The Compatibility of the ISDS Mechanism under the Energy Charter Treaty with the Autonomy of the EU Legal Order

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The article scrutinizes the ex-post constitutional compatibility with the autonomy of the EU legal order of the Investor to State Dispute Settlement (ISDS) mechanism established in Article 26 of the Energy Charter Treaty (ECT). Whereas the compatibility of intra-EU aspects of ECT arbitration is examined primarily in the light of the EU Court of Justice's (CJEU) Achmea and Komstroy judgments, the compatibility of its extra-EU aspects is examined primarily in the light of its Opinion 1/17. Since those Court decisions are indeed in line with the previous case-law, the article does not need to delve into earlier case-law. Although the issue is analysed from the standpoint of EU law, awards of the arbitral tribunals before which the ECT is invoked have been taken into consideration especially to ascertain whether the CJEU's concerns for preserving the autonomy of the EU legal order against any possible legal effects of these awards were justified. The article also analyses the principal options to remedy the incompatibility of the ISDS mechanism under the ECT with the autonomy of the EU legal order.

Keywords: Autonomy of the EU Legal Order, Investor to State Dispute Settlement, the Energy Charter Treaty, Intra-EU Arbitration, Extra-EU Arbitration

1 INTRODUCTION

The principle of autonomy of the EU legal order, as a judge-made principle, is still under construction. Since the Rome Treaty, it has actively shaped the EU legal order as its substratum, on the one hand, and it has been passively developed along with the gradually settled characteristics of the EU legal order and its law, on the other hand. This fact is evident in the use of circular reasoning by the Court of Justice of the EU (CJEU) while justifying and substantiating the essential characteristics of EU law and the autonomy through each other. These particularities would also cause an ex-post constitutional compatibility review with the developed understanding of the autonomy of the EU legal order of certain concluded agreements whose ex-ante compatibility review under Article 218(11) of the Treaty on the Functioning of the EU (TFEU) was ignored or found unnecessary

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in light of the understanding of that principle at the time of their conclusion. The Energy Charter Treaty (ECT), as a mixed multilateral investment agreement with intra- and extra-EU arbitration aspects, is an example of such agreements, alongside other experiences of ex-post arisen incompatibility of intra-EU Bilateral Investment Treaties (BITs) with the autonomy.

The article scrutinizes from the standpoint of EU law the latter legal issue, namely the ex-post compatibility of Investor to State Dispute Settlement (ISDS) under the ECT with the autonomy of the EU legal order. It seeks to provide this scrutiny with a supplementary examination of the practice of arbitral tribunals in order to provide an insight into the question of whether the CJEU's case-law arising from judicial concerns for the preservation of autonomy against the legal effects of intra- and extra-EU arbitration on the EU legal order is reflecting an 'over-autonomization' of EU law or is vindicated by this practice; the reasons underlying the expansion by the author of previous case-law to extra-EU arbitration under the ECT in this scrutiny; the legal consequences of the unremedied incompatibility of the ECT with the autonomy of the EU legal order under international law for both the EU and the Member States. The article is structured as follows. Initially, it analyses the issue of compatibility with the autonomy of the intra-EU ISDS under the current text of the ECT (section 2). Then the focus of the analysis is turned to the compatibility with the autonomy of the extra-EU ISDS under the current text of the ECT (section 3). The article subsequently tackles three main options to remedy incompatibilities with the autonomy of both intra- and extra-EU ISDS under the ECT (section 4) and ends with concluding remarks (section 5).

2 AUTONOMY AND INTRA-EU ARBITRATION UNDER THE ECT

2.1 THE *ACHMEA* AND *KOMSTROY* JUDGMENTS

Although the *Komstroy* case arises as an entirely extra-EU arbitration to resolve a dispute between a third-state operator and a third state, the CJEU by *obiter dictum* explicitly confirmed the incompatibility of intra-EU arbitration under the ECT by finding Article 26(2)(c) ECT non-applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[1] Since this judgment is primarily based upon *Achmea*, it seems sensible to examine first the *Achmea* judgment to better comprehend the legal grounds of the incompatibility of intra-EU arbitration with the autonomy.

The *Achmea* case pertains to a referral made to the CJEU for a preliminary ruling by the Federal Court of Justice, Germany, determining an appeal on a point

[1] Case C-741/19 *Republic of Moldova v. Komstroy LLC* EU:C:2021:655, paras 64–66.

of law against the dismissal by the Higher Regional Court, Frankfurt, of the application of the Slovak Republic brought with the purpose of setting aside an arbitral award. The award was issued within the context of the BIT entered into force in 1992 between the Netherlands and the Czech and Slovak Federative Republic before the latter's accession to the EU. The CJEU started its reasoning by stating that the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law, the preservation of the specific characteristics and the autonomy of the EU legal order. In accordance with Article 19 of the Treaty on EU (TEU), it is for the national courts/tribunals and the CJEU to ensure the full application of EU law in the Member States and the effective judicial protection of the individual rights under EU law. That judicial system through the preliminary ruling procedure under Article 267 TFEU has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, full effect, autonomy and particular nature established by the Treaties.[2]

The CJEU then reiterated the basic tenet that under the settled case-law 'an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law'.[3] The CJEU afterwards applied a three-pronged test. Firstly as regards whether the dispute settlement mechanism involves interpretation or application of EU law, the CJEU found that the arbitral tribunal established under the BIT may be called on to interpret or apply EU law on twofold basis, since, by virtue of its nature and characteristics, EU law both forms part of the law in force in every Member State and derives from an international agreement between the Member States.[4] Secondly as regards the question of whether it is situated within the judicial system of the EU to be considered initially a court/tribunal of a Member State within the meaning of Article 267 TFEU, which is entitled to make a reference to the CJEU for a preliminary ruling and whose decisions are accordingly being subject to mechanisms capable of ensuring the full effectiveness of EU law, the CJEU expressed that the arbitral tribunal is not part of the judicial systems of the Contracting Member States and cannot be classified as either a court/tribunal of a Member State within the meaning of Article 267 TFEU or as a court common to a number of Member States entitled to make a reference to the Court for a preliminary ruling such as the Benelux Court of Justice.[5] Thirdly, as regards the question of whether an award issued by such an arbitral tribunal is subject to judicial review by a court of a Member State, ensuring that the questions of EU

[2] Case C-284/16 *Slowakische Republik v. Achmea BV* EU:C:2018:158, paras 35–37.
[3] *Ibid.*, para. 57.
[4] *Ibid.*, paras 41–42.
[5] *Ibid.*, paras 43–49.

law addressed by that tribunal can be submitted to the CJEU through the preliminary ruling procedure, the CJEU uttered that the decision of the arbitral tribunal provided for in Article 8(7) of the BIT is nevertheless final. Furthermore, under Article 8(5) of the BIT, the arbitral tribunal is to determine its procedure applying the UNCITRAL arbitration rules and, in particular, is itself to choose both its seat and accordingly the law applicable to the procedure governing the arbitration. The fact that the arbitral tribunal applied to by Achmea chose to sit in Frankfurt made German law applicable to the procedure and enabled Slovakia to seek judicial review of the arbitral award, in accordance with that law, by bringing proceedings before the Federal Court of Justice. Nevertheless, not only can such judicial review be exercised by that court only to the extent that national law permits, but also it can be provided under the Code of Civil Procedure only for a limited review, namely concerning the validity of the arbitration agreement under the applicable law and the consistency of the recognition or enforcement of the arbitral award with public policy.[6]

On those grounds, the Member States by concluding the BIT established a mechanism for settling (intra-EU) investor-state disputes, which could prevent those disputes that might concern the interpretation or application of EU law from being resolved in a manner that ensures the full effectiveness of EU law. As a consequence, Article 8 of the BIT governing ISDS calls into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law and is therefore incompatible with the principles of sincere cooperation and autonomy under Articles 4 and 19 TEU and Articles 267 and 344 TFEU.[7]

The *Komstroy* judgment is regarding a request from the Cour d'appel de Paris for a preliminary ruling on the interpretation of investment within the meaning of the ECT. The request is made in proceedings between Moldova and Komstroy concerning the jurisdiction of an arbitral tribunal that issued an award in Paris, which was its seat. The action was brought before the Cour d'appel de Paris with the purpose of annulment against that arbitral decision. The CJEU found its jurisdiction to provide answers and so to interpret the ECT on the following grounds. First, it has jurisdiction to interpret the acts of the EU institutions, in particular the ECT which, as a mixed agreement concluded by the EU and by its Member States, constitutes an act of EU law.[8] Second, with the Treaty of Lisbon, the EU has exclusive competence regarding foreign direct investment and shared competence regarding investment.[9] Third, although the dispute is between an

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6 *Ibid.*, paras 50–53.
7 *Ibid.*, paras 56–59.
8 *Komstroy*, *supra* n. 1, paras 22–24 and 49.
9 *Ibid.*, paras 26–27.

investor of a non-Member State and another non-Member State, since a provision of that agreement can apply both to situations falling within the scope of EU law and to situations not covered by that law, it is clearly in the EU interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.[10] Since the parties chose to submit that dispute to an ad hoc arbitral tribunal established on the basis of the UNCITRAL arbitration rules and agreed that the seat of the arbitration should be established in Paris, that choice has the effect of rendering applicable French law as the *lex fori* to the dispute in the main proceedings and so EU law as forming part of the law in force in every Member State.[11] The arbitral tribunal is accordingly required to interpret, and even apply, EU law.[12]

Having established that, the CJEU continued in the footsteps of *Achmea* with the second pronged-test. The arbitral tribunal however neither constitutes a component of the judicial system of a Member State, in this case the French Republic, nor is entitled to make a reference to the CJEU for a preliminary ruling.[13] As the third-pronged test, since arbitral awards are final and binding on the parties, those awards are not subject to review by a court of a Member State capable of ensuring full compliance with EU law.[14]

If the provisions of Article 26 ECT were to apply to a dispute between an investor of one Member State and another Member State, it would therefore mean that, by concluding the ECT and so by removing that dispute from the EU judicial system, the EU and the Member States established a mechanism for settling such a dispute that could exclude the possibility that that dispute would be resolved in a manner that guarantees the full effectiveness of EU law, notwithstanding the fact that the interpretation or application of EU law is concerned. That would call into question the preservation of the autonomy and the particular nature of EU law.[15] Despite its multilateral nature, Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the BITs. The preservation of the autonomy and the particular nature of EU law precludes the obligations to comply with the arbitral mechanisms under the ECT from being imposed on the Member States as between themselves. The CJEU concluded that Article 26(2)(c) ECT must accordingly be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.[16]

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10 *Ibid.*, paras 28–29.
11 *Ibid.*, paras 32–34.
12 *Ibid.*, para. 50.
13 *Ibid.*, paras 52–53.
14 *Ibid.*, paras 54–55.
15 *Ibid.*, paras 60–63.
16 *Ibid.*, paras 64–66.

2.2 Implications of the case-law for intra-EU arbitration under the ECT

Under the settled case-law, intra-EU relations 'are governed by EU law to the exclusion, if EU law so requires, of any other law'.[17] The CJEU already confirmed the incompatibility with the autonomy of any intra-EU dispute settlement mechanisms established by mixed agreements, concerning the interpretation or application of EU law, between the Member States[18] and between the EU and the Member States[19] on the single basis of Article 344 TFEU. Further, the CJEU totally ruled out, on the extended basis of Articles 4(3) and 19 TEU and Articles 267 and 344 TFEU, the intra-EU ISDS mechanisms established by BITs concluded by the Member States[20] or by multilateral mixed agreements, in particular the ECT.[21] To be precise, the CJEU confirmed by *obiter dictum* in *Komstroy* the incompatibility of intra-EU arbitration under the ECT.

In investment arbitration, there are the instances where EU law is considered non-applicable law to disputes invoking the ECT.[22] Some tribunals consider either the phrase 'the applicable rules and principles of international law' as referring to rules applicable to all states and so as not encompassing EU law, which might be regarded as a matter of fact if potentially relevant to the merits of a dispute,[23] or reference to international law as not including EU law.[24]

One cannot however rule out that EU law could be regarded as applicable law in such disputes in the following forms, as examples of vindicating the CJEU:

(1) as an integral part of the domestic law of the Member States,[25] which are also contracting parties alongside the EU to the ECT;
(2) as the domestic law of a contracting party to the ECT, distinct both from international and national laws;[26]

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17 *Opinion 2/13* EU:C:2014:2454, para. 193.
18 Case C-459/03 *Commission v. Ireland* EU:C:2006:345, paras 123–124.
19 *Opinion 2/13*, *supra* n. 17, paras 210–212.
20 *Achmea*, *supra* n. 2, paras 56–59.
21 *Komstroy*, *supra* n. 1, paras 64–66.
22 *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, *Decision on Respondent Request for Reconsideration Regarding the Intra-EU Objection and the Merits* (1 Feb. 2022), paras 107, 112–116.
23 *Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection (7 May 2019)*, paras 120–123.
24 *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Final Award (23 Dec. 2018), para. 397.
25 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 Nov. 2015), para. 4.119, 4.124; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 Dec. 2016), para. 278; *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection (14 May 2021), para. 517.
26 *Ibid.* (*Electrabel*), para. 4.20.

(3) as a fact[27] within the preceding situations;
(4) as part of the applicable rules and principles of international law.[28]

According to some tribunals, investors may benefit from more favourable provisions of EU law, in both procedural and substantive contexts, under Article 16 ECT.[29] However, it should be noted that Article 16 ECT cannot be applied under EU law due to the lack of intra-EU arbitration under the ECT. Additionally, the non-derogatory conception of the ECT is incompatible with the ruling in *Opinion 2/13*, which states that even international standards of the protection of fundamental rights cannot compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.[30]

The practice of certain arbitral tribunals therefore vindicates the concerns of the CJEU, which takes into account the mere possibility of whether any intra-EU arbitral tribunals are liable to interpret or apply EU law. In other words, there is a strong possibility that in the practice of arbitral tribunals EU law may constitute applicable law within the context of intra-EU arbitration.

As under Articles 4(3) and 19 TEU and Articles 267 and 344 TFEU intra-EU ISDS awards become inapplicable in the EU legal order, the national courts cannot enforce them. With effect from the Member State's accession to the EU, the system of judicial remedies provided for in the EU Treaties replaces the arbitration procedure established by the intra-EU BITs and the consent given to that effect by one of the Member States from that time onwards lacks any force.[31] This replacement is also valid for the intra-EU aspects of any agreements concluded by the EU, including the ECT, whose incompatibility might arise with the normative/jurisdictional autonomy. National courts must therefore uphold applications which seek setting aside arbitral awards infringing Articles 267 and 344 TFEU and the principles of mutual trust, sincere cooperation and the autonomy of EU law.[32] Any further circumvention is avoided as well with the preclusion by Articles 267 and 344 TFEU of any national legislation allowing a Member State to conclude an ad hoc arbitration agreement with an investor to continue arbitration proceedings

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27 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 Sep. 2010), para. 7.6.6; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014–03, Final Award (11 Oct. 2017), paras 177–178; *Eskosol*, *supra* n. 23, paras 120–123.

28 *Electrabel*, *supra* n. 25, paras 4.120, 4.124; *Blusun*, *supra* n. 25, para. 278; *Belenergia S.A. v. Italian Republic,* ICSID Case No. ARB/15/40, Award (28 Aug. 2019), paras 290–292; *AS PNB Banka*, n. 25, para. 517.

29 *Soles Badajoz Gmbh v. Spain*, ICSID Case No. ARB/15/38, Award (31 Jul. 2019), paras 164–165; *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award (8 Mar. 2021), para. 325.

30 *Opinion 2/13*, *supra* n. 17, paras 188–189.

31 Case C-638/19 P *Micula* EU:C:2022:50, para. 145.

32 Case C-109/20 *Republiken Polen v. PL Holdings Sàrl* EU:C:2021:875, para. 55.

initiated on the basis of an arbitration clause, which is contained in an international agreement and so becomes invalid because of its incompatibility with those Articles.[33] Enforcement of intra-EU arbitral tribunal awards is accordingly deemed state aid.[34] Moreover, not only is Article 351 TFEU inapplicable between the Member States including those which acceded to the EU later than being a party to the ECT, but also, as established in *Kadi*, even that article cannot provide derogations from the autonomy, which forms one of the foundations of the EU.[35]

The reactions of arbitral tribunals to intra-EU objection regarding the ECT have indeed diverged. *Green Power* has so far been the only case in which an arbitral tribunal deferred to the EU case-law and confirmed on the basis of primacy and the autonomy of EU law its lack of jurisdiction.[36] Certain tribunals however held that the *Achmea* judgment, which is of limited application, cannot be applied to multilateral agreements including the ECT[37]; there is no basis for finding the extension of *Achmea* to ECT cases and thus the extension of *Achmea* reasoning about a possible risk that an arbitral tribunal may be called on to interpret or apply EU law into a blanket ban on all investment arbitration would be inappropriate[38]; since the Tribunal would have jurisdiction as a matter of public international law, whatever the position under EU law might be, *Komstroy* would not have affected the outcome of the 2019 Decision establishing *Achmea* as non-applicable to an arbitration under the ECT[39]; even where the Contracting Parties terminate the agreement on mutual consent, they acknowledge with the twenty-year sunset clause that long-term interests of investors must be respected[40]; the enforceability of the award is a separate matter which does not impinge upon the jurisdiction[41]; Article 26 ECT neither contains explicit exclusion of EU Member States from its scope, nor expressly recognizes any distinction between intra-EU and extra-EU disputes whatsoever.[42]

It goes without saying that the jurisdiction of the CJEU under Article 19 TEU to interpret and apply international agreements concluded by the EU cannot

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33 *Ibid.*, para. 56.
34 *Micula*, *supra* n. 31, paras 123–125.
35 Joined Cases C-402/05 P and C-415/05 P *Kadi* EU:C:2008:461, paras 303–304.
36 *Green Power K/S and Obton A/S v. Spain*, SCC, V 2016/135, Award (16 Jun. 2022), paras 476–478.
37 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018), para. 679.
38 *Eskosol*, *supra* n. 23, para. 177.
39 *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Respondent's Application for Reconsideration of the 'Intra-EU' Jurisdictional Decisions (22 Feb. 2023), para. 45.
40 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No ARB/17/27, Award (13 Nov. 2019), para. 223.
41 *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Award (25 Jan. 2021), para. 568.
42 *Sun Reserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Award (25 Mar. 2020), para. 448.

however take precedence over either the jurisdiction of the courts of the non-Member States with which those agreements were concluded, nor that of the international courts/tribunals that are established by those agreements.[43] Furthermore, allowing determination of jurisdiction of a court/tribunal established by an international agreement to a domestic court of a contracting party would mean not only granting that contracting party an authority to unilaterally determine its jurisdiction in terms of international obligations arising from that agreement with the legal consequence of limited external control, but also infringement of jurisdictional *Kompetenz-Kompetenz* of that international court/tribunal. European case-law, being unilateral in this context, would therefore be regarded as unacceptable from the international law standpoint. On those grounds, as also explained by AG Wathelet, compliance with the European case-law, being merely an EU law obligation, cannot be ensured under international law. Enforcement of arbitral tribunal awards, which ignore that case-law, might further be even sought under the International Centre for Settlement of Investment Disputes (ICSID) Convention by investors in the jurisdictions outside the EU.[44] As argued by certain legal scholars, where EU-based undertakings relocate their seat to outside the EU after their investment have been protected under the ECT, use an existing seat or have shareholders brought their claims to remove the disputes from the EU judicial system, national courts must find those moves to be an attempt to circumvent the applicability of EU law and must refuse giving effect to extra-EU arbitration awards.[45] One could probably counterargue, given that the CJEU has already confirmed in the context of freedom of establishment that there is no abuse of EU law in such a situation.[46] It should however be recalled that the genuine intent in the former example is the circumvention of EU law (to avoid application of EU law), whilst the latter example is about the circumvention of national law for the application of EU law (giving effect to EU law).[47]

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43 *Opinion 1/17* EU:C:2019:341, para. 116.

44 Opinion of Advocate General Wathelet Case C-284/16 *Slowakische Republik v. Achmea BV* EU:C:2017:699, paras 252–253; *See* for instance *Viorel Micula v. The Government of Romania* 104 F. Supp. 3d 42 (D.D.C. 2015); Claimant Motion for Substitution before the United States District Court for the District of Columbia, 2 Mar. 2023 for the confirmation of award given in *AES Solar and others (PV Investors) v. The Kingdom of Spain*, PCA Case No. 2012–14; Memorandum Opinion of the United States District Court for the District of Columbia (29 Mar. 2023).

45 C. Eckes, *The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty*, Amsterdam Law School Legal Studies Research Paper No. 10 (2023); C. Eckes & L. Ankersmit, *The Compatibility of the Energy Charter Treaty With EU Law* (University of Amsterdam, Amsterdam Centre for European Law and Governance 2022).

46 Case C-212/97 *Centros* EU:C:1999:126, para. 27; Case C-438/05 *Viking Line* EU:C:2007:772, paras 69–74.

47 To preclude abuse of law under the ECT by restricting the concept of investor, the Modernized ECT adds into Art. 1(7)(a)(ii) the requirement of substantial business activities whose existence is to be ascertained by an overall examination, on a case-by-case basis, of the relevant circumstances.

For the foregoing reasons, given that there is no explicit or implicit[48] disconnection clause taking place in the ECT, the autonomy under international law should be preserved rather by incorporating a disconnection clause into the ECT with the consent of other contracting parties or by making an *inter se* modification agreement among the EU, Euratom and the Member States stipulating the preclusion of the application of the ECT and the sunset clause to intra-EU arbitration as proposed by the Commission.[49]

3 AUTONOMY AND EXTRA-EU ARBITRATION UNDER THE ECT

3.1 *Opinion 1/17*

Opinion 1/17 constitutes a pivotal case as to the compatibility requirements of extra-EU arbitration which would be illuminating for the extra-EU ISDS under the ECT. It was issued upon the application brought by Belgium under Article 218(11) TFEU concerning the compatibility of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) with EU primary law. The CJEU stated that an international agreement establishing an ISDS mechanism, in particular the CETA, may be compatible with EU law provided that it has no adverse effect on the autonomy, which exists towards both national and international law as stemming from the essential characteristics of the EU and its law and resides in the fact that the EU possesses a unique constitutional framework.[50] The CJEU then emphasized the necessity to examine whether the ISDS mechanism provided by the CETA is such as to prevent the EU from operating in accordance with its unique constitutional framework.[51]

The CJEU confirmed at the outset that the envisaged ISDS mechanism does not form part of the judicial system of the Contracting Parties and thus stands outside the EU judicial system.[52] In order to determine the compatibility of the envisaged ISDS mechanism with the autonomy, the CJEU enquired whether it is satisfied that the CETA neither confers on the envisaged tribunals any power to interpret or apply EU law other than its provisions, nor structures their powers in such a way that they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.

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48 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (6 Jun. 2016), paras 81–82.

49 European Commission, *Proposal for a COUNCIL DECISION on the Position to Be Taken on Behalf of the European Union in the 33rd Meeting of the Energy Charter Conference*, COM(2022) 521 final, 3 (Brussels 5 Oct. 2022).

50 *Opinion 1/17*, *supra* n. 43, paras 108–111.

51 *Ibid.*, para. 112.

52 *Ibid.*, paras 113–114.

As regards the former, the CETA Tribunal has no jurisdiction to determine the legality of a measure under the domestic law of a Party.[53] The power of interpretation and application conferred on the Tribunal is confined to the provisions of the CETA to be undertaken in accordance with the rules and principles of international law applicable between the Parties.[54] The principle of mutual trust is not applicable in relations between the EU and a non-Member State as well.[55] In determining the consistency of a measure with the CETA, the Tribunal may consider the domestic law of a Party as a matter of fact and in doing so shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party, which are not further bound by any meaning given to their domestic law by that Tribunal.[56] Moreover, the CETA Tribunal has no power to determine whether the host Member State or the EU will be the respondent and the CJEU's exclusive jurisdiction to determine the vertical division of powers as a domestic issue is accordingly preserved.[57] There is no conferral on the Appellate Tribunal jurisdiction to interpret domestic law either.[58] On those grounds, it is consistent with EU law that the CETA makes no provision for the CETA Tribunal or Appellate Tribunal to make a reference for a preliminary ruling to the CJEU and confers on those Tribunals the power to give a definitive ruling on an investor-state/the EU dispute without establishing any procedure for the re-examination of the award by a domestic court of that state or by the CJEU.[59]

As regards the latter, the CETA Tribunal may neither annul the contested measure, nor require that the domestic law of the Party concerned should be rendered compatible with the CETA, nor impose a penalty on the respondent Party, but may order the respondent Party to pay to the claimant investor compensation of damage.[60] The jurisdiction of those tribunals would however adversely affect the regulatory autonomy if it were structured in such a way that those tribunals might call into question the level of protection of a public interest established in the EU by creating a situation where the achievement of that level of protection needs to be abandoned by the EU and a legal consequence that the EU (or a Member State in the course of implementing EU law) has to amend or withdraw legislation. That would accordingly undermine the EU's capacity to operate autonomously within its unique constitutional framework.[61] The CJEU

[53] *Ibid.*, para. 121.
[54] *Ibid.*, para. 122.
[55] *Ibid.*, para. 129.
[56] *Ibid.*, para. 130.
[57] *Ibid.*, para. 132.
[58] *Ibid.*, para. 133.
[59] *Ibid.*, paras 134–135.
[60] *Ibid.*, para. 144.
[61] *Ibid.*, paras 148–150.

nonetheless found that the CETA Tribunal has no jurisdiction to declare incompatible with the CETA the level of protection of a public interest established by the EU measures and, on that basis, order the EU to pay damages.[62] Nor do the discretionary powers of the CETA Tribunal and Appellate Tribunal call into question the level of protection of a public interest determined by the EU following a democratic process.[63] Additionally, the jurisdiction of the CETA Tribunal to find infringements of the obligation to accord fair and equitable treatment to covered investments is specifically circumscribed to situations exhaustively listed.[64] On those grounds, the CETA does not adversely affect the autonomy of the EU legal order.[65]

3.2 Implications of the case-law for extra-EU arbitration under the ECT

The compatibility of the ECT with the autonomy could be examined in terms of three essential matters as applied in *Opinion 1/17*.

3.2[a]. *Do the Arbitral Tribunals Have Any Power to Interpret or Apply EU Law Other than the ECT Provisions?*

Within that context one should examine whether the ECT grants on the arbitral tribunals any authority to interpret or apply EU law going beyond its provisions. According to the settled case-law the mere possibility of interpretation or application of EU law by a court/tribunal standing outside the EU judicial system by itself entails the incompatibility of that dispute settlement mechanism with the jurisdictional autonomy, irrespective of whether the relevant arbitration is intra-EU or extra-EU arbitration. Provided that EU law does not constitute applicable law within extra-EU arbitration and thus its interpretation or application is not involved in the dispute, arguably arbitration would not adversely affect the exclusive jurisdiction of the CJEU and the jurisdictional autonomy and no prior involvement of the CJEU through the preliminary ruling procedure is accordingly required.

It is worth to note from the outset that under EU law Article 351 TFEU does not seem applicable with regard to even extra-EU obligations of the Member States, which accessed to the EU after the conclusion of the ECT on the single ground that that article as established in *Kadi* cannot provide derogations from the autonomy,

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62 *Ibid*., para. 153.
63 *Ibid*., para. 156.
64 *Ibid*., para. 158.
65 *Ibid*., para. 161.

which forms an existential component of the foundations of the EU.[66] Article 16 ECT providing non-derogation of ECT more favourable standards than other agreements concluded by the Contracting Parties does not seem applicable to extra-EU arbitration either under EU law in the light of *Opinion 2/13*[67] and *Opinion 1/17*[68] not to compromise the primacy, unity and effectiveness of EU law. Nor does it seem applicable to extra-EU arbitration under the ECT and international law, unless there is a further international agreement concluded with the non-EU state of the investor concerning the subject matter of investment and dispute settlement.

The question of whether EU law is part of the 'applicable rules and principles of international law' under Article 26(6) ECT, as a matter of practice, might be relevant only to intra-EU disputes should be primarily resolved. There are two models for the determination of the applicable substantive law in international investment law: (1) based upon the rules of procedure of a dispute settlement mechanism and/or (2) based upon (bilateral/multilateral) international investment agreements.[69]

In case of intra-EU disputes, certain arbitral tribunals interpret EU law as international law and consider that since the EU treaties are clearly international agreements not only under Article 16 ECT but also under the Vienna Convention on Law of Treaties (VCLT), they cannot be excluded as potential sources of 'applicable rules and principles of international law' within the meaning of Article 26(6) ECT.[70] Although Article 26 ECT does not differentiate jurisdiction of arbitral tribunals according to the nature of disputes, whether to be intra-EU or extra-EU, such conclusions might however be related only to intra-EU arbitration. This is because, though under international investment law applicable substantive law is to be determined according to the procedural rules of fora and/or dispute settlement rules of agreements concluded by the Contracting Parties, Article 26(6) ECT could be regarded as establishing the exclusive application[71] of the ECT and applicable rules and principles of international law, by way of excluding the mechanisms for determining applicable law under the fora rules.[72] In that regard, the EU Treaties may be considered international agreements in the context of intra-EU arbitration, but not in the context of extra-EU arbitration. Moreover,

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66 *Kadi*, *supra* n. 35, paras 303–304. In that regard, the UK Supreme Court's approach to Art. 351 TFEU cannot be defended under EU law. *Micula and others v. Romania* [2020] UKSC 5, paras 85, 97–108.

67 *Opinion 2/13*, *supra* n. 17, para. 189.

68 *Opinion 1/17*, *supra* n. 43, paras 149–153.

69 M. Bungenberg & A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Eur. Y.B. Int'l Econ. L. 119 (Springer Open 2020), doi: 10.1007/978-3-662-59732-3.

70 *Soles Badajoz*, *supra* n. 29, para. 163.

71 *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue (31 Aug. 2018), para. 120.

72 O. Quirico, *Investment Governance Between the Energy Charter Treaty and the European Union – Resolving Regulatory Conflicts* 17 (Brill Nijhoff 2021).

Article 26(6) ECT does not identify the domestic law of the contracting parties as applicable law that may enable the application of EU law either. Therefore, as regards its extra-EU arbitration aspects, the ECT does not seem to feature EU law, as applicable substantive law, among applicable rules and principles of international law, i.e., as applicable law in the disputes between non-EU investors and the Member States/the EU[73] under Articles 16 and 26(6) ECT, unless there is a further agreement concluded by the EU and the Member State with the non-EU state of investors other than the ECT.

It is however a fact that although the ECT does not refer to the domestic law of a Contracting Party as applicable law, some tribunals do apply it.[74] The need to resort to domestic law when deciding claims on the merits might also be illustrated by umbrella clauses[75] such as Article 10(1) ECT under which examination of contractual breaches, according to some legal experts, would not make sense without taking into account domestic law.[76] Hence, EU law can be potentially applicable either as domestic law in the disputes brought by the European investment companies (Societas Europea) owned by third country investors against the EU[77] or as a part of domestic law of the Member States in the disputes brought against them. It is either where a tribunal must ascertain whether the investment/investor was established in the Contracting Party to qualify for investment protection in accordance with its applicable law under Articles 1(6) and 1(7) ECT or when a tribunal is called to determine contract claims by virtue of an umbrella clause under Article 10(1) ECT as a preliminary matter for the resolution of a dispute between the EU/the Member State and a third country investor.[78] There were indeed instances under extra-EU BITs where arbitral tribunals either took into account EU law mostly as a matter of fact for the assessment of a Member State's responsibility under international law[79] and rarely as matter of law even by interpreting the EU legislation.[80]

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73 M. de Boeck, *EU Law and International Investment Arbitration – The Compatibility of ISDS in Bilateral Investment Treaties (BITs) and the Energy Charter Treaty (ECT) With the Autonomy of EU Law* 397 (Brill Nijhoff 2022).

74 *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sep. 2011), paras 112–113; *Green Power*, *supra* n. 36, paras 169–170, 412.

75 H. E. Kjos, *Applicable Law in Investor-State Arbitration – The Interplay Between National and International Law* 247 (OUP 2013).

76 F. D. Simões, *Settlement of Disputes Between an Investor and a Contracting Party*, in *Commentary on the Energy Charter Treaty* 355 (R . Leal-Arcas ed., Edward Elgar 2018).

77 So far there is one claim brought by a company incorporated in Switzerland though on the basis of the ECT before an arbitral tribunal against the EU. *Nord Stream 2 AG v. European Union*, PCA Case No. 2020–07, Respondent Memorial on Jurisdiction and Request for Bifurcation.

78 de Boeck, *supra* n. 73, at 397–398.

79 *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award (29 Feb. 2008), para. 229.

80 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 Nov. 2000), para. 69.

It is worth to note that in certain agreements jurisdiction and applicable law appear to coincide, whereas in others there is no meaningful correlation.[81] Article 26(6) ECT could also be conceived as having no exclusive application. In that regard, the confirmation of the CJEU in *Komstroy* that 'an arbitral tribunal such as that referred to in Article 26(6) ECT is required to interpret, and even apply, EU law'[82] also seems to be applicable to extra-EU arbitration under the ECT under the seat theory. Although in *Komstroy* the issue was between a non-EU investor and a non-EU state, the choice of the seat of the arbitration entailed the application of the Member State's domestic law as the *lex fori* and accordingly the application of EU law.[83] If the establishment of the seat of the arbitration on the territory of a Member State entails the application of EU law, as forming part of the law in force in every Member State, i.e., *lex fori*,[84] EU law could be potentially regarded as applicable law, unless the arbitration tribunal is established under the ICSID Convention,[85] under which seat has no impact as a truly international arbitration on the applicable law to the dispute. According to the seat theory, tribunals may apply the law of a contracting party which may lead to the application of domestic law of a Member State and so EU law to the disputes. This seems to correspond to the CJEU's understanding of the applicable law in *Achmea* and *Komstroy*, as the applicable law in investment arbitration might be determined under the fora arbitral rules such as UNCITRAL and the Stockholm Chamber of Commerce (SCC), and *lex fori/arbitri*. Conclusions regarding the incompatibility of intra-EU arbitration under the ECT with EU law could therefore be applied *mutatis mutandis* to extra-EU arbitration under the ECT, as long as EU law could be potentially considered applicable law as the *lex fori/arbitri* to the disputes either indirectly as part of domestic law of a Member State in disputes brought against it or directly in disputes brought by the European investment companies against the EU.

Consequently, in the context of the ECT, tribunals may interpret or apply EU law as applicable law to disputes either as forming part of the domestic law of the Member States or directly as the domestic law of a distinct Contracting Party, i.e., the EU. Even though 'as the application of EU law to the merits is what the jurisdictional and institutional autonomy of the EU is concerned with in the final analysis',[86] at least jurisdictional aspects of applicability of EU law to disputes under

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[81] C. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1(1) McGill J. Disp. Res. 1 (2014). In that regard *see Vattenfall*, *supra* n. 71, para. 121; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and Principles of Quantum (11 Feb. 2022), para. 620; *Green Power*, *supra* n. 36, para. 157.

[82] *Komstroy*, *supra* n. 1, para. 50.

[83] *Ibid.*, paras 32–34.

[84] *Ibid.*, paras 32–34; *Green Power*, *supra* n. 36, para. 166.

[85] UNCITRAL, SCC (Stockholm Chamber of Commerce) and ICSID are the fora followed to invoke the ECT to establish an arbitral tribunal.

[86] de Boeck, *supra* n. 73, at 395.

the seat theory cannot be ignored within the context of preservation of the normative/jurisdictional autonomy.

3.2[b] *Could the EU Institutions Be Prevented from Operating in the EU Constitutional Framework?*

It is to be examined whether the ECT structures the powers of arbitral tribunals in such a way that they may issue awards, which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework and thereby undermine the regulatory autonomy. This new dimension of autonomy (as compared to the jurisdictional autonomy) was already introduced in *Opinion 2/13* as a blend of internal and external autonomy with regard to the power granted to the Member States by Article 53 of the European Convention on Human Rights, which is to be coordinated with Article 53 of the Charter 'to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised'.[87] The CJEU then formulated it in *Opinion 1/17* as a new dimension of purely external autonomy against jurisdiction of arbitral tribunals to protect the level of protection of a public interest determined by the EU following a democratic process. It should be clarified here that whereas the jurisdictional autonomy refers to the CJEU's judicial prerogatives on EU law, the regulatory autonomy refers to the ability of the EU institutions to adopt law and policy independently from the external pressure. In that context, one should analyse the following questions: whether arbitral tribunals may annul the contested measure; require that the domestic law of the Party concerned is rendered compatible with the ECT and so the EU institutions or the Member States in the course of implementing EU law must amend or withdraw legislation; impose a penalty on the respondent Party or simply order the respondent Party to pay to the claimant investor compensation of damage.

There is no provision in the ECT that prevents arbitral tribunals from conducting legality review of EU measures. Nor is the right to regulate of the EU and the Member States guaranteed under the ECT within the context of ISDS. Certain substantive standards, for instance, on fair and equitable treatment under Article 10(1) ECT and on indirect expropriation under Article 13 ECT are not specifically constrained. Article 10(12) obliges the Contracting Parties to ensure that their domestic law provides effective means for the enforcement of rights with respect to investments, investment agreements and investment authorizations. That provision could be viewed as an additional legal basis for the jurisdiction of the tribunals to force the EU and the Member States to amend or annul their legislation. As regards the

[87] *Opinion 2/13*, n. 17, paras 188–189.

condition under *Opinion 1/17* that the ECT would not lower the standards and regulations of each Party related to food safety, product safety, consumer protection, health, environment or labour protection,[88] Article 16 ECT nonetheless constitutes to some extent an interior guarantee under international law[89] at least within the context of intra-EU arbitration for the EU and the Member States. The fact that the aforesaid condition is not explicitly enshrined in the ECT would therefore constitute incompatibility with the European regulatory autonomy only within the context of extra-EU arbitration.

The scope of exceptions articulated in Article 24 ECT from the substantive standards seems to be narrower than those articulated in Article 28.3.2 CETA. Exceptions on the one hand shall not apply to Articles 12 (compensation for losses), 13 (expropriation) and 29 (interim provisions on trade-related matters) ECT and on the other hand the Contracting Parties are precluded regarding Part III of the Treaty (post-investment protection) from adopting or enforcing any measure necessary to protect human, animal or plant life or health. That exclusion of substantive investment protection standards from the scope of exceptions thus appears to be against the right to regulation. There is no comprehensive right to regulate in the ECT either. Since ISDS under the ECT is limited to an alleged breach of an obligation of a Contracting Party under Part III, the sovereignty rights over energy resources and the right to regulate the environmental and safety aspects of exploration under Article 18 ECT (part IV), which reflects declaratory nature, are also excluded from dispute settlement.[90] Therefore, arbitral tribunals are likely to carry out balancing tests entailing assessment of EU policies in terms of substantive protection standards in the light of the ECT.[91] Article 16 ECT does not seem to be applicable to extra-EU arbitration, unless any prior or subsequent agreement is concluded with a non-EU country by the EU and the Member States. Such a prior or subsequent agreement could not however compromise the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law.[92]

If arbitration mandates restitution, injunctive relief, specific performance or non-pecuniary compensation, it could also breach the regulatory autonomy of EU law. Pursuant to Article 26(8) ECT, 'an award of arbitration concerning a measure of a sub-national government or authority of the disputing

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88 *Opinion 1/17*, *supra* n. 43, para. 155.

89 This arises nevertheless as nugatory under EU law within the context of intra-EU arbitration.

90 S. Hindelang, *The Price for a Seat at the ISDS Reform Table – CJEU's Clearance of the EU's Investment Protection Policy in Opinion 1/17 and Its Impact on the EU Constitutional Order*, in *The EU and the Rule of Law in International Economic Relations*, 127–153 (A. Biondi & G. Sangiuolo eds, Edward Elgar 2021); Eckes, *supra* n. 45.

91 Eckes & Ankersmit, *supra* n. 45.

92 *Opinion 2/13, supra* n. 17, para. 189.

Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted'. This option is similar to the option left to respondent in Article 8.39.1.(b) CETA, which was found compatible with the autonomy,[93] providing for payment of monetary damages representing the fair market value of the property in lieu of restitution of property, albeit with a limitation to a measure of a sub-national government or authority. In addition to Article 12 ECT, which sets forth restitution, indemnification, compensation or other settlement to accord, Article 26(8) ECT *a contrario* confirms that central governments could be subject to remedies other than compensatory damages.[94] Arbitral tribunals therefore can order, in principle, restitution under the suitable circumstances, though it has not been preferred on certain grounds.

In that respect, under Article 35 of the International Law Commission's Articles, pecuniary compensation is the appropriate remedy for an internationally wrongful act where restitution appears materially impossible or disproportionally burdensome. In the cases concerning disputes submitted on the basis of the ECT, certain tribunals upheld under that article that juridical restitution by ordering the respondent to reinstate its pre-breach legislative and regulatory framework would unduly burden its legislative and regulatory autonomy compared to the benefit it potentially yields to claimant.[95] Tribunals thus order the state to pay monetary damages resulting from their breaches of the ECT on the ground that to order restitution would be disproportional to its interference with the sovereignty of the state compared to monetary compensation[96]; the respondent has a sovereign right to take appropriate legislative and regulatory measures to meet public interests[97]; or restitution is beyond the proper scope of their powers and plainly materially impossible and disproportionately burdensome.[98] Hence, those tribunals implicitly and the Arbitral Tribunal in *Micula* explicitly confirm under Article 54 of the ICSID Convention that they have in principle the power to order non-pecuniary relief.[99] It could be concluded that arbitral tribunals, standing outside the EU

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93 *Opinion 1/17*, *supra* n. 43, paras 144–147.

94 Simões, *supra* n. 76, at 357.

95 *Masdar*, *supra* n. 37, paras 558–562.

96 *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 Jun. 2018), paras 636–638; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34 Decision on jurisdiction, liability and certain issues of quantum (30 Dec. 2019), para. 685.

97 *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award (21 Jan. 2020), paras 674–675.

98 *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (19 Feb. 2019), para. 460.

99 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award (11 Dec. 2013), paras 1309–1310.

judicial system, have, in principle, jurisdiction to order non-pecuniary remedies the fact of which forms incompatibility with the autonomy.

It should also be discussed whether arbitration tribunals have authority to declare the level of protection of a public interest established by the EU measures incompatible with the ECT, so may call into question the level of protection of EU public interests determined under democratic procedures by the EU institutions. Arbitral tribunals have jurisdiction to issue awards finding that the treatment of a non-EU state investor in the EU is incompatible with the ECT because of the level of protection of a public interest established by the EU institutions. Thus, technically they may declare that level of protection incompatible with the ECT. Given the lack of fundamental substantive safeguards regarding the right of the Contracting Parties to regulate in the ECT, the EU institutions therefore would be required to abandon that level of protection to escape from compensation and must amend or withdraw their legislation. Given the foregoing grounds one may conclude in the light of *Opinion 1/17* that the ECT undermines the capacity of the EU to operate autonomously within its unique constitutional framework. If so, enforcement of awards issued by such extra-EU arbitral tribunals becomes incompatible with the regulatory autonomy and those awards accordingly constitute state aid like in the cases of intra-EU arbitral awards.

It is worth to mention that although the CJEU has faced criticism for being selfish in protecting its own judicial prerogatives against international courts/tribunals, I ironically find its articulation for the protection of regulatory autonomy problematic rather than that for the protection of jurisdictional autonomy. It seems to me that its articulation of the regulatory autonomy to protect the level of protection of public interests determined in the EU goes beyond plausible limits to preserve the autonomy. What would be the underlying reason to conclude an agreement if the contracting party may ignore the standards and levels of protection set by it?

3.2[c] *May the Arbitration Tribunals Afford Definitive Interpretation of EU Law?*

It is worth recalling in the context of jurisdictional autonomy that the CJEU has exclusive jurisdiction over definitive interpretation of EU law. ISDS awards may however result in binding definitive interpretation of EU law on the following grounds: First, arbitral tribunals have jurisdiction, which is at least not precluded, under the ECT to determine the legality of a measure under the domestic law of a Party and the allocation of competences/responsibilities between the EU and the Member States and to treat EU law as a matter of law. Second, the bindingness of any meaning given to the domestic law of a Contracting Party by those tribunals upon the courts/authorities of that Party is not precluded unlike in the CETA.

Dispute resolution under the ECT could be provided through domestic jurisdictions, previously agreed dispute settlement procedure and/or international

arbitration, which is not subject to the exhaustion of local remedies. Dispute resolution mechanisms set forth in the ECT are not mutually exclusive[100] and parallel proceedings are not excluded in the ECT,[101] unless the Contracting Parties, listed in Annex ID and IA,[102] make 'fork-in-the-road' reservation by not giving unconditional consent to international arbitration where the investor has previously submitted the dispute to their domestic courts or administrative tribunals or previously agreed dispute settlement procedure under Article 26(3)(b) and with respect to a dispute arising under the last sentence of Article 10(1) under Article 26(3)(c) ECT. In that respect, to trigger fork-in-the-road provision in the ECT a tribunal applies either a triple identity test based on identicality of disputes in terms of identity of parties, cause of action and object of the dispute or a fundamental basis test (whether the claims share the same fundamental basis).[103]

Tribunals might be called upon to decide on the basis of weighing of interests whether or not an EU measure forms fair and equitable treatment under Article 10 ECT, constitutes expropriation under Article 13 or has to be considered unjustified restriction to the freedom of transfers related to investments under Article 14 ECT. Those tribunals might therefore make rulings on acts of secondary EU law, since treating EU law as a matter of law is not forbidden or no obligation to follow prevailing interpretation given by the CJEU to them is set. Their findings would result in definitive decisions that would be binding on the EU and would thus ultimately affect the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law and the autonomy of EU law.[104]

It should be further analysed whether the refusal of direct effect of the ECT would lead us to a contrary conclusion. In the case of recognition of the direct effectiveness of an international agreement that sets forth its own adjudication mechanism, the ultimate arbiter of the legality of EU or national regulation would be an international tribunal, rather than the CJEU.[105] The exclusion of the direct effect of free trade agreements concluded post Lisbon alongside the prohibition of parallel litigation thereunder reflects consistent EU policy on the matter that serves to restrict the effects of the investment protection standards in the EU legal order

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100 Simões, *supra* n. 76, at 349.

101 *Komstroy*, *supra* n. 1, para. 31.

102 Including the EU and certain Member States.

103 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award (18 Jul. 2014), para. 1257; *Nord Stream 2 AG*, *supra* n. 77, paras 16, 22, 26, 122. The latter case will be a litmus paper for the fork-in-the-road reservation, given the case is brought before the General Court. GC 20 May 2020, Case T-530/19 *Nord Stream AG v. EP and the Council* EU:T:2020:213; ECJ 12 Jul. 2022, Case C-348/20 P *Nord Stream 2 AG v. EP and The Council* EU:C:2022:548.

104 *Opinion 1/17*, *supra* n. 43, para. 138.

105 M. Bronckers, *Schizophrenia in the EU About International Law* (21 Jan. 2015), https://www.leidenlawblog.nl/articles/schizophrenia-in-the-eu-about-international-law (accessed 12 Feb. 2023).

for the purpose of separation.[106] In that regard, the autonomy and direct effect become indirectly interrelated issues in commercial and investment matters, though they are not likely to co-exist. Because of the inverse relationship between the autonomy and permeation of international agreement to the EU legal order, the separation of these legal systems with their dispute settlement mechanisms appears easier to ensure the protection of the autonomy.[107] To be precise, the lack of direct effect reinforces the separation between an agreement and EU law by removing the effective option of bringing an application before domestic courts[108] and avoids interferences between the judicial mechanisms established by that agreement and the EU judicial system.[109] In that regard, the fact that the ECT could be invoked for the validity/legality review of EU acts in the EU legal order would make the protection of the autonomy vis-à-vis the ECT ISDS more difficult. The separation of the ECT ISDS and enforcement system from the EU judicial system would conversely make the protection of the autonomy easier. In such a case there arises a dilemma for the EU. On one hand denial of direct effect to an agreement results in the EU and national courts not constituting appropriate fora for the private enforcement of that agreement and the direct protection of investors rights provided therein. On the other hand, this pathway does not appear consistent with the demands articulated in the case-law to protect the autonomy that ISDS be a part of the EU judicial system. In that respect, reconciliation of aspirations of EU law with those of ISDS under international investment law, which reflect a clear logical conflict[110] with the former, seems almost impossible. The compatibility of extra-EU arbitration under the ECT with the autonomy therefore also involves the issue of direct effect of the ECT and at the end of the day would rely upon whether the CJEU finds the ECT directly effective. In that respect, ECT provisions in Part III (post-investment protection) and V (dispute settlement) are likely to have direct effect in the EU legal order.[111] Investors therefore seem to be addressees and beneficiaries of the standards of protection enshrined in the ECT to rely upon them in the domestic legal systems.[112] This approach was also upheld by an arbitral tribunal, which interprets Article 26 ECT

[106] de Boeck, *supra* n. 73, at 418.
[107] This is articulated in observations submitted regarding the CETA by the governments and the Council and the Commission. *Opinion 1/17*, *supra* n. 43, para. 77.
[108] M. Cremona, *The Opinion procedure under Article 218(11) TFEU: Reflections in the Light of Opinion 1/17*, 4(1) Eur. & World L. Rev. 11 (2020), doi: 10.14324/111.444.ewlj.2020.22.
[109] A. de Luca, *Direct Effect of EU's Investment Agreements and the Energy Charter Treaty in the EU*, Eurojus 1 (2016).
[110] E. Gaillard, *L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16)*, 3 Revue critique de droit international privé 616 (2018), doi: 10.3917/rcdip.183.0616.
[111] de Boeck, *supra* n. 73, at 418; Some legal scholars however find direct effect of ECT unlikely on the ground that the agreement itself is incompatible with EU law. *See* Eckes & Ankersmit, *supra* n. 45.
[112] de Luca, *supra* n. 109.

marking a step for investors in their transition from objects to subjects of international law.[113]

3.3 General examination on the compatibilty of extra-EU arbitration under the ECT with the autonomy

As a general examination in the light of case-law, extra-EU arbitration under the ECT appears incompatible with the autonomy on the following grounds. First and foremost, there is no express exclusion of EU law from the corpus of applicable law in arbitration. Moreover, in order for the CJEU to preserve its exclusive jurisdiction, it is not satisfied that the ECT does not confer on the arbitral tribunals, which stand outside the EU judicial system, any power to interpret or apply EU law other than the ECT provisions. As regards procedural safeguards, unlike the CETA, the ECT does not include a provision obliging the arbitration tribunals to treat the domestic law of a Contracting Party as a matter of fact, which may imply limited scrutiny on that legal order[114]; and in doing so to follow the prevailing interpretation given to the domestic law by the courts/authorities of that Party; and further declare that the Contracting Parties are not bound by any meaning given to their domestic law by those tribunals. Nor is there any provision that expressly excludes jurisdiction of arbitral tribunals for the legality review of Contracting Party measures under the domestic law of those Parties.

The ISDS mechanism in the ECT stands outside the EU judicial system. According to Article 26(8) ECT the awards of arbitration shall be final and binding upon the parties to the dispute. Awards are not subject to any review by national courts so as to provide their supervision by the CJEU through the preliminary ruling procedure as well. Arbitration tribunals standing outside the EU judicial system cannot request preliminary rulings from the CJEU and whose decisions are not subject to judicial review of national courts, unless national law permits. Accordingly awards are not subject to mechanisms capable of ensuring the full effectiveness of EU law.

The next issue to be discussed is whether arbitration tribunals have power to determine and identify the appropriate respondent in a case under the ECT and thereby may adversely affect the allocation of responsibilities in the EU, which is within the scope of the CJEU's exclusive jurisdiction to determine, and the jurisdictional autonomy.[115] The ECT does not enshrine exclusive power of the EU to determine

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[113] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), para. 141.

[114] B. Cappiello, *Applicable Law in Investment Arbitration*, in *Handbook of International Investment Law and Policy*, 1143 (J. Chaisse et al. eds, Springer 2021).

[115] *Opinion 1/91* EU:C:1991:490, paras 34–35; *Opinion 2/13*, *supra* n. 17, para. 234.

on the basis of vertical delimitation of competences whether the EU itself or the Member State should be the respondent. If the dispute is submitted to the ICSID, the EU as not being a party to which cannot be a respondent either. In the absence of any ECT provision for the determination of the appropriate respondent, the arbitral tribunals seem to have jurisdiction to identify the appropriate respondent and determine the allocation of responsibilities between the EU and the Member States, which ultimately entails incompatibility with the autonomy. In that regard, it remains to be seen how the CJEU would view the unilateral statement submitted to the ECT Secretariat[116] as a guarantee for the protection of the jurisdictional autonomy.

Furthermore, the ECT provides neither the procedural nor substantive safeguards articulated regarding the CETA for the normative/jurisdictional and regulatory autonomy of the EU having, as the ultimate effect, substantial limitations on the jurisdiction of arbitral tribunals.[117] Those tribunals have jurisdiction to declare incompatible with the ECT the level of protection of a public interest established by the EU measures and in principle to order the Contracting Parties non-pecuniary remedies. One should not rule out in such case certain incompatibilities of the ECT with EU law, since the ECT contains broader substantive provisions and public interest exceptions, which are laid down in Article 24 ECT and narrower than the CETA, do not apply to all clauses.[118] Parties cannot therefore rely upon the exception for the adoption of measures necessary to protect human, animal or plant life or health or safety within the context of ISDS disputes.[119] Not only may certain substantive incompatibilities between EU law and the ECT in respect of state aid, public policy measures and capital transfers arise in disputes submitted on the basis of the ECT by non-EU investors against the EU Member States. But also the ECT's fair and equitable treatment standard and the protection of investors against expropriation and indirect expropriation appear to be more comprehensive than those provided by EU law.[120] Namely, neither is fair and equitable treatment in Article 10(1) ECT, nor are the substantive standards on indirect expropriation in Article 13 ECT specifically restricted. The ECT does not

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116 *Statement submitted to the Energy Charter Treaty (ECT) Secretariat Pursuant to Article 26(3)(b)(ii) of the ECT Replacing the Statement made on 17 November 1997 on Behalf of the European Communities*, OJ L 115/1 (2 May 2019).

117 C. Cross, *Beyond Control, Beyond Reform – The EU's Energy Charter Treaty Dilemma* (Sep. 2020), Commissioned by the Confederal Group of the European United Left/Nordic Green Left (GUE/NGL), https://left.eu/issues/publications/beyond-control-beyond-reform-the-eus-energy-charter-treaty-dilemma/ (accessed 13 Mar. 2023); G. Kübek, *Autonomy and International Investment Agreements After Opinion 1/17*, 4(1) Eur. & World A L. Rev. 15 (2020); Eckes & Ankersmit, *supra* n. 45; Eckes, *supra* n. 45.

118 I. Damjanovic, *Between Aspirations and Reality: The European Union and International Investment Law Reform*, Ph.D Thesis, the Australian National University, 306 (Jul. 2020).

119 Eckes & Ankersmit, *supra* n. 45.

120 Cross, *supra* n. 117.

provide a clear affirmation of the right to regulate. Additionally, state sovereignty and right to regulate the environmental and safety aspects of exploration under Article 18 ECT fall outside the ISDS protection. Thus the public interests would be weighed differently from EU law under the ECT by arbitral tribunals, which may call into question the level of protection of a public interest established in the EU and so its regulatory autonomy. Imposition of legislative obligations on the EU and so interference with the legislative choices of the EU institutions might cause the EU to amend or annul legislation, abandon the level of protection of a public interest and thus prevent the EU from operating in accordance with its unique constitutional framework. Therefore, there exists a risk that arbitral tribunals would bind the EU to a particular interpretation of EU law.[121]

Finally, while ascertaining in *Komstroy* whether the arbitral tribunal pursuant to Article 26(4) ECT may interpret or apply EU law, the CJEU articulated, as a justification, the nature of the ECT as an act of EU law.[122] The ruling goes beyond the scope of intra-EU arbitration and therefore requires further discussion. In fact, it appears that the CJEU was swimming in unchartered waters by reaching the correct result through a wrong justificatory way, probably to refrain from having EU law considered as the applicable rules and principles of international law between the Member States. Although agreements are also acts of the institutions, under the settled case-law it was however supposed to be, in principle, compatible with EU law that any agreement concluded by the EU, including the ECT, provides for the dispute settlement mechanism responsible for the interpretation of its provisions and whose decisions are binding on the EU, provided that the autonomy is respected by limiting the jurisdiction of arbitral tribunals within the confines of the agreement provisions.[123] In other words, being an act of EU law for an agreement does not justify the jurisdictional autonomy, but merely the jurisdiction of the CJEU to interpret or apply the provisions of mixed agreements. Thus it appears to be confusion here between the issue of the scope of jurisdiction of the CJEU regarding the interpretation of mixed agreement provisions and the issue of jurisdictional autonomy vis-à-vis international courts. Not the latter, but the former might indeed require the justification on the ground that the agreement itself, in particular the ECT, is an act of EU law and there is necessity for uniform interpretation in order to forestall future differences of interpretation. Consequently, this approach would not however leave any EU agreements out of the scope of interpretation or application of EU law by international courts standing outside the EU judicial system. This could result in lack of a clear boundary between

[121] de Boeck, *supra* n. 73, at 416.
[122] *Komstroy*, *supra* n. 1, paras 48–50.
[123] *Opinion 2/13*, n. 17, para. 182; *Opinion 1/91*, n. 114, paras 40, 70; *Opinion 1/09* EU:C:2011:123, para. 74; *Achmea, supra* n. 2, para. 57; *Opinion 1/17*, *supra* n. 43, para. 106.

autonomy-compatible and -incompatible agreements that establish dispute settlement mechanisms standing outside the EU judicial system. This consequence is also asserted by a tribunal in a way that '[t]he CJEU appears to find that an ECT tribunal … must apply EU law simply because the EU has signed the ECT. This could imply that any tribunal constituted under the ECT even those in non-intra-EU disputes would be required to interpret, and even apply, EU law'.[124] If so, that ruling, let alone its nature of *obiter dictum*, seems to rebut the presumption articulated by the CJEU on the basic tenet that an international agreement providing for the establishment of a dispute settlement mechanism responsible for the interpretation of its provisions is not in principle incompatible with EU law. That is because, neither would there otherwise remain any provisions of agreements staying out of the scope of the conception of interpretation or application of EU law which is supposed to be open, in principle, to the international courts. Nor would there remain any possibility for a jurisdiction of an international court, standing outside the EU judicial system, confined merely to interpretation and application of agreement provisions. To put it otherwise, according to the understanding underlying that justification, no dispute settlement mechanism, established by an agreement concluded by the EU, including the ECT, and standing outside the EU judicial system, would never ever be compatible with the autonomy.

4 THE PRINCIPAL OPTIONS TO REMEDY INCOMPATIBILITY

4.1. To construct arbitral tribunals as part of the EU judicial system or make their awards subject to review by a national court?

The issue of preservation of autonomy boils down to the question of whether the international court/tribunal is liable to interpret or apply EU law other than the provisions of international agreement establishing it. Both in *Achmea* and *Komstroy* the CJEU established, as also verified in the arbitral practice, that arbitral tribunals 'may be called on to interpret or indeed to apply EU law'[125] or are 'required to interpret, and even apply, EU law'.[126] In the light of case-law, to construct those arbitral tribunals as a component of national and accordingly the EU judicial system therefore would constitute an option to remedy incompatibility with the autonomy. This could be achieved through classifying them as national courts/tribunals entitled to make a reference to the CJEU for a preliminary ruling. Alternatively, arbitral awards could be made subject to judicial

[124] *Infracapital*, *supra* n. 22, para. 106.
[125] *Achmea*, *supra* n. 2, para. 42.
[126] *Komstroy, supra* n. 1, para. 50.

review by national courts to ensure that the questions of EU law addressed by them can be submitted to the CJEU by means of a reference for a preliminary ruling and the full effectiveness of EU law is thus ensured. Nevertheless, there are some obstacles to those options. Firstly, an international court/tribunal classified as such or whose awards are made subject to review by national courts cannot thus remain an international court/tribunal in a true sense under international law. Secondly, such judicial aspiration of the CJEU is in logical conflict with the aspiration of international investment law according to which arbitration is an alternative dispute settlement mechanism detached from the domestic judicial systems with disbelief towards biased domestic courts. Thirdly, the CJEU has already identified arbitral tribunals under the ECT both in *Achmea*[127] and *Komstroy*[128] not as a component of the national and so the EU judicial systems, but, clearly, as standing outside the EU judicial system.

4.2 To modernize the text of the ECT?

The second option would be providing that arbitral tribunals standing outside the EU judicial system are not indeed liable to interpret or apply EU law to ensure the protection of autonomy with procedural and substantive safeguards as articulated in the case-law. The opportunity for the modernized ECT to include such language should be assessed in the light of arbitral practice.

Article 24(3) of the modernized ECT provides a disconnection clause according to which '[f]or greater certainty, Articles 7, 26, 27, 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organization in their mutual relations'. This disconnection clause would not guarantee to resolve the incompatibility problem of intra-EU arbitration under the ECT with the jurisdictional autonomy, unless the clause is revised to include an express ban on moving the seat of the investor to prevent legal and factual possibility for shifting any dispute from intra-EU to extra-EU arbitration and to prevent their claims from being qualified as extra-EU arbitration.[129]

As regards extra-EU arbitration under the ECT, the modernized ECT inspired by *Opinion 1/17* includes a footnote to Article 26(6) ECT to clarify applicable law in disputes. According to this clarification:

> [f]or greater certainty, the domestic law of a Contracting Party shall not be part of the applicable law. Where a tribunal is required to ascertain the meaning of a provision of the domestic law of a Contracting Party as a matter of fact, it shall follow the prevailing

[127] *Achmea*, *supra* n. 2, paras 45 and 55.
[128] *Komstroy*, *supra* n. 1, para. 52.
[129] Eckes & Ankersmit, *supra* n. 45.

> interpretation of that provision given by the courts or authorities of that Contracting Party, where such interpretation exists and in accordance with the legal procedures of that Contracting Party, and any meaning given to the relevant domestic law of a Contracting Party by the tribunal shall not be binding upon the courts or authorities of that Contracting Party. A tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of the obligations under Part III of this Treaty, under the domestic law of a Contracting Party.[130]

One could legitimately expect including this important clarification in the text of the treaty to increase its legal force rather than being kept in a footnote.

Further, the preamble includes the affirmation that the Contracting Parties acknowledge 'the inherent rights of the Contracting Parties to regulate investments within their territories in order to meet legitimate and public policy objectives'. This is reinforced with the new article, introduced into Part III, pursuant to which '[t]he Contracting Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of the environment, including climate change mitigation and adaptation, protection of public health, safety or public morals'. In pursuance of legitimate public policy objectives, the regulatory margin of the host Contracting Party is broadened in favour of autonomy that would be influential on the standards of fair and equitable treatment and indirect expropriation within the context of balance between public and investor interests. Furthermore, the list of exceptions under Article 24 ECT is extended to enable Contracting Parties to adopt or enforce any measure, inter alia, 'necessary to protect public morals or to maintain public order' and, without reservation concerning Part III, 'necessary to protect human, animal or plant life or health'. It is also clarified in Article 26(9) ECT that an arbitral tribunal may award monetary damages and any applicable interest and restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution in line with the CETA. Article 26(10) explicitly precludes punitive damage awards. Moreover, as regards the standards of fair and equitable treatment, a list of breaches is provided with the occurrence of arbitrariness, targeted discrimination, fundamental breach of due process, denial of justice in criminal, civil or administrative adjudicatory proceedings, abusive treatment and frustration of an investor's legitimate expectations. The type of indirect expropriation is codified and defined with standards for when to occur and when not to occur by setting out the factors inter alia to be taken into account on case-by-case fact-based inquiries. The above appears to circumscribe to a certain extent the scope of fair and equitable treatment and indirect expropriation and so discretionary powers of tribunals.

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[130] European Commission, *Note for the Attention of the Trade Policy Committee (Services & Investment)*, WK 9218/2022 INIT (Brussels 27 Jun. 2022).

As a consequence, provided that arbitral tribunals are not liable to interpret or apply EU law, which is the primary concern in the settled case-law, these procedural and substantive safeguards formulated in the footsteps of the approach followed in the preparation of the CETA text would help to bring extra-EU arbitration in the ECT closer to the compatibility with the autonomy though still with the following failures.

First, the modernized text still does not confer on the EU the power to determine whether the EU or the host Member State will be the respondent. Second, the text does not incorporate wording to ensure that the ECT cannot lower the standards and regulations of each Party related to food safety, product safety, consumer protection, health, environment or labour protection for the protection of regulatory autonomy within the context of extra-EU arbitration. Third, given that Article 26 ECT was not in the list of topics subject to the reform process, ISDS under the ECT was not formulated to completely remedy incompatibility with the autonomy. The ISDS mechanism, as the practice of arbitral tribunals demonstrates, stands as one of the primary barriers before the compatibility with the autonomy. As regards extra-EU ISDS under the ECT as the plausible realm of reconciliation between two laws, the reform of ISDS in the ECT thus remains to be crowned with the establishment of the dispute settlement system consisting of ECT Tribunal and Appellate Tribunal in order to satisfy procedural and substantive safeguards developed in the case-law for the protection of the autonomy. This may reduce inconsistency in awards, with the exclusive application of its own procedural rules, its own exclusive identification of applicable substantive law and its own exclusive enforcement mechanism of awards instead of leaving them to ad hoc arbitral tribunals and their certain forum rules. This could otherwise be accomplished by providing the Multilateral Investment Court, if established under UNCITRAL, to apply to the ECT. Fourth, Article 16 ECT, the ECT non-derogation clause, is not altered. EU law cannot always provide a more favourable treatment especially within the context of determination of public interests. Insistent reliance upon that provision by arbitral tribunals in order to apply the ECT over EU law on the ground of a more-favourable substantive protection provided therein for investors[131] would therefore continue to undermine the regulatory autonomy.

4.3 Withdrawal from the ECT?

Italy already withdrew from the ECT in 2016 and certain Member States declared in 2022 their intention to do so. Pursuant to the collapse of

[131] *Badajoz, supra* n. 29, para. 164; *RREEF*, *supra* n. 48, para. 75; *FREIF*, *supra* n. 29, para. 325.

modernization efforts, the failure to attain a qualified majority in the Council in favour of modernization of the ECT and the Resolution adopted by the European Parliament[132] led to the European Commission,[133] which had enthusiastically advocated amendment, to change its strategy and eventually propose coordinated withdrawal.

The combination of the exclusive nature of EU competences in foreign direct investment and the shared nature of EU competences in foreign non-direct investment/portfolio investments and dispute settlement in international investment, which signifies a joint nature type of those competences, indeed obliges the collective initiative either in the conclusion of the modernized text or in withdrawal from the ECT. In that respect, the EU and the Member States can neither become a party to a new international investment agreement with a dispute settlement mechanism, in particular the modernized ECT, nor withdraw[134] from the ECT, nor remain a party to the ECT without the consent of each other. The fact that withdrawal from the ECT would not end its application because of the sunset clause under Article 47(3) ECT (a period of at least twenty years) also drives the European side to such a strategic collective decision and coordinated action. In order to neutralize the sunset clause, the Commission proposed the adoption of a subsequent *inter se* modification agreement under Article 41 VCLT among the EU, Euratom, and the Member States on the interpretation of the ECT including a confirmation that 'the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for intra-EU arbitration proceedings, and that the sunset clause does not apply intra-EU'.[135]

5 CONCLUSION

It is established in the light of case-law that the ISDS mechanism under the ECT with its intra-EU and extra-EU arbitration aspects is incompatible with the jurisdictional and regulatory autonomy of the EU legal order. The ECT is not only incompatible with EU primary law from the perspective of the dynamic understanding of the jurisdictional and regulatory autonomy as exhibited in the CJEU case-law and vindicated by the practice of arbitral tribunals, but also substantively outdated compared to EU law and policies. Given especially that

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[132] European Parliament, *Joint Motion for a Resolution – European Parliament Resolution on the Outcome of the Modernisation of the Energy Charter Treaty (2022/2934(RSP))*, B9-0498/2022} B9-0502/2022} B9-0513/2022} B9-0536/2022} RC1 (23 Nov. 2022).

[133] European Commission, *supra* n. 49.

[134] Uncoordinated withdrawal from the ECT or remaining as Contracting Parties may cause possible legal problems within the context of dispute settlement regarding the identification of respondent and (joint) responsibility of the EU and sunset clauses.

[135] The European Commission, *supra* n. 49, at 3.

the ECT structure signifies subordination of environmental protection and climate issues to investment protection and trade liberalization aspirations,[136] which could not have been satisfactorily rectified in the modernization process, withdrawal from the ECT remains the last reasonable option. In that respect, withdrawal indeed appears to arise rather from the outdated legal structure of the ECT, which is not in line with EU investment law, EU climate law, the objectives of the European Green Deal, energy transition and climate goals and other international commitments of the EU and its Member States such as the Paris Agreement.[137] Pursuant to the failure of modernization efforts to align it with those policies, the ECT, which as an instrument enables the investors that invested in the fossil fuel fields to challenge adverse actions of the Contracting Parties before arbitral tribunals and claim compensation for their damages, would otherwise make the adoption of environmental and climate measures to pursue policies for fossil fuels phase-out much more costly for the EU and the Member States with the risk of regulatory chill.

[136] Eckes & Ankersmit, *supra* n. 45.
[137] European Parliament, *supra* n. 131.