and the right to take the host state to arbitration. Thus, albeit private parties, investment treaties turn investors in holders of rights under public international law. Private enforcement is even one of the very purposes of investment treaties.

Part III further submits the following: As (i) the ECT is a treaty concluded by the EU and its member states, (ii) bestows public international law rights on private parties, and (iii) the *pacta sunt servanda* principle applies to the EU under both public international law and Art. 216 of the Treaty on the Functioning of the European Union (TFEU), the obligations under the ECT of the EU and its member states *vis-à-vis* EU (and non-EU) private investors need to be recognized by the EU, its institution and its member states (internal binding effect). Furthermore, the EU institutions are bound not to obstruct the due implementation of the rights and obligations of investors and the relevant host states. A violation of that obligation by EU institutions constitutes an ECT infringement in itself.

Finally, Part III sets out that in *Achmea* the issue of investors' rights was not submitted to, and correspondingly not addressed by, the ECJ. Hence, already as a matter of procedural law the ruling cannot serve as precedent for the compatibility of the rights bestowed upon investors under the ECT with EU law. For the same reason, *Achmea* cannot serve as a precedent for further intra-EU BIT conflicts either (and not even for the Slovakia Netherlands BIT). Likewise, as *CETA* dealt with a *future* treaty, not with a concluded treaty under which rights have already come into existence under public international law, *CETA* does not have precedent character either.

Part IV discusses the alternative: If one were to disregard the above, the question arises how intra-EU investment arbitration under the ECT would fare under the criteria to which the ECJ has confined its analysis of the compatibility of investment arbitration with EU law. The article submits that, according to these criteria, intra-EU arbitration under the ECT (i) does not fall within the reach of *Achmea* and (ii) under the criteria of the *CETA* Opinion in essential respects fares better than the CETA.

After a summary in Part V, the concluding Part VI submits that investors should not be bereaved of rights which have been bestowed upon them by public international law treaties and on the basis of which they have made their investments. This is a matter of material justice and holds all the more true where the EU was instrumental in soliciting the investments.

II. *Achmea* and Its Background

1. Investment Treaties: *Private Enforcement* of Public International Law

a) Investment Treaties and Their Private Enforcement

As mentioned, investment treaties form part of public international law. Nevertheless, they bestow *private investors* with rights against the host state, notably (1) the right that the host state complies with the treaty's protection standards and (2) the right to take the host state to arbitration. In other words, investment treaties provide "for the direct invocation of arbitration claims by investors themselves against the host State" and "vouchsafe" the "substantive rights" of investors thereunder.[6] There is nothing in public international law to prevent contracting states from so bestowing private parties with subjective rights[7] and thus, albeit private parties, inves-

[6] *C. MacLachlan/L. Shore/M. Weiniger*, International Investment Arbitration, 2007, paras. 1.06, 2.20, 7.01.

[7] *LaGrand Case* (*Germany v. United States*), Judgment, ICJ Reports 2001, 466 et seq., para. 77; for a more detailed overview *N. Klein*, Das Investitionsschutzrecht als völkerrechtliches Individualschutzrecht im Mehrebenensystem, 2018, 178 et seq.; *R. Hofmann*, in: M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (eds.), International Investment Law, 2015, Chap. 2 III, paras. 12-14; *A. Peters*, Beyond Human Rights – The Legal Status of the Individual in International Law, 2016, §§ 10.2, 10.4; as she sets out this holds true irrespective of the question whether one perceives public international law as a means to enforce the public interest or rather focuses on "subjective" legal positions of specific entities. It is similar, but

tors become holders of rights under public international law.[8] Such rights of investors to enforce the treaty standards by way of arbitration against the host state and to enforce the ensuing arbitral awards (*private enforcement)* is even one of the essential features of investment treaties[9] and constitutes a genuine, autonomous procedural right of the investor under international law serving to enforce international law. The same applies to substantive rights under investment treaties.[10] The relevant claims are acknowledged to belong to the investors, and the international legal responsibility of the host states is owed to those investors.[11]

b) Direct or Derivative Rights?

Their private enforcement character distinguishes investment treaties from *diplomatic protection* which is a public law instrument for the home state, rather than for the investor.[12]

While private enforcement in accordance with investment treaties differs from diplomatic protection, authors have raised the conceptual question of the nature of investors' rights under investment treaties and the placement

---

nevertheless a distinct legal phenomenon that *municipal* law may treat (or interpret) public international law rules as internally binding; see *Armin Steinbach's* discussion of the conferral of individual rights and the direct effect of WTO rules, *A. Steinbach*, EU Liability and International Economic Law, 2017, 31 et seq.

[8] *N. Klein* (note 7), 178 et seq.; *R. Hofmann* (note 7); A. Peters (note 7), §§ 10.2, 10.4.

[9] *Broches* noted in 1972: "From a legal point of view the most striking fatur of the [ICSID] Convention is that it firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law", *A. Broches*, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, RdC 136 (1972), 331, 349; *N. Klein* (note 7), 118 et seq., 182 et seq., 192 et seq.; *R. Dolzer/C. H. Schreuer*, Principles of International Investment Law, 2nd ed. 2012, 233 et seq.; *M. Herdegen*, Internationales Wirtschaftsrecht, 9th ed. 2011, 299; *K. Miles*, International Investment Law: Origins, Imperialism and Conceptualizing the Environment, Colo. J. Int'l Envtl. L. & Pol'y 21 (2010), 1, 3 et seq.; for a more extensive historical background of investment treaties, of diplomatic protection and law of aliens as their predecessors, and the individual (human) rights elements in the law of aliens, see *N. Klein* (note 7), 19 et seq. and 91 et seq.,;as well as *N. Basener*, Investment Protection in the European Union, 2017, 37 et seq.

[10] *A. Peters* (note 7), §§ 10.2, 10.2.3.

[11] *A. Peters* (note 7), §§ 10.2 et seq. The separate discussion of the nature of the agreement to arbitrate (see *A. Peters*, §§ 10.2.1, 10.2.2) is irrelevant in the present context.

[12] Permanent Court of Justice, *Greece v. United Kingdom* (*The Mavrommatis Palestine Concessions*), PCIJ Reports Series A, No. 2, 12; in respect of diplomatic protection *Douglas* has shown that this formula continues to apply to date, *Z. Douglas*, The International Law of Investment Claims, 2009 (reprint 2012), 13.

of such rights in the context of public international law, notably as to whether rights of investors under investment treaties are "direct" rights of the investors as private parties or, as diplomatic protection, only "derivative".[13] The traditional view was that while investment-related treaties benefit the interests of investors, the actual treaty obligations are owed not to the private investor, but rather to the investor's home State or capital-exporting State party. According to this view, the home State is the rights-holder which has "delegated" enforcement to private parties for convenience.[14] In regard to BITs, some *domestic courts*, too, have denied that investors may have "direct" rights stemming from such treaties.[15] Analyzing the case law of the Permanent Court of International Justice, arbitral tribunals, and other sources of public international law, *Zachary Douglas* has, however, come to the conclusions (1) that there is no reason why an international treaty cannot create rights for individuals and private entities, (2) that investment treaties essentially differ from diplomatic protection and (3) that thus "the fundamental assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based on the vindication of its own rights rather than of its national state".[16]

These conclusions were seminal and followed suit by commentators[17] and the English Court of Appeal.[18] In addition, these conclusions underlie arbitral practice:[19]

---

[13] For an in-depth overview see *N. Klein* (note 7), 141 et seq.

[14] *S. P. Subedi*, International Investment Law, 3rd ed. 2016, 116, 131; *A. Peters* (note 7), § 10.4.1.

[15] *A. Peters* (note 7), 2016, § 10.4.1, refers to the French Conseil Constitutionnel (French Conseil d'Etat, Décision No. 280264 of 21.12.2007) and the Federal Constitutional Court of Germany in connection with German government bonds and the rights under the Argentine-German BIT (2 BvM 1/03, Ruling of the Second Senate of 8.5.2007, para. 51; dissenting opinion ruling, Judge *Lübbe-Wolff*, *loc. cit.*, para. 73).

[16] *Z. Douglas* (note 12), 17 et seq., 38, see also 6 et seq. and 10 et seq.; *Z. Douglas*, Hybrid Foundations, 2004, 160 et seq., under the heading: "To Whom are Investment Treaty Obligations Owed?; *N. Klein* (note 7), 165 et seq., 170; see also *C. I. Nagy*, Intra-EU Bilateral Investment Treaties and EU Law after Achmea: "Know Well What Leads You Forward and What Holds You Back", GLJ 19 (2019), 981, 997.

[17] *C. MacLachlan/L. Shore/M. Weiniger* (note 6), para. 3.62; *O. Spiermann*, Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties, Arb Int'l 20 (2004), 179.

[18] *Republic of Ecuador v. Occidental Exploration and Production Co.*, 2005, EWCA Civ 1116, at para. 20, quoting *Douglas'* words, and pointing out that the "language [of the treaty at bar] makes clear that injured nationals or companies are to have a direct claim for their own benefit". It is worthy of note that the relevant language of the ECT (Arts. 10, 23) resembles the relevant provisions of the 1993 USA – Ecuador BIT (Arts. II, VII) before the Court of Appeals. See also *N. Klein* (note 7), 173 et seq.

(1) In the cases *GAMI v. Mexico*[20] and *Mondev v. USA*[21] the awards were rendered irrespective of the fact that the home states opposed the claims before the tribunals.[22] Likewise, in *Lucchetti v. Peru,* the host state Peru commenced arbitration against the investor's home state and sought to have the investor-state arbitration to be stayed until final resolution of the state-to-state dispute. However, the tribunal rejected the request.[23] Finally, in *Archer Daniels Midland Co. v. Mexico*, the tribunal followed the "derivative" approach for purposes of the North American Free Trade Agreement (NAFTA), but neither the tribunal nor even respondent Mexico drew into question *the procedural right* of the investor to pursue the substantive (inter-state) NAFTA standards by way of investor-state-arbitration.[24]

(2) Compensation awards invaryingly calculate the damages only on the basis of the interests of the investor, not on the basis of the interests of its home state.[25]

(3) It is common ground that investors are free not to pursue their claims under investment treaties,[26] and a broad practice shows many instances in which investors chose not to enforce their rights.

Hence, the conceptual setting of diplomatic protection has *not* been carried forward to investment treaties. Such treaties directly and individually

---

19 See *C. MacLachlan/L. Shore/M. Weiniger* (note 6), para. 3.62; for an extensive overview over the case-law and doctrine, see *A. Peters* (note 7), §§ 10.4.2.1 to 10.4.2.3. She pleads for "treaty-by-treaty" approach on the basis of the interpretation of the relevant treaty in which the wording has a prominent role given the fact that the wording is the basis of reliance of investors. She finds direct investor rights to be at hand where the treaty stipulates that the host state "*shall accord*" fair treatment, or the investor "*shall not be subject*" to discrimination, or where language as "*the investor shall have the right*" to a certain treatment is used. She also refers to model treaties on investment protection which expressly accord autonomous rights to investors such as the 2004 Canadian model BIT which speaks of the "rights of an investor" in the subrogation clause of Art. 15, para. 2. As for the ECT she finds that it provides direct rights, and refers to the ECT's Art. 13(2) which according to an individual right to national remedies, analogous to Art. 13 ECHR (*A. Peters*, § 10.4.2.3).

20 *GAMI Investments Inc. v. United Mexican States*, submission of the US of 30.6.2003, <www.state.gov>; for more details see *Z. Douglas* (note 12), 19, note 79.

21 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Second submission of Canada, <www.state.gov>; for more details see *Z. Douglas* (note 12), 19, note 81.

22 See also *N. Klein* (note 7), 166 et seq.

23 *Empresas Lucchetti SA and Luccetti Peru SA v. Peru*, ICSID Case No. ARB/03/4, Award, 7.2.2005, para. 9.

24 *Archer Daniels Midland Co. v. Mexico*, ICSID Additional Facility, Case No. ARB/AF/04/05, Award, 21.11.2007, paras. 164 et seq., notably paras. 165, 170, 177, 179 et seq.

25 *Z. Douglas* (note 12), 30.

26 *N. Klein* (note 7), 171.

entitle investors *vis-à-vis* the host state[27] and have been said to be "the archetype of treaties conferring rights on individuals".[28]

c) Taking Rights Seriously

It is the key proposition of this article that these rights need to be taken seriously. While this locution alludes to *Ronald Dworkin's* well-known book,[29] this article is not concerned with *Dworkin's* considerations on the tension between positivism and the rights of individuals as a higher source of law. It is true, the article's propositions are based on the rights of *individuals*. However, the rights dealt with here have already found expression in rules positively committed to writing in investment treaties, and their nature and scope have been carved out by a voluminous body of arbitral awards and legal writing. In the present context "taking rights seriously" thus means that courts and tribunals have to take these rights into regard and apply what the customary rules of public international law command in respect of their interpretation and reach. This holds all the more so as it would be contradictory if the contracting parties to investment treaties bestow such rights on investors so as to solicit their privately financed investments, but renege on their commitments *after the investments have been made* (Part III. 1.).

d) Content and Abrogation of Rights by the State Parties to the Treaty

It should be added that the described nature of the relevant substantive and procedural rights as entitlements of investors under public international law does not answer the question what the exact *scope* and *content* of such rights are. Those questions have to be answered by the customary rules for the interpretation of treaties under public international law as applied in the voluminous body of arbitral awards.

---

[27] *N. Klein* (note 7), 135: Entry of private parties, bestowed with, and thus as holders of, rights international public law rights into the state to state relationship; see also 139 et seq.

[28] *O. Spiermann* (note 17), 179; also quoted by *N. Klein* (note 7), 134; *J. Griebel*, Internationales Investitionsrecht, 2008, 68 et seq.; *C. I. Nagy* (note 16), 981, 995 et seq. ("*Whatever the correct conceptualization is, thus much is certain: Protective rights accrue to investors")*; in the same sense, for example, *F. Francioni*, Access to Justice, Denial of Justice, and International Investment Law, in: P.-M. Dupuy/F. Francioni/E.-U. Petersmann (eds.), Human Rights in International Investment Law and Arbitration, 2009, 65.

[29] *R. Dworkin*, Taking Rights Seriously, 1977.

This also leads to the answer to the further question as to whether the state parties to an investment treaty, through which they have created the investors' rights, may abrogate these rights by termination of the treaty, by mutual agreement or by the treaty's reinterpretation. For our context this might mean that the EU could, by agreement with the other state parties to the ECT or maybe even unilaterally by findings of the EU courts, simply revoke or curtail rights which it granted under the ECT to investors: The answer to this question again is a matter of the content, and thus of the *interpretation*, of the relevant treaty:[30] Does the treaty bestow rights on investors on which they can *rely* for the duration of their investments?[31] Of course, a treaty could stipulate that the host state is free to revoke the investors' protection as and when it sees fit, and sometimes treaties provide for specific procedures of the state parties for retroactive (re)interpretation of the treaty. However, this in an exception; generally speaking, the contracting states want to attract investors, and thus aim at providing a stable legal basis for investments. Hence, as a matter of course the rights provided in the treaties are irrevocable, at least in respect of investments already made. This is confirmed by the "sunset clauses" which many treaties comprise providing for the survival of investors' rights in the event of a unilateral termination of, or withdrawal from, a treaty by a state party.[32] The purpose of these clauses is to ensure protection at least for the investment made during the term of the relevant treaty.[33] Likewise, in *CETA* the ECJ has found that a retroactive (re)interpretation of the CETA by the CETA Joint Committee (which is comprised of representatives of Canada and the EU) would not stand with the principle of the independence of the CETA arbitral tribunals.[34] Hence, under public international law, as a general rule, a reduction of treaty protection cannot impair investors' rights *after* these have made investments. This holds particularly true about the ECT: It governs the energy sector, that is, a sector characterized by long term investments. Its Art. 1 sets out that the provisions of the Treaty "have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal frame-

[30] This falls in line with *Anne Peters'* treaty-by-treaty approach in respect of the question whether an investment treaty awards direct or derivative rights to investors, *A. Peters* (note 7), §§ 10.4.2.1 to 10.4.2.3.

[31] *A. K. Bjorklund*, in: M. Bungenberg/J. Griebel/S. Hobe/A. Reinisch (note 7), Chap. 4 III B, para. 12.

[32] *A. K. Bjorklund* (note 31), Chap. 4 III B, para. 12.

[33] *R. Dolzer/C. H. Schreuer* (note 9), 36.

[34] *CETA* Opinion, paras. 236 et seq., on the authority of the CETA Joint Committee to interpret the CETA (see also below footnote 125; similar *A. K. Bjorklund*, Chap. 4 III B, para. 12, in respect oft he NAFTA.

work to promote long-term cooperation" in the energy sector, and its Art. 47 provides, in view of the long-term character of energy investments, a sunset period of 20 years in the event a state party withdraws from the treaty. For our context this means that under public international law the EU cannot by agreement with the other state parties to the ECT, let alone unilaterally, simply revoke or curtail rights which the ECT bestowed upon investors.

2. Intra-EU Investment Arbitration and the European Commission

a) The European Commission's Concerns About Intra-EU Investment Arbitration

EU member states are parties to numerous investment treaties, including treaties with other EU member states (intra-EU). In addition to many intra-EU BITs, all EU member states,[35] the EU and many members of the former Commonwealth of Independent States (CIS) are parties to the already mentioned ECT, a multilateral investment treaty of 1994 protecting cross-border investments in the energy sector.

After the Treaty of Lisbon amending the EU Treaties had entered into force on 1.12.2009,[36] the European Commission has come to oppose intra-EU investment treaties, and in particular intra-EU arbitration proceedings. The background is the expansion by Art. 207(1) TFEU of the European Commission's competences by the Treaty of Lisbon which has, for the first time, awarded an – exclusive – competence for investment treaties *with third states* to the European Union.[37] In line with its opposition to intra-EU

[35] Italy withdrew from the ECT in 2016. Pursuant to Art. 47(3) ECT, this does not affect the arbitration proceedings against Italy as host state pending at the time of the withdrawal.

[36] As regards the consequences of the Treaty of Lisbon on EU investment protection competences and policies, see, for example, *C. E. Anderer*, Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty, Brooklyn J. Int'l L. 35 (2010), 851, 864 et seq.; *C. Herrmann*, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW 21 (2010), 207 et seq.; on the consequences for investment treaties between EU member states *S. Leif/E. Johannsen*, Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon, Institut für Wirtschaftsrecht 2009, 27 et seq.

[37] There has been a number of rulings of the ECJ dealing with the relationship between the autonomy of the EU legal order on the one hand and public international law treaties on the other hand, such as Opinion 1/91 of 14.12.1991 on the EEA Agreement, Opinion 1/00 of

investment arbitration, the EU Commission has filed *amicus curiae* interventions in a great many arbitration proceedings.[38] In the *Achmea* proceedings it has laid out its position and proffered the following reasons for its concerns: (1) Art. 344 of the Treaty on the Functioning of the European Union would provide that controversies between EU member states on the interpretation or application of the EU Treaties must not be settled in a way other than provided for in the TFEU, and this provision would be violated by investment arbitration, at least where it involves EU law.[39] (2) Pursuant to Art. 30(3) of the Vienna Convention on the Law of Treaties (VCLT),

---

18.4.2002 on the establishment of a European Common Aviation Area, Opinion 1/09 of 8.3.2011, on the Agreement on the creation of a unified patent litigation system, and Opinion 2/13 of 18.12.2014 on the Accession of the EU to the ECHR. However, this does neither refute the change of the *Commission*'s attitude in respect of investment treaties following the Treaty of Lisbon, neither the surprising character of that change, see Opinion of Advocate General *Wathelet* in the *Achmea* case, 19.9.2017, Case C-284/16, paras. 39 et seq.: "*For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe. [The] Commission attempted to explain that change in its position on the incompatibility of BITs with the EU and FEU Treaties, maintaining that the agreements in question were necessary in order to prepare for the accession of the candidate countries. However, if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which has lasted more than 30 years in the case of some Member States and 13 years in the case of many others? In addition, in the European Union, there are no investment treaties solely between market-economy countries and countries which previously had controlled economies or between Member States and candidate countries for accession, (43) as the Commission has suggested. Furthermore, all the Member States and the Union have ratified the Energy Charter Treaty […]. That multilateral treaty on investment in the field of energy operates even between Member States, since it was concluded not as an agreement between the Union and its Member States, of the one part, and third countries, of the other part, but as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing. In that sense, the material provisions for the protection of investments provided for in that Treaty and the ISDS mechanism also operate between Member States. I note that if no EU institution and no Member State sought an opinion from the Court on the compatibility of that treaty with the EU and FEU Treaties, that is because none of them had the slightest suspicion that it might be incompatible would add that the systemic risk which, according to the Commission, intra-EU BITs represent to the uniformity and effectiveness of EU law is greatly exaggerated. UNCTAD's statistics show that out of 62 intra-EU arbitral proceedings which, over a period of several decades, have been closed, the investors have been successful in only 10 cases, representing 16.1 % of those 62 cases, a rate significantly below the 26.9 % of 'victories' for investors at the global level.*" See also note 5 above.

[38] For a short overview of the relevant proceedings, see *C. I. Nagy* (note 16), 981, 985 et seq.

[39] Recount of Commission arguments by Oberlandesgericht (Higher Regional Court) Frankfurt, 10.5.2012, 26 SchH 11/10, <http://openjur.de>, paras. 27 et seq.

BITs of an EU member state with other EU member states entered into before the accession of such member state to the EU had been rendered ineffective by virtue of the accession to the EU of the new member, and EU law would have supremacy anyway.[40] (3) Investment protection awarded by an EU member state as a host state to investors from certain (but not all) other EU member states would be discriminatory and thus violate the prohibition of discrimination under Art. 18 TFEU.[41] (4) Arbitration procedures between EU member states would violate a principle of mutual trust between the courts of the EU member states.[42] (5) Finally, the competence of an arbitral tribunal would have to be denied because arbitral tribunals did not have the right to request decisions of the ECJ under Art. 267 TFEU so that the integrity of EU law and the supreme authority of the ECJ to interpret it would be jeopardized.[43]

In its communication of 19.7.2018 on Protection of intra-EU investment,[44] the Commission repeats its position finding that intra-EU BITs confer rights only in respect of investors from one of the two member states concerned, and are thus in conflict with the principle of non-discrimination among EU investors within the single market under EU law. In addition, by setting up an alternative system of dispute resolution, intra-EU BITs take away from the national judiciary litigation concerning national measures and involving EU law. According to the Commission, they "entrust this litigation to private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice".[45]

---

[40] Recount of Commission arguments by Oberlandesgericht (note 39), para. 30.

[41] Recount of Commission arguments by Oberlandesgericht (note 39), para. 31.

[42] Recount of Commission arguments by Oberlandesgericht (note 39), para. 32.

[43] Recount of Commission arguments by Oberlandesgericht (note 39), para. 33. According to the recounts of the arbitral tribunals, the arguments (1) to (5) have also been presented by the Commission in *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30.11.2012, paras. 4.33, 4.89 et seq., 5.8 et seq.; *Eastern Sugar B.V. v. The Czech Republic*, SCC 088/2004, UNCITRAL, Partial Award, 27.3.2007, paras. 119 et seq.; *Achmea B.V.* (*formerly Eureko B.V.*) *v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26.10.2010, paras. 175 et seq.

[44] Communication from the Commission to the European Parliament and the Council of 19.7.2018, COM(2018) 547 final, on Protection of intra-EU investment.

[45] In a recent presentation the former president of the German Constitutional Court (*Bundesverfassungsgericht*), *Ferdinand Kirchhof*, has found that there is an ECJ monologue rather than a dialogue, Süddeutsche Zeitung, 15.3.2019, <https://www.sueddeutsche.de>. This issue is beyond the scope of this article. However, a recent study on the "dialogue" between the ECJ and member state courts in the area of the protection of private property and other fundamental rights finds that the ECJ reacts with delay and on stark pressure only, *M. Buschmann*, EuGH und Eigentumsgarantie, 2017, 62 et seq. Recent decisions of the German

In line therewith, in August 2015 the Commission initiated infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden in respect of their intra-EU BITs and in September 2016 formally requested these member states to terminate the relevant treaties.[46] On 15. and 16.1.2019, the 28 member states of the European Union issued declarations[47] undertaking to terminate bilateral investment treaties concluded between them ("intra-EU BITs") by 6.12.2019. The member states issued these declarations in response to the March 2018 *Achmea* judgment of the ECJ.[48] In the declaration, 22 of the 28 member states have also set out their view that the *Achmea* judgment applies equally to intra-EU investor-state arbitration under the Energy Charter Treaty.

For purposes of this article it is worthy to note that none of these concern deals with investors' rights.

b) Further Discussions

Following the European Commission's interventions, the relationship of EU law and intra-EU investment arbitration has become the subject of a very broad discussion.[49] However, arbitral tribunals both under BITs and

Constitutional Court also indicate a rising irritation on the ECJ's position as regards the protection of fundamental rights in criminal procedure, see *G. Dannecker*, Der Grundrechtsschutz im Kartellordnungswidrigkeitenrecht im Lichte der neueren Rechtsprechung des EuGH, NZKart 2015, 25, 26 et seq.

[46] See press release of the Commission of 18.6.2015, <https://europa.eu>, as well as Communication from the Commission to the European Parliament and the Council of 19.7.2018, COM(2018) 547 final, on Protection of intra-EU investment.

[47] <https://ec.europa.eu>.

[48] Decision of 6.3.2018, *Slovak Republic v. Achmea BV*, Case C-284/16 (2018).

[49] See, for example, *N. Basener* (note 9), 191 et seq.; *T. Eilmansberger*, Bilateral Investment Treaties and EU Law, Stockholm International Arbitration Review 2008:3; *Electrabel S.A. v. The Republic of Hungary* (note 43), parts 4 and 5 of the award; *A. Kulick*, Electrabel locuta, causa finita? – Intra EU Investitionsstreitigkeiten unter dem Energiecharta-Vertrag, SchiedsVZ 11 (2013), 81, 86 et seq.; *C. I. Nagy* (note 16), 981, 987 et seq.; *S. Hindelang*, Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective, ELRev 44 (2019), <https://www.steffenhindelang.de>; *P. Stöbener de Mora*, Das Achmea-Urteil zum Intra-EU-Investitionsschutz, EuZW 29 (2018), 363 et seq.; *J. Lee*, The Empire Strikes Back: Case Note on the CJEU Decision in Slovak Republic v. Achmea BV, 6.3.2018, Contemporary Asia Arbitration Journal 11 (2018), 137; *A. Pinna*, The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6.3.2018, Case 284/16, *Slovak Republic v. Achmea BV*, Paris Journal of International Arbitration, Cahiers de l'arbitrage, 2018, 73; *B. Arp*, Slowakische Republik (Slovak Republic) v. Achmea B.V., AJIL 112 (2018), 466; *S. Wilske/L. Markert/L. Bräuninger*,

the ECT have invaryingly affirmed that EU law did not remove their jurisdiction and that they did not find collisions between treaty law and EU law which prevented them from deciding on the merits of these cases.[50]

3. The ECJ's *Achmea* Ruling

Upon a request for a preliminary ruling of the German *Bundesgerichtshof* (German Federal Supreme Court),[51] in *Achmea* the ECJ found intra-EU investment arbitration under the Slovakia Netherlands BIT to violate EU law. Disregarding Advocate General *Wathelet's* detailed opinion to the contrary, the ECJ found that Arts. 267 and 344 TFEU preclude a provision in an investment treaty such as Art. 8 of the Slovakia Netherlands BIT providing for investor-state-arbitration.

The ruling is short and does neither reflect the broad discussion of the issue, nor, what is more in the present context, the rights or interests of the EU investors.[52] In contrast, the key paras. 56/57 of the ruling exclusively drew upon arguments of competence and governance of EU institutions as basis for the ruling.

4. Post *Achmea* Awards and the Intra-EU Application of the ECT

In respect of the ECT, arbitral tribunals have, despite *Achmea*, continued to affirm their jurisdiction to intra-EU arbitration. As the *Foresight* tribunal observed in November 2018[53] it was not aware of a single award that has found intra-EU disputes to be excluded from the scope of arbitration under the ECT. By now, there are more than 20 awards upholding tribunal juris-

Entwicklungen in der internationalen Schiedsgerichtsbarkeit im Jahr 2017 und Ausblick auf 2018, SchiedsVZ 16 (2018), 134.

50 See Part II. 4. below.

51 German Federal Supreme Court of 3.3.2016, I ZB 2/15.

52 For a more extensive description, the genesis and the context of the ruling, see *S. Hindelang* (note 49); *P. Stöbener de Mora* (note 49), 363 et seq.; *C. I. Nagy* (note 16), 981 et seq.

53 *Foresight v. Spain*, SCC Arbitration V, 2015/150, Award, 14.11.2018, para. 221, with a list of awards affirming intra-EU arbitration; see also, for example, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of 16.5.2018, paras. 325 et seq.; *Vattenfall et al. v. Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea issue, 17.8.2018, paras. 136 et seq.

diction over intra-EU investment treaty disputes, of which eleven were post *Achmea*.[54] The tribunals' holdings are based on principles of public international law, and set out that *Achmea* does not cover the ECT as a *multilateral* investment treaty *to which the EU is a party* (as opposed to a bilateral investment treaty without EU involvement which was the subject of *Achmea*). To assess how *investors' rights* need to be taken in regard so as duly to determine their effects in intra-EU scenarios, it is, to begin with, necessary to analyze how tribunals determine the scope under public international law of these rights (see Part II. 1. a) and d) above).

a) Applicability of the ECT to Intra-EU Scenarios as a Matter of Interpretation of the ECT Under Public International Law

All arbitral tribunals found the ECT to apply to intra-EU disputes.[55] The arbitral tribunal in the matter *Vattenfall v. Germany* has expressly rejected the Commission view that the ECT has to be interpreted in line with EU law but referred to the general interpretation rules of Art. 31(3) Vienna Convention on the Law of Treaties. Hence, according to the tribunal, EU law is to be "taken into account, together with the context" under Art. 31(3)(c), but

> "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".

It found such proposition of the Commission to be "unacceptable as it would potentially allow for different interpretations of the same ECT treaty provision", and thus to be incoherent, anomalous and inconsistent with the object and purpose of the ECT. It stressed the rules of international law on treaty interpretation and application, in particular the Preamble and Art. 26 VCLT which emphasizes the universal recognition of "the principles of free consent and of good faith and the pacta sunt servanda rule".[56]

---

[54] *Foresight v. Spain* (note 53), paras. 207 et seq.; *9REN Holding S.a.r.l. v. Spain*, ICSID Case No. ARB/15/15, Award, 31.5.2019, paras. 170 et seq.

[55] *Foresight v. Spain* (note 53), para. 221, with a list of awards affirming intra-EU arbitration; see also, for example, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (note 53), paras. 325 et seq.; *Vattenfall et al. v. Germany* (note 53), paras. 136 et seq.

[56] *Vattenfall et al. v. Germany* (note 53), paras. 154 et seq.

b) Accession Statements of the EU

This is in line with the intent of the EU institutions involved with the accession by the EU to the ECT. The internal documents preparing the accession demonstrate that the EU did not intend the ECT to distinguish between intra-EU and extra-EU disputes: In fact, the ECT had its origin in a joint initiative of the EU member states and the EU itself.[57] After having been asked by the European Council in June 1990 to set up a "European Energy Charter", in its responding Communication of 14.2.1991,[58] the European Commission expressed that Charter to apply to the dealings of all countries with each other and with the rest of the world, and should constitute a specific form of cooperation "in Europe" (see paras. 5, 4, 8, 10, 11, 16, 18-25). The Communication's Annex states that the Charter shall ensure that the existing international rules on investment and trade apply (paras. 10/11). In short, the EU *wanted* to establish a *general* set of rules for *all* signatory states "*in Europe*", applicable in a non-discriminatory fashion and incorporating the established rules and methods of investment protection.[59]

c) No Carve-Out ("Disconnection Clause") for the EU Treaties

In line therewith, the Energy Charter Treaty, as adopted not only by all EU member states, but by both the European Commission and the Europe-

[57] The European Council is a collective body that defines the European Union's overall political direction and priorities. It comprises the heads of state or government of the EU member states, along with the President of the European Council and the President of the European Commission. While under the EU Treaties the European Council has no formal legislative power, it is its key strategic body that expresses the very will of the EU member states, provides the Union with political directions and priorities, and acts as a collective presidency.

[58] COM(91) 36 final; <http://eur-lex.europa.eu>.

[59] It should be added that the ECT was ratified prior to the EU gaining competences in the area of direct investments (see note 88 above). This leads to two considerations: (1) Have the involved EU institutons erred about the EU's competencies when entering into the ECT? This would mean that the rules are unclear to the EU institutions themselves which, in turn, underscores the wisdom of the public international law rule that insulates third parties against internal competence uncertainties of the contractual counter-parties: *Pacta sunt servanda* (see Part III. 1. b) below). (2) If, in contrast, the involved EU institutions were aware of a lack of their competencies in respect of *external* investment regulation, their declarations must have been specifically aimed at *intra*-EU relations. As for the intricacies of the allocation of competencies for investment treaties in the EU, see *A. Steinbach* (note 7), 131 et seq.

an Council,[60] does not contain any indication that differing rules should apply "intra-EU" on the one hand and in respect of non-EU parties on the other hand. The absence of such carve-out (disconnection clause) for the EU Treaties is all the more important as the ECT parties did not simply forget about potential collisions of the ECT with other multilateral treaties and trade organizations. On the contrary, Art. 4 of the Energy Charter Treaty makes such carve-out for the General Agreement on Tariffs and Trade (GATT). It even contains a carve-out for the Svalbard Treaty, a treaty which concerns an archipelago in the Arctic.[61] That the EU was well aware of the issue can also be taken from the fact it had already included disconnection clauses in treaties prior to the ECT, starting with the 1988 Joint Council of Europe/Organisation for Economic Cooperation and Development (OECD) Convention on Mutual Assistance in Tax Matters.[62] Last but not least, the *travaux préparatoires* of the ECT reveal that during the negotiation of the ECT, the EU had proposed the insertion of a disconnection clause. However, that clause was ultimately dropped from the draft treaty[63] but the EU and its member states signed the ECT nevertheless. All of this underscores that under public international rules of interpretation the ECT applies intra-EU. The EU's described negotiation conduct as well as the findings of Attorney General *Wathelet* in his *Achmea* opinion[64] also show that the EU's attitude has simply changed. However, from the perspective of public international law, such change cannot be made at the detriment of investors as third parties (and even appears to be in bad faith, see Part III. 1. c)).

[60] Council and Commission Decision of 23.9.1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, 98/181 /EC, ECSC, Euratom.

[61] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (note 53), para. 311; *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13.10.2014, para. 208.

[62] Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, Article 27(2); see *Vattenfall et al. v. Germany* (note 53), para. 203.

[63] European Energy Charter Conference Secretariat, Draft Basic Agreement for the European Energy Charter, 12.8.1992, 84, Item 27.18; Appendix 36, Draft Ministerial Declaration to the Energy Charter Treaty, Versions 2-7, 17.3.1994, Version 7, 6; see *Vattenfall et al. v. Germany* (note 53), para. 205.

[64] See note 37 above.

d) Reinforcement by the Declaration of the EU Under Annex ID to the Energy Charter Treaty

In addition, in *Achmea* the ECJ had found the Slovakia Netherlands BIT to undermine the uniformity of EU law as the arbitral tribunal under Art. 8 of such treaty would have to address EU law issues, but could not refer questions to the ECJ and would thus jeopardize the uniform and supreme interpretation by the ECJ of EU law. However, in *Achmea*, the ECJ had not to deal (and did not deal) with a declaration as the one issued by the European Communities under Annex ID to the Energy Charter Treaty.[65] That Declaration does not only set forth that the "*European Communities and their Member States*" are thus "*internationally responsible*" for the fulfillment of the ECT and expressly mentions the "*right of the investor to initiate proceedings against both the Communities and their Member States*". Additionally, it expressly deals with the role of the ECJ and documents that the EU acceded to the ECT in full cognizance of the fact that the ECJ can be involved in such proceedings only (1) "*under certain conditions*" and in particular only (2) "*in accordance with Art. 177 of the Treaty*" (now Art. 267 TFEU). Hence, the declaration expresses the acceptance by the EU of the curtailment to the competences of the ECJ resulting from investment arbitration under the ECT.

III. Taking Investors' Rights Seriously

The public international law findings of Part II. 4. open the eyes for the perspective of investors: They have to rely on what is expressed and documented by the state parties to the relevant treaty (or, in the case of the EU, the relevant organization of states). It would have to be expected that their rights play a role for the compatibility of intra-EU arbitration with EU law. Part III illuminates this role in respect of the ECT as a multilateral investment treaty and on intra-EU BITs, and analyzes whether these findings contradict *Achmea* or *CETA*, or are invalidated their precedent character. It should be emphasized that the article's purpose is *not* to contribute to the voluminous debate[66] on the *Achmea* ruling and on the compatibility of investor-state-arbitration with Arts. 344, 267 and 18 TFEU or other EU governance principles such as the "principle of mutual trust"; this debate is

[65] <https://energycharter.org>.
[66] See note 52 above.

conducted within the purview *of these rules and these rules are internal EU governance rules*. In contrast, the article examines the rights of investors *under public international law* as *third* parties, and the extent to which these third party rights bind the EU, its institutions and its member states. This approach could be described as "external" in nature and considers the *public international law rules* on the binding effect of treaties on and within the Union.

1. The Effect of the ECT Investment Treaty Rights of Investors Under Public International Law

a) Investors' Rights Under the ECT as Public International Law Rights of Third Parties

As set out in Part II. 1., the basis of the relevant investors' rights are the investment treaties which bestow public international law rights on investors, and the exact scope and content of these rights need to be determined in accordance with the customary rules of interpretation of treaties under public international law as applied in the voluminous body of arbitral awards. This is in line with the CETA Opinion, issued under Art. 218(11) TFEU, on the compatibility of the investor-state dispute resolution provisions of the CETA. In the *CETA* Opinion the ECJ has, in passing, mentioned that the CETA must be interpreted in accordance with the VCLT.[67] This is in line with former findings of the ECJ on the interpretation of public international law treaties which the ECJ concedes must be interpreted pursuant to the VCLT interpretation rules, notably "*in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose*".[68] In the present context this means that, *for purposes of public international law*, the ECJ recognizes (1) the described character of investors' rights and (2) the described scope of such investors' rights under the individual investment treaty. In respect of (1), under public international law, the investors' rights are individual entitlements as described in Part II. 1. In respect of (2), as set out in Part II. 4., not only

[67] ECJ, Opinion of 30.4.2019, paras. 121, 234; of course, the *CETA* Opinion has mainly expanded on the criteria which the ECJ selects for its assessment of the compatibility of investment arbitration with EU law. These criteria will be discussed in Part IV. 2.

[68] ECJ, 16.7.2015, C-612/13, *ClientEarth*, paras. 33 et seq.; ECJ, 10.1.2006, C-344/04, *IATA and ELFAA*, para. 40; see also Case C-268/99, *Jany and Others*, para. 35.

Vattenfall but *all arbitral tribunals* which have dealt with the issue have, without exception, affirmed that, under public international law, the ECT is to be interpreted *to cover intra-EU investments*. There is no indication that such a long, uniform and unequivocal line of arbitral holdings does not constitute an interpretation of the ECT "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose" and thus the interpretation is applicable under the VCLT.

b) Binding Effect of the ECT as a Concluded Treaty

aa) *Pacta sunt servanda* / Art. 216(2) TFEU

This leads to the question which consequences the existence of *investor* rights under public international law has for the relationship between the EU and the relevant EU host state on the one hand and the investor on the other hand. In this connection it must be recalled that, unlike the CETA, the ECT is a *concluded* treaty. Thus, the rights thereunder have, under public international law, already been bestowed upon investors (at least to the extent they have already made investments). Furthermore, under Art. 216(2) TFEU "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.*" Hence, in line with its purpose to further the economic welfare of its citizens, the TFEU acknowledges the EU and its institutions not to be a legal hermit, detached and absolute from other parties, but are engaged in manifold relations with other actors under public international law and thus embedded in public international law. Admittedly, the ECJ makes an *internal* exception to Art. 216(2) TFEU, that is, an exception *as regards the parties to the EU Treaties, the EU and its institutions*: *Vis-à-vis* these parties the ECJ confines the binding effect of treaties under Art. 216 to supremacy over *secondary* EU law, and carves out *primary* EU law.[69] However, this internal limit to the effect of public international law treaties does not apply to *third parties* (that is parties *other* than the parties to the EU Treaties, the EU and its institutions). *Vis-à-vis* third parties, under public international law the EU is bound by the treaties it has concluded. This follows from public international law, namely from Arts. 26, 27(2), and 46(2) VCLT as well as from the *pacta sunt servanda* principle. Correspondingly, in the event a treaty has been entered into by the EU alt-

[69] *IATA and ELFAA* (note 68), para. 35.

hough the treaty violates *primary* EU law (be it because of a wrongful legal basis, because of incorrect proceedings, or because of a violation of substantive provisions), then the obligations of the EU under the relevant treaty *vis-à-vis third parties* entitled thereunder are nevertheless valid and persist.[70] This rule does not come as a surprise: Under public international law, parties to a treaty must be able to rely on the binding effect therof on their counterparty where the treaty has been executed by the relevant representatives of the counterparty and formally passed the ratification process. The risk of identifying and analyzing internal governance rules of the counterparty, let alone the risk of change of, or strive about, internal governance must be borne by the relevant counterparty itself. This is in line with the EU courts' case-law: In a decision of 11.9.2003 of the General Court found it is

> "common ground that the content of international agreements cannot be amended unilaterally, without new negotiations being undertaken by the contracting parties."[71]

---

[70] *C. Calliess/M. Ruffert*, EUV/AEUV, 5th ed. 2015, Art. 216, para. 27 (in translation: "the obligation of the Union under public international law vis-à-vis the contractual counterparties persists irrespective of a conflict with internal EU rules [*ungeachtet […] der unionsinternen Konfliktlage*] (see Art. 27 para. 2, Art. 46 para. 2 of the VCLT II) […]"); *S. Vöneky/B. Beylage-Haarmann*, in: E. Grabitz/M. Hilf/M. Nettesheim (eds.), Das Recht der Europäischen Union, lose leaf, status February 2019, Art. 216, para. 25 (in translation: "From the perspective of international public law, the Union and the member states are, as a result of the status as subjects of public international law, bound by the public international law rules within the meaning of Art 38 of the statute of the International Court of Justice. In respect of public international law treaties this holds, however, true only where the Union or the member state has become a party to the relevant treaty. Such binding effect is an expression of the legal principle that *pacta sunt servanda* which is laid down in Art. 26 of the VCLT. This effect comes about upon the entry into the treaty"; *R. Mögele*, in: R. Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Art. 216, para. 50; *A. Dimopoulos*, The Compatibility of Future EU Investment Agreements with EU Law, Legal Issues of Economic Integration 39 (2012), 447, 450; *A. Dimopoulos*, The Validity and Applicability of International Investment Agreements Between EU Member States Under EU and International Law, CML Rev. 48 (2011), 63, 70. *N. Basener* (note 9), 296, confirms the "external validity" of treaties entered into by the EU but does not address the issue of investors as "external parties" (as proposed here) and thus comes to the conclusion that the "mere" signing by the EU of an investment treaty cannot be considered a decisive argument for the compatibility of an arbitration clause with EU law. However, in respect of the ECT there was not only a "mere" signing by the EU, and investors, as "external" parties bestowed with rights under the ECT, relied on these rights (see Part III. 1. a) and c)).

[71] EU General Court, 11.9.2003, C-211/01, para. 57. In that case, the EU General Court had to deal with two treaties concluded by the EU with Bulgaria and Romania regarding the carriage of goods. The conclusion by the EU had been authorised by its Council. Since the European Commission was of the opinion that the Council erred as regards the legal basis of

In another matter, the ECJ held without ado "that the Community cannot rely on its own law as justification for not fulfilling (the international treaty at bar)".[72] Given that the above rules are recognized under EU law, the purposes of the article do not require a discussion of the issue of the nature of EU law as domestic law or international law.[73]

bb) Private Investors as Third Parties Entitled to Rely on the *pacta sunt servanda* Rule

This has a bearing on the rights of the investors: They are separate legal entities, holders of public international law rights, and not identical with the parties to the EU Treaties, the EU itself or its institutions (in respect of which the ECJ, as described in item a) above, limits the binding effect of treaties). Hence, private investors must be considered third parties for purposes of Arts. 26, 27(2), and 46(2) VCLT as well as the *pacta sunt servanda* principle. Furthermore, their means to analyze the internal governance rules of the EU (or a host state) for potential infringements which may impact the validity of the treaty or of obligations contained therein, are substantially lower than the means of the other state parties which negotiated, concluded and agreed on the ratification process for, the relevant treaty. Hence, a private investor's expectation that both the EU and their host states are bound by the treaty according to its terms, once executed by the relevant representatives and formally ratified, deserves particular protection. Thus, the endowed private investors must be entitled to rely on the treaty: *Pacta sunt servanda*, in particular where investors have made investments which they cannot undo.

In this connection it does not make a difference that intra-EU investment arbitration is typically directed against the relevant host state, not against

---

that decision, the Commission requested the General Court to annul the Council decisions in so far as they were based on the contested legal basis but "should maintain the effects of the agreements until the Council has adopted new concluding acts". It is true that the General Court added to its finding quoted in the text that in the case at bar the material content of the agreements was not in dispute and that thus, in "those circumstances, in order to avoid any legal uncertainty as regards the applicability of the international commitments entered into by the Community within the Community's legal order, the effects of the contested decisions must be maintained until the measures necessary to implement the present judgment have been adopted". However, this addition did not refer to the binding effect of the relevant treaties but to *the internal Council decisions*.

[72] ECJ, 30.5.2006, Joined Cases C-317/04 and C-318/04, *European Parliament v. Council*, para. 73.

[73] See, for example, *M. Ruffert*, in: C. Calliess/M. Ruffert (note 70), Art. 216, paras. 4-7 and the literature cited.

the EU. As a party to the ECT, the EU is bound not to obstruct the due implementation of the rights and obligations of investors and the relevant host states.[74] This is a corollary of the EU having acceded to the ECT, thereby espousing the ECT's rules. By the same token, the obstruction by the EU of the due implementation of the ECT would constitute a treaty violation in itself.

cc) Similarity to Art. 351 TFEU

That the ECT binds the EU and meber states *vis-à-vis* investors as third parties is supported by similar considerations developed for Art. 351 TFEU: Under that provision

> "the rights and obligations arising from agreements concluded by an acceding state before the date of its accession shall not be affected by the provisions of the Treaties".

It is true, the provision does *not* address the present issue, but the separate issue of preexisting treaties of member states (a setting which may or may not apply in respect of investment treaties). Furthermore, its wording limits the scope of Art. 351 TFEU to treaties *with third countries* and the provision hence does *not* extend to intra-EU treaties. However, certain considerations developed in connection with Art. 351 TFEU are in parallel to the above finding and thus bolster that finding despite the distinct purview of Art. 351 TFEU: The ECJ has applied Art. 351 TFEU by way of analogy ("*mutatis mutandis application*") in case a member state has entered into a treaty with another member state at a point in time at which the EU had not yet been granted competences in the relevant field.[75] Hence, Art. 351 TFEU lends itself to application beyond its wording, and this is in line with the finding of Advocat General *Kokott* that a *mutatis mutandis* application of Art. 351 TFEU is "conceivable" where *an international obligation undertaken* by a member state conflicts with subsequently applicable EU law".[76]

---

[74] As for the liability of the EU on the one hand and member states on the other hand in connection with mixed investment agreements in general *A. Steinbach* (note 7), 133 et seq., 141 et seq.

[75] ECJ, 9.2.2012, C-277/10 – *Luksan*, paras. 63/64.

[76] Opinion of Advocat General *Kokott*, 13.3.2008, Case C-188/07 – *Commune de Mesquer*, para. 94; the same view is hed by *R. Geiger*, in: R. Geiger/D.-E. Khan/M. Kotzur, EUV/AEUV Kommentar, 6th ed. 2017, TFEU Art. 351, para. 2; *S. Lorenzmeier*, in: E. Grabitz/M. Hilf/M. Nettesheim (note 70), AEUV Art. 351, para. 28; *J. Kokott*, in: R. Streinz (note 70), Art. 351, para. 6; *N. Lavranos*, in: H. von der Groeben/J. Schwarze/A. Hatje, Europäisches Unionsrecht, 7th ed. 2015, Art. 351, para. 6.

The finding is relevant in the present context as it is not confined to obligations *vis-à-vis* other countries, but refers to "international obligations" irrespective of the party to which the obligation is owed.[77] This confirms an absence of a reason not to apply it to private parties as long as the relevant "obligation" is one under public international law.[78] Likewise, for EU investment treaties with non-EU countries, the ECJ has recognized that EU law does

> "not affect the duty of the member state concerned to respect the rights of non-member countries under a prior agreement *and to perform* [*such member state's*] *obligations thereunder*"[79] (*emphasis* provided).

That the claimants in said proceeding before the ECJ were private parties was of no concern to the ECJ, and rightly so: As already set forth in Part II. 1. above, (a) it is the very purpose of investment treaties to bestow public international law rights on *private investors*, (b) the contracting parties rely on private enforcement of the compliance by the host state with the relevant treaty standards, and (c) the key obligations of the host state are to be performed *vis-à-vis* private investors. This corroborates the above finding that not only other ECT member states as contracting parties, but the endowed private investors as well, must be entitled to rely on the treaty, in particular where investors have made investments.

dd) Particular Circumstances

This must hold all the more true where an infringement by the treaty of EU internal governance rules is hard, if not impossible, to perceive even for the most diligent third party. Such are the circumstances in respect of the

---

77 *R. Geiger* (note 76), TFEU Art. 351, para. 2, makes reference to international organisations. After the Treaty of Lisbon has granted exclusive competence to the EU for investment treaties, many commentators advocate the analogous application of TFEU Art. 351, see: *J. P. Terhechte*, Art. 351 AEUV, das Loyalitätsgebot und die Zukunft mitgliedstaatlicher Investitionsschutzverträge nach Lissabon, EuR 45 (2010), 517, 522 et seq.; *C. Herrmann* (note 36), 207, 211; with reservations *J. Kokott/C. Sobotta*, Investment Arbitration and EU Law, CYELS 18 /2016), 12 et seq. As for the discussions in connection with Regulation 1219/2012 of 12.12.2012 and the provision of grandfathering clauses for BITs see *N. Lavranos* (note 76), Art. 351, para. 6.

78 The above considerations are a corollary of the *structures* of TFEU Art. 351, and are thus not affected by the allocation to the EU of competences to regulate foreign investment by the Treaty of Lisbon, or the fact that TFEU Art. 351 has, as already set forth in the text above, a limited scope of application (see, for example, Opinion of Advocate General *Wathelet*, 19.9.2017, Case C-284/16, para. 46).

79 ECJ, 15.9.2011, Case C-264/09 *ATEL*, paras. 41 et seq., 51 et seq.; see also 14.10.1990, Case 812/79 – *Burgoa*, para. 8.

ECT: As shown in Part II. 4. b) above, none of the documents generated by the EU institutions in connection with the preparation, negotiation and ratification of the ECT raise concerns in respect of the principles of "mutual trust" and "sincere cooperation", and the EU's declaration issued in connection with the ECT expressly explains that the ECT and its conflict resolution mechanism are compatible with the ECJ's competences.

ee) Other Rules On Conflicts Between International Law Treaties and EU Law?

In contrast to the above, the discussion on the solution between conflicts between investment treaties and EU law has, so far, not taken regard of the *pacta sunt servanda* rule, but focused on (1) Arts. 30, 59 VCLT, Arts. 350, 351 TFEU on the one hand and (2) the EU principle of supremacy of EU law on the other hand.[80] The *former* rules include, for example, the principle that a more recent treaty between certain parties derogates conflicting rules of an older treaty between these parties (*lex posterior derogat legi priori*).[81] Applying said rule in the present context, it may be arguable that, generally speaking,[82] the ECT is more recent than the EU Treaties. However, even so, in respect of the relationship between EU member states the most important conflict rule discussed in this connection appears to be the *latter* rule, that is, the – already mentioned – supremacy of EU law. While not expressly laid down in the EU Treaties, the principle of supremacy of EU law is enshrined in the case law of the ECJ and, unless the exception of Art. 351 TFEU applies (see Part III. 2. a) below), is considered to command the "non-survival" of intra-EU treaty obligations between member states.[83] Correspondingly, the ECJ has ruled even in connection with Art. 351 TFEU that agreements concluded prior to the entry into force of the EU Treaties may not therefore be relied upon in relations between Member States in order to justify restrictions on trade within the Community,[84] and

> "whilst [TFEU Art. 351] allows Member States to honour obligations owed to non-member states under international agreements preceding the [TFEU], it does

[80] See *N. Basener* (note 9), 204 et seq., 225 et seq.
[81] 30(4) lit. a(3) VCLT; see *N. Basener* (note 9), 249.
[82] The rule may, in respect to the ECT, lead to questions regarding amendments to the EU treaties and accessions of new member states after 1994. However, this can be left open here.
[83] *N. Basener* (note 9), 250.
[84] ECJ, 11.3.1986, Case C-121/85, *Conegate*, para. 25.

not authorise them to exercise rights under such agreements in intra-Community relations".[85]

Hence, the supremacy of EU law appears to function as a supreme "immanent conflict rule".[86]

However, all of the described conflict rules exclusively address the relationship *between the contracting EU member states* exposing themselves to conflicting obligations. They do not address the rights which are, as set forth in Parts II. 1. and III. 1. above, bestowed *upon investors as third (private) parties* under the ECT. Hence, the discussed inter-*state* conflict rules cannot apply to them.

c) Good Faith / Estoppel

The ECJ's holdings quoted in Part III. 1. a) above acknowledged the principle of good faith to form part of the interpretation of public international law treaties. The reference to good faith corroborates the above findings: The circumstances of the accession by the EU to the ECT indicate a lack of good faith, if the EU were *now* to renege on, or interfere with the implementation of, the rights which the ECT has bestowed upon (EU and non-EU) investors.

On the basis of the considerations set forth in Part II. 4., pursuant to both the conduct and the declarations of the EU in connection with its negotiation of, and accession to, the ECT, such treaty applies to intra-EU and extra-EU investments alike. At the same time, the EU knew that voluminous intra-EU investment were incessantly made after the entry into force of the ECT. Yet, the EU did not interfere with such investments. In contrast, in many cases it spurred them. A prominent example are the EU's directives on renewable energy:[87] The EU desired to improve the world climate but did not want to muster own funds for its policy. It hence adopted the aforesaid directives and cooperated with the EU member states in soliciting *private investment* to reach its policy goals at the cost of private parties, and thus launched multi-billion intra-EU investments by private parties to achieve the EU's goal to decrease CO_2 emissions. In this connection, Recital 25 of Directive 2009/28/EC (the "2009 RE Directive") expressed the need

[85] ECJ, 7.7.2005, Case C-147/07, *Commission v. Austria*, para. 73.
[86] *N. Basener* (note 9), 250, 254.
[87] Directive 2001/77/EC and its successor, Directive 2009/28/EC.

> "to guarantee the proper functioning of national support schemes […] in order to maintain investor confidence and allow Member States to design effective national measures for [renewable energy] target compliance",

and the implementation of these renewable energy targets by the member states was closely monitored by the EU. At the same time the EU knew that it had acceded to the ECT, that the EU had made the declarations referred to in Part II. 4. b) and d) above expressing the intra-EU applicability of the ECT as a matter of course, that the accession to the ECT by the EU and its declarations were in the public domain and served as basis of reliance to investors, that investments usually cannot be undone once made and that investors are, hence, "trapped" as soon as they have made their investment. All the same, in the almost 25 years since 1994, the EU did not terminate, or attempt to amend, the ECT, not even after the expansion of the EU's competence in respect of investment treaties by the Treaty of Lisbon in 2009 or the discussions in connection with Regulation 1219/2012 of 12.12.2012[88]. The EU simply continued the conduct it had shown in the ECT negotiations of 1994 when it had made an attempt to insert a carve-out ("disconnection") clause for intra-EU matters but withdrew it and went on to sign the treaty (see Part II. 4. c) above).

While, hence, on the one hand multi-billion intra-EU investments were incessantly made by private investors with the ECT regime in force, on the other hand interests on the part of the EU and its institutions have not changed since 1994: Where EU institutions, notably the European Commission or ECJ, find today that their institutional competencies would be negatively affected by intra-EU investment arbitration, they must have had this view in 1994 already. However, they did not voice such view, signed the ECT and, for almost 25 years, did not take action *vis-à-vis* the other ECT parties or investors.

Against this background, one may, when assessing the matter, hence has to analyze whether the described circumstances would, under public international law, violate good faith (or even be *in bad faith)* if one were to interpret and apply the ECT in a way interfering with the due implementation of rights bestowed upon investors (or at least expressed to be bestowed upon them) under the ECT. Additionally, one may has to analyze whether the EU institutions are *estopped*[89] from proposing an interpretation or applica-

[88] See *N. Lavranos* (note 76), Art. 351, para. 6.

[89] As for the principle of estoppel in public international law and its content, see, for example, *A. Kulick*, Estoppel im Völkerrecht, AVR 52 (2014), 522, 526 et seq.

tion to this effect. However, such analyses are beyond the scope of this article.

d) Circularity or "Sidelining" EU Law?

Are these considerations circular? Does one, in contrast, have to argue: If an investment treaty is in violation of EU law, there are no valid rights under the Treaty and no legitimate expectations to protect in the first place?

Such argument would, however, overlook that the above considerations are rooted in the rules governing the effects of actions of subjects of public international law (here: the EU and its member states) *vis-à-vis other* subjects of public international law (here: private investors): As set out in Part II. 3., *Achmea* is based on EU rules on the principle of "mutual trust" and the principle of "sincere cooperation",[90] hence on the rules on the relationship *between member states*, that is, internal rules. These rules have not been made part of the relevant investment treaties. As set forth in Part III. 1. b) above, in the event a public international law treaty has been entered into by the EU although the treaty violates *primary* EU law (for example because of a wrongful legal basis, because of incorrect proceedings, or because of a violation of substantive provisions), then the obligations of the EU under the relevant treaty *vis-à-vis third parties* entitled thereunder are nevertheless valid. As already quoted, the ECJ has found that "the Community cannot rely on its own law as justification for not fulfilling [an international treaty]".[91] Furthermore, as set out in Part III. 1. b) aa) above, the ECJ has acknowledged that under the VCLT an international public international law treaty is to be interpreted "*in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose*",[92] and how the ECT has to be interpreted under the VCLT is demonstrated by a long and unbroken line of arbitral decisions. Thus, if one takes the public international law rule seriously that investors are "third

[90] See *Achmea*, para. 58: "Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the member states but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in para. 34 above."

[91] ECJ, 30.5.2006, Joined Cases C-317/04 and C-318/04, *European Parliament v. Council*, para. 73, as well as notes 70 to 72 above; *S. Vöneky/B. Beylage-Haarmann* (note 70), Art. 216, para. 25; see additionally the literature cited in note 73.

[92] ClientEarth (note 68), paras. 33 et seq.; *IATA and ELFAA* (note 68), para. 40; see also *Jany and Others* (note 68), para. 35.

parties", and that the EU must keep concluded treaties, EU governance principles do not have effect *vis-à-vis the relevant investors*.

e) Conclusions for the ECT

As a result, the propositions submitted here continue to be: The ECT is a treaty concluded by the EU. It bestows public international law rights on private parties. EU law recognizes rights of private parties under a treaty concluded by the EU even if the treaty violates (primary or secondary) EU law. Hence, the obligations of the EU and the member states under the ECT *vis-à-vis* (EU or non-EU) private investors are valid and need to be recognized even if the ECT were to infringe EU governance rules such as the principles of "mutual trust", sincere cooperation, autonomy and supremacy of EU law or supremacy of ECJ competences.

2. Consequences for Intra-EU Bilateral Investment Treaties

Bilateral investment treaties between EU member states differ from the ECT in that the EU is not a party to them. As the above considerations are based on the EU's own accession to the ECT, the above considerations do, generally speaking, not apply to intra-EU BITs. Two possible exceptions to this finding are, however, conceivable.

a) Art. 351 TFEU

The public international law rights bestowed by *BITs* upon investors' (including the Slovakia Netherlands BIT which was the subject of *Achmea*) may bring about similar effects where a host state has acceded to the EU after it has entered into a BIT. As is submitted under Part III. 1. b) cc), Art. 351 TFEU grandfathers rights of investors as third parties.[93]

[93] *Achmea* involved the Netherlands Slovakia BIT, and thus a BIT which had been made by the host state (Slovakia) before its accession to the EU. It is beyond the scope of this article to analyze whether or not Art. 351 TFEU grandfathers the investors' rights under that BIT. If this question were to be answered in the affirmative the next issue would arise whether such grandfathering could have been brought up in the *post award* phase which raises a number of additional procedural issues. The proposition that investors' rights must be respected must take into account the procedural setting and the phase in which such claim is raised.

b) Acts or Omissions of the EU?

In addition, the considerations set out in Part III. 1. above for the ECT may bear out for intra-EU BITs irrespective of Art. 351 TFEU where acts or omissions of the EU in connection with the relevant treaty are at hand: Of course, Art. 216 TFEU, the VCLT and the EU law principles of the protection of legitimate expectations and certainty of law, obligate *the EU* only if there has been an act or omission *of the EU*.[94] However, even where the EU is not a party to a BIT, there may have nevertheless been such acts or omissions of the EU in respect of the relevant BIT. This may, for example, be the case where a host state has acceded to the EU after it has entered into a BIT: There may be relevant EU acts in connection with the accession of that host state to the EU, the efforts to integrate the host state's law to the EU *acquis communautaire*, the time lag between the relevant accession and the *Achmea* judgment (2018; 14 years in the case of Slovakia), the maintenance of the BIT after the expansion of the EU's competence in respect of investment treaties by the Treaty of Lisbon in 2009, the discussions in connection with Regulation 1219/2012 of 12.12.2012,[95] and actions of the EU to spur investment from EU investors in the relevant host state. However, this would have to be analyzed in the individual case.[96]

3. The Lack of Precedent Character of *Achmea* and the *CETA* Opinion

The following chapter discusses whether the above findings contradict, or are precluded or invalidated by the precedent character of, *Achmea* or *CETA*.

[94] For the ECJ Principles of the protection of legitimate expectations and certainty of law, *F. Mayer*, in: E. Grabitz/M. Hilf/M. Nettesheim (note 70) after Art. 6 of the EUV, para. 397. The exception of the implementation by member states of EU regulations does not play a role here.

[95] See *N. Lavranos* (note 76), Art. 351, para. 6.

[96] As for the liability of the EU on the one hand and member states on the other hand in connection with mixed investment agreements in general *A. Steinbach* (note 7), 133 et seq., 141 et seq.

a) The Limited Binding Character of Preliminary Rulings

To begin with, preliminary rulings under Art. 267 TFEU do not have an *erga omnes* effect but only bind the national court of the main proceedings in question[97] and thus the parties to the main proceedings.[98] Yet, the referral procedure under Art. 267 TFEU is non-contentious in nature and has the purpose to have EU law interpreted for the EU as a whole.[99] Hence, rulings often are not without effect as precedent beyond the case at bar.[100] According to the ECJ

> "[t]he interpretation which […] [ECJ] gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by [domestic] courts […]".[101]

In addition, where a preliminary ruling has found *a provision of EU law* to be *invalid*, all EU institutions, member states and their internal courts and administrative agencies are, by way of analogous application of Art. 266 TFEU, obligated to take the measures necessary to take account of such invalidity.[102] According to the ECJ, the invalidity of *a provision of EU* law constitutes a sufficient reason for any other court ("*une raison suffisante pour tout autre juge*") to consider this provision invalid as well.[103] However, this does not apply to new issues. The ECJ has confirmed the right of both the referring court of the main proceedings as well as any other court, to make a (further) reference (1) where the national court encounters difficulties in understanding or applying the preliminary ruling, (2) when it refers a

---

97 ECJ, 29.6.1969, Case 29/68, *Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken*, para. 3.

98 *B. W. Wegener*, in: C. Calliess/M. Ruffert (note 70), Art. 267, para. 49.

99 ECJ, 24.5.1977, Case 107/76, *Hoffmann-LaRoche v. Centrafarm*, para. 5; *B. Wägenbaur*, Commentary on Statute and Rules of Procedurs of the Court of Justice of the European Union, 2013, RP ECJ, Pre Art. 93, paras. 1 and 4. Statute, Art. 23, para. 6; *M. Pechstein*, EU Prozessrecht, 4th ed. 2011, para. 749.

100 *M. Pechstein* (note 99), paras. 866 et seq.

101 ECJ, 27.3.1980, Joined Cases 66, 127 and 128/79, Judgment of the Court of 27.3.1980, *Amministrazione delle Finanze v. Srl Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi*, para. 9.

102 ECJ, 8.11.2007, Case C-421/06, *Fratelli Martini & C. SpA v. Ministero delle Politiche agricole e forestali*, paras. 52, 54; 19.10.1977, Case 117/76 et 16/77, *Ruckdeschel et Ströh v. Hauptzollamt Hamburg-St. Annen*, para. 13; 29.6.1988, Case 300/86, *Van Landschoot*, para. 22; *B. W. Wegener* (note 98), Art. 267, para. 50.

103 *Fratelli Martini & C. SpA v. Ministero delle Politiche agricole e forestali* (note 102), para. 54; see also ECJ, 13.5.1981, Case 66/80, *International Chemical Corporation*, para. 13.

"fresh question of law" to the ECJ, or (3) when it submits new considerations "which might lead the ECJ to give a different answer to a question submitted earlier".[104] Hence, under these circumstances even a preliminary ruling *on the invalidity* of a provision of EU law does not prevent the (re)submission to the ECJ of an issue.[105] This applies all the more where the ECJ has not found the *invalidity* of a provision of EU law, that is, where it has either found an EU law provision to be *valid* or has solely *interpreted* EU law.

These limits on the effect of preliminary rulings are a corollary of the procedural rules to which the ECJ is subject: Under the applicable rules of procedure (Art. 267 TFEU, Art. 23 Statute of the ECJ; Arts. 93 *et seq*. Rules of Procedure of the ECJ) the ECJ does not engage in an *ex officio* analysis of all legal issues of relevance for the requested ruling. In contrast, just as in its practice on annulment actions[106] under Art. 263 TFEU, in preliminary ruling proceedings the ECJ confines itself to the issues submitted to it by the relevant national court; at best it sometimes extends the scope of its analysis to the pleas of the parties made in the main proceedings before the national court.[107] By nature, the selection of both the arguments in the referring court's request for a ruling and the pleas of the parties in the main proceedings are individual and tailored to the case at bar. In other words, the selection of issues and arguments with which the ECJ deals are accidental. Where, as a result of such accidental character or of oversight, the ECJ does not address a legal plea or consideration, its rulings cannot have precedent character in respect thereof.[108] This is not only expressed by the above-quoted *Wünsche* decision of the ECJ,[109] but also reflected by the way

[104] ECJ, 5.3.1986, Case 69/85, *Wünsche Handelsgesellschaft GmbH & Co. v. Germany*, para. 15.

[105] *Wünsche Handelsgesellschaft GmbH & Co. v. Germany* (note 104), para. 15; *International Chemical Corporation* (note 103), para. 14; *J. Schwarze/N. Wunderlich*, in: J. Schwarze/U. Becker/A. Hatje/J. Schoo, EU-Kommentar, 4th ed. 2019, TFEU Art. 267, para. 70.

[106] *M. Pechstein* (note 99), paras. 866 et seq.

[107] ECJ, 11.7.1990, Case C-323/88, *SA Sermes v Directeur des services des douanes de Strasbourg*, para. 13; see also Art. 94 (c) of the ECJ Rules of Procedure; *M. Pechstein* (note 99), paras. 848, 524. The diversity of the court's judges probably also entails that proceedings are confined to the lowest common legal denominator, that is the pleas/issues submitted.

[108] *J. Schwarze/N. Wunderlich* (note 105), TFEU Art. 267, paras. 71 et seq.; *B. W. Wegener* (note 98), Art. 267, paras. 49-51; para. 13 of the ECJ's decision *International Chemical Corporation* (note 103), does not testify to a wider understanding of the ECJ as the ruling is concerned about the *retroactive* effect of its rulings, and does not limit the ECJ's findings in *Wünsche Handelsgesellschaft GmbH & Co. v. Germany* (note 104), para. 15. The *Wünsche* ruling, in contrast, addresses the lacking binding effect of ECJ rulings in respect of a "fresh question of law" or the "submission of new considerations".

[109] *Wünsche Handelsgesellschaft GmbH & Co. v. Germany* (note 104), para. 15.

in which the ECJ words its rulings where it finds an EU law provision *valid*. In such cases the ECJ typically sets out that the examination of the relevant provision has not disclosed any factor casting doubt on or affect its validity.[110] As a result, *Achmea* has no binding or precedent effect beyond the considerations it has dealt with.

b) Ensuing Limits to the Bearing of the *Achmea* Ruling

aa) Procedural Limits

Hence, to begin with, *Achmea* is not a ruling on the validity or invalidity of an EU law provision. *Achmea* found the investor-state dispute resolution mechanism under Art. 8 of the Slovakia Netherlands BIT to be incompatible with the principle of sincere cooperation, and is hence confined to an *interpretation* of EU law. More importantly, the ECJ did not address investors' individual rights. The ECJ followed the path beaten by the *Bundesgerichtshof's* request for a preliminary ruling as well as the submissions of investor *Achmea* in the main proceedings which were limited to the EU governance issues of Arts. 18, 267 and 344 TFEU.[111] Thus, the ruling does not preclude or bar investors' rights (including their right to investment arbitration) under an intra-EU investment treaty.[112]

bb) Retroactive Interpretation and the ECJ Principles of Certainty of Law and Protection of Legitimate Expectations

This holds all the more true as one can infer from the case-law of the ECJ that the court takes individual rights into consideration when interpreting EU law in settings resembling the *Achmea* circumstances: The ECJ postulates its competence to interpret EU law *with retroactive effect*. Under its case-law, the ECJ interprets EU law

---

[110] For example ECJ, 25.6.1997, *René Kieffer and Romain Thill*, Case C-114/9639, para. 39; 29.5.1997, Case C-26/96 C-26/96, *Rotexchemie v. Hauptzollamt Hamburg-Waltershof*, para. 25.

[111] German Federal Supreme Court (*Bundesgerichtshof*), court decree of 3.3.2016, I ZB 2/15; the statement of reasons is summarized in the preliminary ruling, ECJ, 6.3.2018, Case C-284/16, *Achmea*, paras. 14 et seq.

[112] The *procedural* limits described in the text on *Achmea's* purview are independent from the limits to the ruling's purview resulting from the analysis of the *substance* of ruling, that is, on the pleas *the ECJ dealt with*; for the *latter* limits, see *C. I. Nagy* (note 16), 981, 993 et seq.

> "as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation […]".

However, it recognizes that such retroactive interpretation may adversely affect *private parties* and thus "exceptionally" the ECJ

> "may, in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships".[113]

None of this was submitted to, or dealt with, by the *Achmea* ruling of the ECJ.

cc) Conclusion

Hence, already as a matter of procedural law the ruling cannot serve as a precedent for the compatibility with EU law of the protection of investors' rights under the ECT. For the same reason, it cannot serve as a precedent to intra-EU BITs either. This even holds true in respect of the Slovakia Netherlands BIT.

c) CETA

The *CETA* Opinion is no such either: To begin with, *CETA* answered *in the affirmative* the question whether the investor-state-arbitration provisions of the envisaged CETA were compatible with EU law. Nevertheless, it set out a whole set of criteria against which it measured the CETA. It is true, Part IV below submits that the ECT meets the *CETA* criteria so that the *CETA* Opinion does not indicate a lack of compatibility with EU law of the ECT. However, against the background of investors' rights it should be added that, even if one were to find the ECT to fail the *CETA* criteria, *CETA* would not impair investors' rights because *CETA* dealt with a *future* treaty. It had thus not to deal with a treaty which had already been concluded, had come into force, had bestowed rights on investors, and in reliance

[113] *International Chemical Corporation* (note 103), paras. 13 et seq.; see also ECJ, 8.4.1976, Case 43/75, *Defrenne v. Sabena*, paras. 71/72.

on which investors had made investments. In contrast, the CETA was submitted to the ECJ *in the course of the treaty conclusion procedure* under Art. 218(11) TFEU, hence before it had come into force and before investors could have possibly made investments in reliance thereon.[114] Correspondingly, under public unternational law it is common ground that investors' rights cannot accrue for investments made before the relevant investment treaty *existed*.[115]

Of course, *CETA* did not fail to consider the position of investors (see, for example, paras. 146, 172 *et seq*. and 180-181 of the Opinion). However, these were *ex ante* considerations. As for the *future*, the CETA Opinion informs Canadian investors about the CETA's scope of protection they can expect for investments in the EU. It warns Canadian investors of the limits of protection under the CETA for future investments in the EU. If Canadian investors consider that protection insufficient, they can steer clear of the EU and redirect their investments to other, safer jurisdictions (see already Part III. 1. b) above).

In contrast, the ECT is a concluded treaty which has been in force for many years and under which investors *have already made* a great many intra-EU investments. Thus, when making their investments, investors were entitled to have the expectation that the ECT would be respected by its parties, including the EU.

4. Summary

The findings of Part II do neither contradict *Achmea* nor *CETA* as these rulings do not address the issue of investors' rights which have already come into existence.

---

114 In short script, one could say that only under such circumstances treaty rights of investors "vest" under public international law. As an alternative, *Z. Douglas* (note 12), 34 et seq., discusses whether the "vesting" of the investors' rights should be determined (1) on the basis of the investor's *substantive* rights, or (2) *procedurally* and thus to consider the investor's rights to vest only upon filing of a notice of arbitration by the investor. He finds approach (1) more convincing and, indeed, the authority adduced in Part II. 1. b) to show that investors' rights are the investors' *direct*, individual rights effectively follow such approach. Furthermore, only approach (1) reflects that investment treaty obligations are triggered by the making of an investment, and that arbitration should always be an *ultima ratio* only to resolve controversies. For the subject this article the exact time when rights "vest" is, however, of subordinate importance. For the same reasons, the ECJ Opinion 2/2013 of 18.12.2014 on the compatibility with EU law of the *draft* agreement on the accession by the EU to the ECHR is of no relevance here.

115 *Empresas Lucchetti SA and Luccetti Peru SA v. Peru* (note 23), para. 61.

IV. Applying the Criteria of the *CETA* Opinion

In the alternative: If one (contrary to the above) were to *disregard* investors' rights under public international law, the question arises how the ECT would fare under the criteria selected by *Achmea* and *CETA* to assess the compatibility of intra-EU investment arbitration with EU law. Part IV proposes that the ECT does not run aful of, but meets, those criteria.

1. The ECT Is to Be Distinguished from the Facts Underlying *Achmea*

Achmea dealt with a bilateral investment treaty between Slovakia and the Netherlands and (1) sets forth that under Art. 8 of the Slovakia Netherlands BIT the disputes in question "*may relate to the interpretation both of that agreement and of EU law*",[116] and (2) refers to the BIT as "an agreement which was concluded not by the EU but by Member States".[117] In contrast, the ECT is not only a multilateral investment treaty to which the EU is a party, but the EU's declarations made in the context of its accession of the treaty document the applicability of the treaty to inter-EU disputes (see Part II. 4. above). Moreover, under the applicable law clause of the ECT (Art. 27(3)(g)), tribunals under the ECT "*shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law*". Hence, even leaving out investors' rights the ECT does not meet the criteria which *Achmea* factored in.

2. Confirmation by the *CETA* Opinion of the ECJ

Against this backdrop, it is worth the while to analyze the *CETA* Opinion. The Opinion is based on a reasoning much more detailed than *Achmea* and approves of the CETA. It is true, the *CETA* Opinion does not address an *intra-EU* treaty, but a treaty with a non-EU country (Canada). However, its considerations are fruitful to understand the ECJ's lines of thought and

[116] *Achmea*, para. 58, (note 90); this sidelines the finding of Attorney General *Wathelet*, according to whom the jurisdiction of the arbitral tribunal is confined to ruling on breaches of the BIT and the scope of that BIT and the legal rules which it introduces are not the same as those of the EU and FEU Treaties; Opinion of Advocate General *Wathelet* (note 4), paras. 173 et seq.

[117] *Achmea*, para. 58, (note 90).

confirm the above finding that the ECT is to be distinguished from the BIT at bar in *Achmea*. The chapter follows the sequence of the ECJ analysis and discusses the compatibility of the ECT investor state dispute settlement (ISDS) mechanism with (1) the autonomy of the EU legal order, (2) the general principle of equal treatment and with the requirement of effectiveness of competition law, and (3) the right of investors of access to an independent tribunal. In all three respects, the ECT ISDS can be likened to the CETA ISDS.

a) Compatibility With the Autonomy of the EU Legal Order

The ECJ confirms such compatibility because it finds (a) the CETA ISDS tribunals not to have jurisdiction to interpret and apply rules of EU law other than the provisions of the CETA (Opinion, paras. 120-136) and (b) the CETA ISDS not to have an effect on the operation of the EU institutions in accordance with the EU constitutional framework (Opinion, paras. 137-161). Applying the ECJ standards, the ECJ fares better than the CETA.

aa) The ECT Does Not Empower the Tribunal to Interpret or Apply EU Law

In respect of criterion (a), that is, the ECT tribunals' jurisdiction, the applicable law clause of the ECT, that is, Art. 27(3)(g), limits the tribunals' jurisdiction provides to the ECT and public international law. In essence, this corresponds to the relevant CETA provision (Chapter Eight, Section F, Art. 8.18 of the CETA): As the CETA Tribunals, an ECT tribunal is not authorized to decide on EU law. In respect of the CETA the ECJ has also confirmed that this finding is neither invalidated because a CETA Tribunal may consider the domestic law of the host state as a matter of *fact*, nor because the relevant treaty as such becomes a part of EU law (Opinon, paras. 119, 130). That Art. 27(3)(g) ECT essentially ressembles the corresponding CETA provision corroborates that the ECT differs from the Slovakia Netherlands BIT, which was the subject of *Achmea*: Under Art. 8(6) of the Slovakia Netherlands BIT the arbitral tribunal has to take into account "*the law in force of the contracting party concerned and other relevant agreements between the contracting parties*", and thus EU law. In contrast, Art. 27(3)(g) of the ECT excludes EU law from the scope of tribunal jurisdiction *even more strictly* than the CETA (see *CETA* Opinion, paras. 129-131).

It is worthy of note that, in its attempt to distinguish the CETA from *Achmea*, the ECJ (Opinion, paras. 128-129) sets out that *Achmea* concerned

"*an agreement between Member States*", and such an agreement differs from an agreement between the Union and a non-member state because the

> "Member States are, in any area that is subject to EU law, required to have due regard to the principle of mutual trust. That principle obliges each of those States to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including fundamental rights, such as the right to an effective remedy before an independent tribunal laid down in Article 47 of the [ChFR]".

The "mutual trust" requirement is thus not only tied to the fundamental rights of EU citizens but to the maintenance of EU law at large.[118] Nevertheless, it is not perceptible how the application of the ECT would entail a violation of EU law, let alone its fundamental rights. On the contrary:

First, in respect of EU member states' "consideration" (probably the ECJ means *expectation*) that their fellow member states respect fundamental rights "such as the right to an effective remedy before an independent tribunal" under the Art. 47 Charter of Fundamental Rights of the EU (ChFR), it needs to be noted that Art. 26 ECT (unlike the ISDS rules of the CETA) does *not* cut off the right of an investor to avail itself of the courts of the host state. In contrast, the investor is free either to file action with such court or, alternatively, to initiate arbitration.[119] Hence, the ECT adds, and does not curtail, procedural rights. It is true, according to the *CETA* Opinion such mutual consideration (expectation) of the EU member states is not confined to compliance with fundamental rights but ("*other than in exceptional circumstances*") extends to compliance with EU law at large. As ECT tribunals are, however, confined to the application of public international law, it is ensured that they do not tamper with EU law. Last but not least: In the alternative, even if one were the assume that ECT tribunals apply and, in this vein, also were to infringe EU law, then one would have to consider such event to be "exceptional" within the meaning of the *CETA* Opinion. The exceptional character is due to the very limited number of intra-EU ISDS proceedings and in view of the fundamental substantive congruence with EU law of the principles enshrined in the ECT. Hence, such rare events, if any, would not call into question that the relevant EU host states comply EU law "other than in exceptional circumstances".

---

[118] *N. Basener* (note 9), 292 et seq. on the basis of an analysis of the earlier decisions of the ECJ drawing upon this *topos*. *Basener* on p. 292 to 295, finds intra-EU investment arbitration to violate the principle of "mutual trust". However, his analysis is partly outdated by the CETA Opinion and does not take into account the rights of the investors.

[119] See also the discussion in Part IV. 2. c) below.

Second, that EU member states "consider" (expect) their fellow member states to comply with EU law does not extend to an expectation (let alone a legitimate expectation) of member states that their fellow member states abstain from granting investors in their countries further standards of protection (as long as specific EU law, notably EU State aid rules, are not violated).

Third, it would *violate* "mutual trust" if EU member states were systematically to deny investors from other EU member states the rights which they grant to investors from non-EU countries. Art. 20 ChFR provides that "everyone is equal before the law", and the *CETA* Opinion sets out that said provision is applicable to all situations governed by EU law, including those falling within the scope of an international agreement entered into by the Union (*CETA* Opinion, paras. 171 and 179 *et seq.*). Hence, it does not detract from, but fosters, "mutual trust" if investors from EU member states are not treated worse than non-EU investors. In this context it should be borne in mind that, in terms of investment arbitration, intra-EU and third country settings do not differ much: In either case the arbitration is between one individual (the private investor) and one member state (not between two EU member states).

Fourth, as set forth in Part III, the fundamental rights of investors, including the protection of their legitimate expectations and the certainty of law, command the recognition by the EU and the EU member states of the ECT, not its rejection.[120]

bb) No Effect of Preventing the EU Institutions from Operating In Accordance With the EU Constitutional Framework

As regards above criterion (b), that is the absence of "*effect on the operation of the EU institutions in accordance with the EU constitutional framework*" (Opinion, paras. 137-161), the ECJ sets forth that a tribunal would

> "adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might […] call into question the level of protection of a public interest"

[120] In addition, on the basis of a detailed analysis *C. I. Nagy* (note 16), 981, 983, 997 et seq. sets out (1) that intra-EU investment protection stimulates the free movement of capital and the exercise of the freedom of establishment within the EU, and thus furthers the internal EU market and EU integration and (2) that EU law and investment treaties do not collide as EU law does, for historical reasons, not provide for adequate protection of fundamental rights against member state action.

that were comforted by the EU by way of generally applicable regulations. Where the finding of a tribunal confines itself to adjudicating an individual event, the ECJ does not find such "adverse effect". However such adverse effect can, according to the *CETA* Opinion, arise if awards

> "could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages, [the protection awarded to public interest] needs to be abandoned by the Union" (Opinion, para. 149).

The ECJ assesses the CETA not to lend itself to such a situation because the CETA (1) insulates from investor challenge measures necessary to protect public security, public morals and public order (Opinion, para. 152), (2) reserves the host states the "right to regulate to achieve legitimate policy objectives" (Opinion, para. 154), and (3) will not lower the standards and regulations of a host state related to food safety, product safety, consumer protection, health, environment or labor protection (Opinion, para. 155). In its Art. 24 the ECT provides for similar respect to the described public interests. In addition, it follows from a multitude of awards issued under the ECT that the ECT does not protect investors against measures taken by the host state to protect legitimate public welfare, such as health, safety and the environment, except in the rare situation that the measures are excessive, discriminatory or manifestly unfair.[121]

b) Compatibility With the General Principle of Equal Treatment and With the Requirement of Effectiveness of Competition Law

As regards to equal treatment, *CETA* (Opinion, paras. 179 *et seq.*) deals with the problem that as a result of the CETA, intra-EU investors may be treated worse than Canadian investors. However, it denies that this results in an unequal treatment by not likening Canadian investors in the EU with EU investors investing within the relevant member state, but by likening Canadian investors with EU investors investing within Canada (Opinion, para. 180). This analysis also applies to the ECT. It also brings about the reciprocity which the ECJ found decisive. What is more, as all EU member states are party to the ECT, it brings about equal treatment within the Union.

As regards effectiveness of EU competition rules, the *CETA* Opinion then deals with the problem that the CETA Tribunal may issue an award in terms of which a fine imposed by the Commission or by a competition au-

[121] *R. Dolzer/C. H. Schreuer* (note 9), 24; *C. Binder* (note 7), Chap. 4.

thority of a member state on a Canadian investor under EU competition rules (Arts. 101, 102 TFEU) constitutes a breach of the CETA protection standards (Opinion, paras. 184, 187/188). However, the ECJ considers such a situation to be difficult to conceive, and where such an award were conceivable, the cancelling out of the fine would not create such a risk because in the unlikely event that a competition law fine were so unlawful that it would run afoul of CETA protection standards, the fine could also be annulled under EU law.

Hence, the ECJ denies that the arbitration provisions of the CETA undermine the "requirement of effectiveness" of EU competition law. Its considerations also apply to the ECT as the ECT protection standards in essence resemble those of the CETA. In addition, *a fortiori* one can argue the following in favor of the ECT: The ECJ had to make a jurisdictional *forecast* whether or not the CETA Tribunal may in the future issue an award in terms of which a fine imposed by the Commission or by a competition authority of a member state on a Canadian investor under EU competition rules (TFEU Arts. 101, 102) constitutes a breach of the CETA protection standards. The ECJ forecast that such an award was hard to conceive and, if so, only under circumstances under which the fine would also have to be annulled under EU law. In respect of the ECT, the ECJ needs not embark on such jurisdictional *forecast* but can rely on 25 years of practice since the coming into force of the ECT: In all these 25 years there has never been an award

> "in terms of which a fine imposed by the Commission or by a competition authority of a member state on a Canadian investor under EU competition rules (TFEU Arts. 101, 102) constitutes a breach of the CETA protection standards".

In addition, it appears safe to say that in these 25 years there has never been an investor who even considered it worth the while to file such a claim.

c) Compatibility With the Right of Access to an Independent Tribunal Under Art. 47 of the EU Charter of Fundamental Rights

The ECJ sets forth that, pursuant Art. 47 of the EU Charter on Fundamental Rights, the EU must ensure that the ISDS tribunals "will each have the characteristics of an *accessible* and *independent* tribunal" (Opinion, para. 191). The ECJ adds that the CETA aims at ensuring the confidence of foreign investors in the tribunals as the "body that has jurisdiction to de-

clare infringements by the host State with respect to their investments" and deduces from such aim that the independence of the envisaged tribunals from the host State and the access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade as stated in Art. 3(5) TFEU and that is pursued by the CETA (Opinion, para. 200).

aa) Accessibility

As regards accessibility, the ECJ considers the financial burden of legal costs (fees and expenses of the tribunal and of counsel) which the claimant investor may, if his claim is dismissed, have to bear entirely (paras. 208 *et seq.*). Against this background the ECJ finds the commitment undertaken in the CETA by its parties to provide for "better and easier access to this new court for the most vulnerable users, namely [small and medium-sized enterprises] and private individuals" and that,

> "irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court".

The ECJ expressly sets out that the Council will "ensure" that the ISDS mechanism will not come into force before that commitment will have been fulfilled and finds the accessibility requirement thus fulfilled "taking into consideration this commitment" (Opinion, paras. 221/222).

The ECT does not have such mechanisms. However, the market for arbitration funding has evolved substantially over the last years and there is abundant supply of both funding for investment claims as well as for insurance against the adverse cost risk. Hence, there are appropriate measures of (co-)financing of actions of small and medium-sized enterprises. Furthermore, the ECJ fails to compare ISDS arbitration cost against the cost of pursuit of claims before state courts: No matter whether handled by a tribunal or state courts, investment arbitration usually is complex and triggers substantial legal cost in either case. In respect of state courts, the cost for both legal counsel and court is likely to be higher than arbitration cost because more instances are to be gone through. Furthermore, the CETA rule that legal cost are to be borne by the unsuccessful party, does not differ from the rule that is normally applicable before state courts (see *CETA* Opinion, para. 96). Last but not least, unlike the CETA, the ECT does *not* compel investors (including small and medium-sized enterprises) to bring their disputes before an ECT arbitration tribunal: Pursuant to the ECJ, Art. 30.6 CETA deprives investors of the possibility of relying directly on the CETA before the domestic courts and tribunals of the Parties; any action

directly based on the provisions of that agreement will have to be brought before the CETA Tribunal (*CETA* Opinion, para. 198). This is not so under the ECT as the ECT's Art. 26, as pointed out above, does not deprive the investor from the possibility to resort to the courts of the host state. Hence, ECT arbitration fares substantially *better* under the Art. 47 ChFR accessibility test than the CETA.

bb) Independence

The ECT also fares substantially better under the Art. 47 ChFR *independence* test than the CETA:

i) The Standards Set by the ECJ

Pursuant to the ECJ, such test has two aspects, that is, an "external" one presupposing that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The ECJ finds this to require guarantees against removal from office and appropriate remuneration.[122] The second aspect, which the ECJ finds "*internal*", is

> "linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."

The ECJ furthermore sets out that independence and impartiality

> "require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[123]

[122] Opinion, para. 202, refering to ECJ, Judgment of 25.7.2018, *Minister for Justice and Equality* (*Deficiencies in the judicial system*), C-216/18 PPU, paras. 63 et seq. and the case-law cited.

[123] Opinion, paras. 203 et seq., refering to *Minister for Justice and Equality* (note 122), para. 65 and the case-law cited.

Against this background, the ECJ had to cope with certain peculiarities of the CETA: While it found the CETA rules on the bringing of cases to have been largely inspired by traditional ISDS mechanisms (such as the ECT), "that is not the case with respect to the rules on the composition of that Tribunal and on dealing with those cases" (Opinion, para. 194). The CETA provides for the establishment of a permanent tribunal of 15 Members, and a division of three Members will hear the cases on a rotation basis so as to ensure that the composition of the divisions is random and unpredictable. These rules were intended by the EU and Canada to

> "move decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals"

and to bring about an "important and radical change in investment rules and dispute resolution" (Opinion, paras. 195/196). Pursuant to the CETA, while these Members "shall not be affiliated with any government", "the fact that a person receives remuneration from a government does not in itself make that person ineligible" (Opinion, para. 240). At the same time a CETA Joint Committee is (1) "to appoint the Members of the Tribunal and of the Appellate Tribunal" and to determine or adjust the number, by multiples of three, of Members of whom those Tribunals are to be constituted (Opinion, para. 227), (2) to determine the amount of the monthly retainer fee to transform that retainer fee and fees and expenses into a regular salary, and to decide applicable modalities (Opinion, para. 228), and (3) may adopt interpretations of the agreement that will be binding on the CETA Tribunal (Opinion, para. 232).

Against the background of its own case-law,[124] the ECJ had to make, and indeed made, an effort to find these rules to be compatible with Art. 47 ChFR[125] which efforts show that the ECJ was willing to make inroads into that provision.

ii) Assessment of the ECT Against These Standards

As regards the question whether the *ECT* lives up to the standards set out by the ECJ, the following point suffices to answer the question in the affirmative: The ECT follows the "traditional approach of investment dis-

[124] See Opinion, paras. 202 et seq., refering refering to *Minister for Justice and Equality* (note 122), paras. 63 et seq. and the case-law cited.

[125] See, for example, paras. 227 et seq. on the appointment of the "Members", paras. 236 et seq. on the authority of the CETA Joint Committee to interpret the CETA, and paras. 230 et seq., 240 et seq. on the remuneration aspects.

pute resolution". It hence does not feature *any* of the characteristics calling into doubt the compatibility of the CETA tribunal. In contrast, the "traditional approach" featured by the ECT brings about what the ECJ requires, that is "equal distance from the parties to the proceedings" so as to

> "dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it".

iii) The Unsurprising Lack of Account for the Investors' Position in the ECJ Analysis

The above citations from the ECJ Opinion demonstrate that the ECJ has failed to recognize the difference in position of investors on the one hand and the host state on the other hand: *Investors* typically fear bias on the part of state courts in favor of the host state which has instituted them.[126] Be that right or wrong, the mere fear is the background of "traditional" investment arbitration. Conceptually, the ECJ takes this fear serious, be such fear in the concrete case warranted or not: The court expresses "independence" to require

> "[dispelling] any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it" (Opinion, para. 204).

As the CETA is a treaty *between Canada and the EU* granting rights to investors as third parties (see Part II. 1., it could have taken the position that it is sufficient if the tribunal members are equidistant to *Canada and the EU*, not necessarily to the investors.[127] In such case the investors would have been warned that, procedurally speaking, the tribunal is not independent from the *state* parties to the CETA and may thus in the application of the CETA standards lean towards are more etatistic, host state friendly view. However, when defining its independence standards, the ECJ did not pursue this avenue but, as already quoted above, referred to "equal distance from the parties *to the proceedings*" so as to "dispel any reasonable doubt […] as to [the tribunal's] neutrality *with respect to the interests before it*" (emphasis *provided*). The arguments which the ECJ then mustered to

[126] As for investors' fear of a lack of impartiality of state courts, see *R. Dolzer/C. H. Schreuer* (note 9), 23.

[127] For a discussion of the similar issue whether the states parties to a treaty are able to modify their interpretation to the detriment of the investor, especially during arbitration proceedings that have already commenced, see *A. Peters* (note 7), § 10.6.1.

demonstrate the CETA to live up to this standard do not take account for the equidistance of the tribunal *vis-à-vis* the investors: Investors do not have a say in the appointment or the tribunals and can hardly interfere[128] if the members of the CETA tribunals tend to apply the CETA in a host state friendly way so as to ensure their reappointment after the expiry of their six year term.

This inherent inconsistency in the ECJ's findings is irrelevant for the assessment of the ECT because the ECT provides for higher independence standards than the CETA. However, the inconsistency falls in tune with the basic proposition of this article: The ECJ case-law fails to take investors' positions into account but is driven by etatist considerations. However, assessing investment law without taking account of investors' rights runs afoul of the very purpose of investment law.

V. Summary

The ECT does not run afoul of, but meets, the criteria which *Achmea* and *CETA* have selected to assess the compatibility of (intra-EU) investment arbitration with EU law.

VI. A Matter of Justice

In closing, the following needs to be added: Investors *rely* on the *rights* bestowed upon them by public law investment treaties and on the *pacta sunt servanda* principle. From the perspective of public international law, the Commission's position regarding intra-EU investment arbitration is, as the *Vattenfall* tribunal put it (see Part II. 4.), "unacceptable", "incoherent", "anomalous and inconsistent with the object and purpose of the ECT and with the rules of international law on treaty interpretation and application". This is corroborated by the EU's conduct and declarations when entering into the ECT. Hence, that investors not be bereaved of rights which have been bestowed upon them by public international law treaties and on the basis of which they have made their investments, is a matter of *material jus-*

[128] Such tendency will be subtle and not comein the form of, for example, expressly advocating the *in dubio mitius* rule (according to which the interpretation granting stronger protection to the sovereignty of the State party in question should be chosen when in doubt); as regards such rule see *A. Peters* (note 7), § 10.6.1.

tice. This holds all the more true where (a) the EU was instrumental in soliciting the investments and/or (b) changed its position at a point in time when investments had already been made.