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Article

EU Law in investment arbitration: a view from international arbitral tribunals

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Abstract

The conflict between international investment law and EU law provides fruitful insights into how the arbitral tribunals, acting outside the EU's judicial system, have viewed the EU and EU law. Taking as an example the topical questions of the principle of autonomy of EU law as well as the EU's State aid rules in investor-State arbitration, the article discusses how arbitral tribunals have seen the role of EU law and how they have treated the opposite demands from the two legal regimes. The claim of EU law rendering the intra-EU investment treaties invalid has constantly proved unsuccessful, and the tribunals have maintained their jurisdiction to be based on international law. However, the possibility of EU law affecting the assessment of the merits of the cases is clearer and more accepted. While harmonious interpretation could somewhat alleviate the remaining conflicts between the two legal regimes, it is unlikely that either regime would compromise the core elements of their systems. The article argues that, for the specific nature of the EU's legal order to be secured in a way that does not

conflict with international law, the relationship between EU law, international (investment) law and investment dispute settlement should be clearly regulated in instruments of international law.

Keywords autonomy of EU law; investment arbitration; EU law; arbitral tribunals; treaty conflict

1. Introduction

The relationship between international investment law and EU law has been a stormy one. The existence of bilateral investment treaties between the EU Member States (intra-EU BITs) has culminated in the measures terminating the BITs,¹ and numerous arbitral cases in the uncertain situation of whether the enforcement of the awards is precluded by EU law.² Simultaneously, the fate of the intra-EU applicability of the Energy Charter Treaty (ECT) remains unclear. The EU, conversely, continues to develop its external investment policy and conclude international investment agreements with third States, as the Court of Justice of the European Union (CJEU) has given a green light for their conclusion.³ In all its storminess, the conflict between the two regimes provides a fruitful insight into how the arbitral tribunals acting outside the EU legal order have viewed the EU and EU law, and how they have treated the demand for the preservation of the autonomy of EU law in the investor-State dispute settlement practice.

It is well established that the EU legal order is 'its own legal system' and 'an integral part of the legal systems of the Member States', and EU law has primacy over national laws of the Member States.⁴ The CJEU has summarised that

according to settled case-law of the Court, [the] autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties.⁵

Thus, the EU legal order is by nature autonomous in relation to both national laws of the Member States and international law.⁶ Whereas internal autonomy entails the independency of EU legal order from the national legal orders of the Member States, the external dimension has been described to entail 'the idea that the integrity of EU law and the EU legal order should not be undermined by the international action of the Union or the Member States'.⁷ This feature of EU law has brought about a line of cases where the CJEU has assessed the limits of the right of judicial bodies external to the EU legal order to apply and interpret EU law. According to this case law, an external judicial body cannot affect the division of competences within the EU or give interpretations on EU law binding within the EU.⁸ Furthermore, the Court stated in Opinion 1/17 that tribunals 'outside the EU judicial system ... cannot have the power to

¹ See Agreement for the termination of bilateral investment treaties between the EU Member States OJ L169/1.

² See e.g. Case C-333/19 *Romatsa and Others*, Request for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium) lodged on 24 April 2019 [2019] OJ C220/24; Case C-109/20 *Republic of Poland v PL Holdings Sàrl*, Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 27 February 2020 [2020] OJ C161/40.

³ Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* EU:C:2019:341.

⁴ Case 6/64 *Flaminio Costa v E.N.E.L.* EU:C:1964:66.

⁵ Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* EU:C:2018:999, para 45.

⁶ Opinion 1/17 (n 3) para 109.

⁷ Jed Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law', EUI Working Paper MWP 2016/07, European University Institute 2016, 1.

⁸ Opinion 2/13 *EU Accession to the ECHR* EU:C:2014:2454; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* EU:C:2008:461; Opinion 1/09 *European and Community Patents Court* EU:C:2011:123; Case C-459/03 *Commission v Ireland (Mox Plant)* EU:C:2006:345; Opinion 1/00 *European Common Aviation Area* EU:C:2001:687; Opinion 1/91 *European Economic Area I* EU:C:1991:490. More detailed general discussion on the principle of autonomy of EU law is beyond the scope of this article. To that effect, see e.g. Ramses A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence – The EU Legal Order under the Influence of International Organisations* (TMC Asser Press 2013); Cristina Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) 54 CML Rev 1627; Marcus Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) 6 EL Rev 815.

interpret or apply provisions of EU law other than those of the [investment treaty] or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework'.⁹

Although the characteristics of the EU legal order are rather well established within the Union, the question of how they relate to competing obligations raised by international law remains. A prominent example of the culmination of the tensions between EU law and international law has been the surge of investment arbitration between an EU Member State and an investor from another Member State (intra-EU disputes). The investor-State arbitral tribunals are constituted based on investment treaties – either BITs, multilateral treaties such as the ECT, or numerous free trade agreements containing provisions on investment protection and dispute settlement (such as the new international investment agreements concluded by the EU (EU IIAs)). Although EU law may be relevant in a case, as will be discussed below, the tribunals are bound by the rules of international law.¹⁰ How far can, and should, the tribunals then go in respecting the special features of EU law, if that would entail a conflict with international law? Should the tribunals, acting outside the EU legal order, take the EU law issues into consideration, or are the issues merely internal to the Union?

Taking the topical questions of the principle of autonomy of EU law and the treaty conflict in intra-EU cases as well as the EU's State aid rules in investor-State arbitration as examples, the article discusses how the EU and EU law have been viewed by the arbitral tribunals. By analysing publicly available arbitral awards,¹¹ the article examines how the tribunals have understood the nature and the status of EU law and how they have treated EU law in practice, in questions relating either to the jurisdiction of the tribunals or to the substantive provisions of the investment treaties in intra-EU cases (Section 2).¹² Then, the article turns to discuss whether there are means in EU law and international law that would enable a mutual understanding and appreciation of the central features of the other legal regime (Section 3). Lastly, it will be discussed whether any implications for the status and treatment of EU law can be drawn from the intra-EU cases and applied to the extra-EU practice (Section 4). Section 5 concludes.

2. EU law in intra-EU investment arbitration

2.1. How have the arbitral tribunals seen the nature of EU law?

The status and the effect of EU law in intra-EU investment arbitration has proved to be a pivotal question. Besides the possibility of EU law being relevant in the dispute through the applicable law provisions in the investment treaties and being a part of the relevant international law to be taken into consideration in the interpretation and application of the treaty, it can form a part of the facts in the assessment of the alleged breach of the treaty standards. Furthermore, the intra-EU investment tribunals have faced questions of whether the EU Treaties and the accession of States into the Union have rendered the investment treaties and their jurisdiction invalid. The view of the arbitral tribunals on these questions will be discussed in more detail in Sections 2.2–2.5, but first an overview will be provided on how the tribunals have generally understood the nature of EU law.

Investment treaties usually contain provisions on the applicable law for the settlement of the merits of the dispute.¹³ The contents of such provisions may vary, and some treaties mention international law, some national law, and some both. These provisions are not purely decisive on the determination

⁹Opinion 1/17 (n 3) para 118.

¹⁰*Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v The Slovak Republic*) Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 [229]. To avoid confusion with the CJEU's judgment in *Achmea*, the name of *Eureko* will be used in this article when referring to the arbitration in this case.

¹¹The analysis included over 80 cases, classified as 'intra-EU' when both the State parties had been EU Member States at the time the case was concluded. It was limited to cases that were decided either in favour of the investor or the State, and to cases that were pending at the time of writing, but where a decision on jurisdiction had been rendered. Additionally, publicly available extra-EU cases, decided either in favour of the state or the investor, were analysed. The cases were compiled from Investment Policy Hub, 'Investment Dispute Settlement Navigator' (UNCTAD) <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 29 May 2020.

¹²See a similar analysis on the reception of the *Achmea* judgement by arbitral tribunals: Szilárd Gáspár-Szilágyi and Maxim Usynin 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's *Achmea* Judgment' [2019] *European Investment Law and Arbitration Review* 29.

¹³It should be noted that the applicable law provisions do not apply to the determination of the jurisdiction of the tribunals. See Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bundenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (Hart Publishing 2015) 1212, 1220–2.

of applicable law; general rules of treaty interpretation also play their part in such assessment.¹⁴ An applicable law provision may also be found, for example, in Article 42 ICSID Convention, according to which

[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.¹⁵

The application of international law and national law differs in treaty-based investment arbitration as relevant international law is taken into account together with the treaty, and national law, in turn, may come into play merely as a factual matter.¹⁶ Thus, the understanding of the nature of EU law plays a crucial role in determining whether the tribunals have to interpret and apply EU law, or merely to 'take it into consideration as a fact'.¹⁷ This question has been particularly relevant in the assessment of whether the tribunals in fact interpret EU law and whether that conflicts with the autonomy of EU law.

Arguably, the understanding of the status of EU law links to how the nature of the EU itself is perceived. The tribunals in intra-EU cases have tended to understand EU law to be, by nature, international law, as well as being a part of domestic legal orders of the Member States ('dual nature of EU law').¹⁸ Perhaps the most well-known case engaging with the assessment of EU law is *Electrabel v Hungary*, where the Tribunal stated that EU law has a 'multiple nature' and 'is a sui generis legal order, presenting different facets depending on the perspective from where it is analysed'.¹⁹ The Tribunal acknowledged that EU law forms a part of national legal orders of the Member States but argued that, from the perspective from which it looks at the issue, EU law should primarily be understood as international law, being based on international treaties. According to the Tribunal, this reasoning applies both to primary and secondary EU law. The Tribunal concluded that 'there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law'. By contrast, it was also held that EU law should be taken into consideration as a part of national legal order of the Member State, and thus applied as a fact in the arbitration.²⁰ Some later tribunals have in principle agreed with the reasoning in *Electrabel*, but they differentiated between primary and secondary EU law. For example, the Tribunal in *Vattenfall v Germany* agreed that EU law is international law as it derives from international treaties. It noted, however, that a more 'exact way to say' would be that EU law also contains internal rules that are not part of international law.²¹

The special nature of EU law as an autonomous legal order or the 'constitutional nature' of the EU Treaties have been seen as not preventing EU law from being international law.²² However, in recognising the nature of EU law as international law, or 'a subsystem of public international law',²³ some tribunals have emphasised that there are limits to its application. The Tribunal in *Eskosol v Italy* noted that EU law

¹⁴Ole Spiermann, 'Investment Arbitration: Applicable Law' in Marc Bundenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (Hart Publishing 2015) 1373, 1385. For a more detailed discussion on the choice of law provisions, see e.g. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 288–93.

¹⁵Art 42 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) (1965) 575 UNTS 159.

¹⁶Spiermann (n 14) 1381. Interestingly, the Commission and EU Member States have had varying suggestions on how EU law should be characterised. In some cases, it has been submitted that it forms part of the applicable law, whereas in others the tribunals have been encouraged to interpret investment treaties in light of EU law (Gáspár-Szilágyi and Usynin (n 12) 35).

¹⁷A related question is whether the CJEU is a domestic court or an international court, which remains controversial from points of view external as well as internal to the EU. See Christina Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' CLEER papers; No. 2016/2, Centre for the Law of EU External Relations, 27–9.

¹⁸*European American Investment Bank AG (EURAM) v Slovak Republic*, UNCITRAL, Award on Jurisdiction, 22 October 2012 [69]; Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH Co. KG v Czech Republic, PCA Case No. 2014-03 Final Award, 11 October 2017 [177].

¹⁹*Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19 Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 [4.117].

²⁰*ibid* [4.118]–[4.129].

²¹*Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12 Decision on the Achmea issue, 31 August 2018 [146]. See also *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 December 2019 [314]; Tomáš Fecák, *International Investment Agreements and EU Law* (Kluwer Law International 2016) 409.

²²*Vattenfall v Germany* (n 21) [145].

²³*EURAM v Slovak Republic* (n 18) [71].

is not general international law, but it can rather be characterised as ‘a special species of international law’. As such, EU law does not prevail over other fields of international law, but ‘they exist side-by-side’.²⁴ This is a logical argument: although EU law has supremacy within the EU legal order, it is not superior in relation to other fields of international law. Similarly, it has been stated that EU law does not constitute principles of general international law.²⁵ The understanding by the tribunals of EU law as forming a part of international law is in line with the understanding of EU law under international law generally, which can be summarised as seeing EU law as ‘a special and potentially self-contained subsystem of public international law’.²⁶

However, the tribunals seem unanimous in the fact that, when necessary, EU law can be applied in the arbitration as domestic law, forming part of the facts applicable to the case.²⁷ The Tribunal in *Eskosol*, for example, stated that ‘an ECT tribunal [can] consider EU law as a *matter of fact* if potentially relevant to the merits of a dispute, just as an ECT tribunal may consider a State’s domestic law as part of the factual matrix of a case’.²⁸ As noted above, this understanding of the role of national law in investment arbitration applies to international investment law in general, and not only to intra-EU cases.

When faced with questions of EU law, the tribunals tend to refer to the case law of the CJEU and follow the interpretation of EU law laid down there.²⁹ This suggests that the tribunals recognise the CJEU’s role as the ‘ultimate interpreter’ of EU law, flowing from Article 19 Treaty on European Union (TEU).³⁰ However, the tribunals have emphasised that this role is not without limits. The Tribunal in *Eureka v Slovakia* drew a distinction between a monopoly to interpret EU law and a monopoly to give ‘final and authoritative interpretation’. Whereas it recognised that the CJEU has the latter, it rejected the argument that it has both.³¹ Other tribunals have similarly agreed that the CJEU does not have a monopoly over the interpretation and application of EU law.³² The Tribunal in *PL Holdings v Poland* noted that ‘so far as the Tribunal knows, no other jurisdiction in the world has asserted a monopoly – much less succeeded in asserting a monopoly – over the interpretation and application of its law, even though it may of course claim to have “the last word” on the meaning of its law’.³³ Similarly, the tribunals have acknowledged that they have no capacity to rule on the legality of State actions under EU law, but their jurisdiction is limited to assessing breaches of investment treaties.³⁴ Thus, the autonomy of EU law and the central role of the CJEU in determining the ‘last word’ in the interpretation of EU law appears to be recognised by the tribunals, although not without limits.

2.2. Assessment of the effect of EU law on the jurisdiction of the tribunals

Perhaps the most controversial question in the interplay of EU law and investment arbitration has been – and remains – whether the investment tribunals have jurisdiction over the disputes based on intra-EU investment treaties. From a practical point of view, the answer to this has significant ramifications. From the EU law perspective, the autonomy of EU law is compromised if the jurisdiction is considered valid, while from the international investment law perspective the denial of jurisdiction entails that the investors cannot use the dispute settlement mechanism provided in the investment treaty, and thus cannot practically invoke the substantial provisions of the treaty.

²⁴*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 [115], [181].

²⁵See *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 February 2019 [130] [158]; *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No. V 2015/095 Final Award, 23 December 2018 [397].

²⁶Eckes (n 17) 19.

²⁷However, the case law on the status of domestic law has not been entirely consistent. See Fecák (n 21) 410.

²⁸*Eskosol v Italy* (n 24) [123] (emphasis in the original).

²⁹See e.g. *EURAM v Slovak Republic* (n 18) [70].

³⁰The CJEU ‘shall ensure that in the interpretation and application of the Treaties the law is observed’ (art 19 Consolidated Version of the Treaty on European Union [2016] OJ C202/1).

³¹*Achmea B.V. v The Slovak Republic* (n 10) [282].

³²*EURAM v Slovak Republic* (n 18) [248].

³³*PL Holdings S.à.r.l. v Republic of Poland*, SCC Case No. V 2014/163 Partial Award, 28 June 2017 [315]. Poland argued in the case that as the dispute concerns an intra-EU investment, the EU Courts have ‘exclusive authority’ over the matter by virtue of art 344 Treaty on the Functioning of the European Union (TFEU). This follows from the argument that the BIT is not valid due to Poland’s accession to the Union (arts 30 and 59 Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (VCLT)), and thus investment protection and disputes are covered by EU law. *Ibid* [301]–[304].

³⁴*Achmea B.V. v The Slovak Republic* (n 10) [290].

The tribunals tend to take the point of view of international law in the determination of their jurisdiction and assessment of the issue of whether EU law has rendered it invalid in intra-EU cases. As the relevant Articles 30 and 59 VCLT³⁵ apply when there is incompatibility between the treaties or the subject matter of the allegedly conflicting treaties is the same, it has been crucial to determine the scope of investment protection under EU law. Several tribunals have thus engaged in analysis – albeit sometimes rather superficial – of the protection of investments under EU law. The tribunals have generally argued that investment treaties offer broader substantial protection in comparison to EU law, especially the provisions on free movement of capital and freedom of establishment, which are of relevance here. Furthermore, the tribunals have considered that the dispute settlement mechanisms under EU law do not equate to investment arbitration. Thus, Articles 30 and 59 VCLT are not seen as applicable to the treaty conflict between EU Treaties and the BITs or the ECT, as there is no treaty conflict to begin with.³⁶ In relation to Article 59 VCLT, it has also been necessary to assess whether the Member States have intended to replace the BITs with EU law. This argument has also been rejected by the tribunals. For example, the Tribunal in *Oostergetel v Slovakia* argued that the objective of EU law is to create a common market, whereas a BIT aims to provide ‘guarantees for the investor’s investment’.³⁷

Thus, the tribunals have generally not *directly* rejected the relevance of EU law but instead have engaged in the assessment of the nature and content of the EU legal order, in order to determine whether the VCLT provisions on treaty conflict are applicable. Were the tribunals to conclude that EU law and investment treaties do cover the same subject matter, they would be faced with a more difficult assessment: which treaty prevails under international rules of treaty conflict? The Tribunal in *Electrabel* argued that ‘from whatever perspective the relationship between the ECT and EU law is examined, ... EU law would prevail over the ECT in case of any material inconsistency’.³⁸ The Tribunal in *Charanne v Spain* agreed with this line of reasoning,³⁹ and similar argument has also been presented in the literature.⁴⁰ Thus, the conclusion that EU law and investment treaties do not share the same subject matter has practically provided an ‘escape route’ from having to conclude – under the *international law* rules of treaty conflict – that EU law could prevail over the jurisdiction of the arbitral tribunals.

In addition to the analysis on the existence of treaty conflict between the two regimes, the Tribunal in *Eureko* recognised that the wider protection provided by the BIT in comparison to investment protection under the EU Treaties may lead to a breach of the principle of non-discrimination of EU law. It argued, however, that this possible breach did not mean that there had not been a valid consent to arbitrate by the parties.⁴¹ This shows that while the tribunals may recognise real issues under EU law following from the exercise of their jurisdiction under the investment treaties, they still consider themselves as being constituted under international law and having the obligation to respect the binding nature of valid international treaties. The Tribunal further stated that ‘it is not for an arbitral tribunal to cancel rights created by a valid treaty in order to safeguard a State party against the possibility that it might one day decide to apply the treaty in a way that could violate its obligations under one or more other later treaties’.⁴²

In addition to the direct assessment of EU law, the tribunals allowing the Commission to submit *amicus curiae* may also be seen as a sign of recognition of the relevance of EU law. In *JSW Solar v the Czech Republic*, the respondent State had in fact not raised the intra-EU jurisdictional objection, but it was raised by the Commission. The Tribunal noted that normally non-disputing parties are not able to object to jurisdiction but this did not prevent the Commission from raising the issue. The Tribunal further stated that the issue should be reviewed *ex officio*.⁴³ Both, the allowing of the Commission’s *amicus*

³⁵Art 30 VCLT regulates the application of successive treaties relating to the same subject matter, whereas art 59 VCLT covers the implied termination or suspension of a treaty by conclusion of a later treaty.

³⁶See e.g. *Achmea v The Slovak Republic* (n 10) [239]–[265], [273]–[277]; *Anglia Auto Accessories Ltd v Czech Republic*, SCC Case No. V 2014/181 Final Award, 10 March 2017 [126]–[128]; *Ivan Peter Busta and James Peter Busta v Czech Republic*, SCC Case No. V 2015/014 Final Award, 10 March 2017 [114]–[116]; *JSW Solar v Czech Republic* (n 18) [253]; *PL Holdings v Poland* (n 33) [310]–[313]; *EURAM v Slovak Republic* (n 18) [178]; *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL Decision on Jurisdiction, 30 April 2010 [76]–[77]; *Electrabel v Hungary* (n 19) [4.176].

³⁷*Oostergetel v The Slovak Republic* (n 36) [75].

³⁸*Electrabel v Hungary* (n 19) [4.191].

³⁹*Charanne and Construction Investments v Spain*, SCC Case No. V 062/2012 Award, 21 January 2016 [439].

⁴⁰Christian Tietje and Clemens Wackernagel, ‘Enforcement of Intra-EU ICSID Awards – Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration’ (2015) 16 *The Journal of World Investment and Trade* 205.

⁴¹*Achmea B.V. v The Slovak Republic* (n 10) [266].

⁴²*ibid* [267].

⁴³*JSW Solar v Czech Republic* (n 18) [250].

curiae and the need to assess the issue *ex officio* could be seen as reflecting a level of acknowledgement towards EU law and the possible treaty conflict between the EU Treaties and the investment treaties. Similarly, the Tribunal in *PL Holdings v Poland* noted that it could have rejected the intra-EU objection as it was submitted by the Respondent too late in the proceedings, but decided to address the issue. The Tribunal argued that the issue ‘implicates important sovereign assertions not only by Poland but also by the European Union’, and thus considered it necessary to address it.⁴⁴

Perhaps a more inventive solution to the intra-EU jurisdictional challenge was seen in *Tomasz Cześćcik and Robert Aleksandrowicz v Cyprus*, in an award rendered prior to the CJEU’s judgment in *Achmea*, where the Tribunal acknowledged that it might have to assess its jurisdiction under the BIT in the light of EU law if the CJEU decided that the EU Treaties prevailed over the BIT. The Tribunal, however, relied on its *kompetenz-kompetenz* and held that in the absence of such a ruling by the CJEU it was able to uphold ‘*prima facie* jurisdiction’ in order for it to be able to decide the case on the merits and to see whether the conflict between the BIT and EU law materialised in an award favourable to the investor.⁴⁵ In other words, as the Tribunal decided the merits in favour of the State, it considered it unnecessary to further address the intra-EU objection. Although the Tribunal did not address the effect of EU law on its jurisdiction, it should be noted here, for the purposes of the current article, that the Tribunal was ready to acknowledge the authority of the CJEU’s judgment on the matter.

Altogether, the case law shows that the intra-EU investment tribunals do not generally tend to ignore EU law, but rather they have engaged in different levels of assessment of it. Rather than merely denying the effect of EU law, it has been decisive that the tribunals have not seen any conflict between EU law and the intra-EU investment treaties under international law.⁴⁶ Conversely, as will be discussed below, some arguments have also been raised according to which EU law is not relevant to the jurisdiction of the tribunals.

2.3. Rejection of the relevance of EU law for the jurisdiction of the tribunals

Perhaps the most straightforward rationale behind the rejection of the intra-EU jurisdictional objections was summarised by the Tribunal in *PL Holdings*. It stated that it ‘determines its jurisdiction solely on the basis of the instrument that purports to found its jurisdiction and not on the norms of an entirely different legal order’.⁴⁷ Similarly, the Tribunal in *Eureko* argued that it ‘cannot derive any part of its jurisdiction or authority from EU law as such: its jurisdiction is derived from the consent of the Parties to the dispute, in accordance with the BIT and German law’.⁴⁸ Furthermore, the Tribunal in *Strabag v Poland* concluded that EU law could be relevant for its jurisdiction only if it formed ‘a part of international public order or such international law principles which meet the fundamental requirements of justice in international trade’.⁴⁹ Thus, the tribunals tend to emphasise that they are by nature *international* dispute settlement bodies by nature and they operate under international law and international legal instruments.⁵⁰ As such, they are not based on EU law nor derive their existence from the EU legal order. The tribunals have also argued that the implicit effect of a BIT becoming an intra-EU BIT, that is, the accession of a State to the EU, on their jurisdiction must be assessed in the light of international law and the VCLT.⁵¹

Similar logic can be seen in the rejection of the existence of an ‘implicit disconnection clause’ in the ECT. A disconnection clause would render the ECT inapplicable in the relations between EU Member States, and it has been argued by the Commission and some EU Member States parties to intra-EU ECT cases that such a clause is implied in the treaty due to EU law. In *Charanne*, for example, the Tribunal argued that the inclusion of an implicit disconnection clause could only be confirmed through interpretation of the ECT in the light of rules of treaty interpretation under international law. As, according to the Tribunal, the ECT is clear on the lack of a disconnection clause, no recourse to

⁴⁴*PL Holdings v Poland* (n 33) [306]–[307].

⁴⁵*Tomasz Cześćcik and Robert Aleksandrowicz v Cyprus*, SCC Case No. V 2014/169 Final Award, 11 February 2017 [168]–[173].

⁴⁶Kai Struckmann, Geneva Forwood and Aqel Kadri, ‘Investor-state Arbitrations and EU State Aid Rules: Conflict or Co-existence’ (2016) 2 *European State Aid Law Quarterly* 258, 263.

⁴⁷*PL Holdings v Poland* (n 33) [306]–[309].

⁴⁸*Achmea B.V. v The Slovak Republic* (n 10) [225].

⁴⁹*Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v Republic of Poland*, ICSID Case No. ADHOC/15/1 Partial Award on Jurisdiction, 4 March 2020 [8.115].

⁵⁰See also e.g. *9REN Holding S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/15/15 Award, 31 May 2019 [150].

⁵¹See e.g. *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC Case No. 088/2004 Partial Award, 27 March 2007 [156].

additional means of treaty interpretation was necessary.⁵² In other words, the Tribunal did not accept the interpretation of EU law to be able to entail the result that there was an implicit disconnection clause in the ECT, nor was there a need to interpret the ECT in the light of EU law.

2.4. Assessment of the CJEU's *Achmea* judgment

Maintaining that their jurisdiction is based on international treaties unaffected by EU law, and either rejecting the relevance of EU law or conducting different levels of assessment of it, the tribunals never accepted 'the intra-EU objection' to their jurisdiction in the intra-EU cases prior to the judgment of the CJEU in *Achmea*.⁵³ In *Achmea*, the CJEU ruled that dispute settlement provisions in intra-EU BITs, 'such as' in the Netherlands–Slovakia BIT in question, are precluded under EU law as they are incompatible with Articles 267 and 344 TFEU.⁵⁴ While the aftermath of the judgment has led to the Agreement terminating the intra-EU BITs,⁵⁵ the scope of the judgment remains uncertain, especially in relation to the ECT.⁵⁶ Furthermore, the effect of *Achmea* on the ongoing intra-EU arbitrations or on the validity of the consents to arbitrate given in the intra-EU BITs has not been clear.

Unsurprisingly, the arbitral tribunals have tended to interpret *Achmea* in a restrictive manner and denied its effect on their jurisdiction. Gáspár-Szilágyi and Usynin have divided the reception of the judgment by the intra-EU tribunals into two groups: (i) some tribunals have engaged in the assessment of the effect of the judgment on their jurisdiction but rejected it; and (ii) some tribunals have rejected *Achmea* based on procedural arguments.⁵⁷ As the latter group has little importance for the current topic, the following will concentrate on the assessment of the arguments falling in the former group. Out of the cases engaging in the assessment of the relevance of *Achmea*, the Tribunal in *Watkins Holdings v Spain* has recognised three different lines of argumentation: (i) there is no incompatibility between EU law and international investment law; (ii) *Achmea* only applies to bilateral treaties, and thus not to the ECT; and (iii) there is no conflict between the EU Treaties and the investment treaties, and they exist and should be applied in parallel.⁵⁸

In the ECT cases, the rejection of the applicability of *Achmea* has been argued to have reached the status of *jurisprudence constante* among the tribunals.⁵⁹ Arguably, this should not be a surprise, bearing in mind that even the EU Member States have not been unanimous as to the effect of *Achmea* on the intra-EU applicability of the ECT.⁶⁰ In *Masdar v Spain*, the Tribunal rejected the relevance of *Achmea* simply by arguing that it does not apply to multilateral treaties and that it is silent on the ECT.⁶¹ The Tribunal in *RWE v Spain*, in turn, argued that if EU law were to deprive it of its jurisdiction, it would have to be explicitly provided in the text of the ECT, which is the instrument constituting its jurisdiction. This was followed by an analysis of the wording of the ECT interpreted in the light of the VCLT – an analysis similar to the ones conducted by several tribunals prior to *Achmea*, as discussed above. The Tribunal concluded by rejecting the intra-EU argument and emphasising the principle of *pacta sunt servanda*. It rejected the relevance of *Achmea* by stating that the EU is a party to the ECT but not to the BITs, and that the dispute does not require the determination of EU law issues.⁶² The Tribunal in *InfraRed v Spain*, in turn, rejected the relevance of *Achmea* as it is 'enacted solely within the legal sphere of the European Union and, as such, has not met with the agreement of all ECT Contracting Parties (including non-EU

⁵² *Charanne v Spain* (n 39) [437].

⁵³ Gáspár-Szilágyi and Usynin (n 12) 35–6.

⁵⁴ See Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* EU:C:2018:158.

⁵⁵ Agreement for the termination of bilateral investment treaties between the EU Member States (n 1).

⁵⁶ See e.g. Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p 3.

⁵⁷ Gáspár-Szilágyi and Usynin (n 12) 36.

⁵⁸ See *Watkins Holdings S.à r.l. and others v Kingdom of Spain*, ICSID Case No. ARB/15/44 Award, 21 January 2020 [207]–[220].

⁵⁹ Gáspár-Szilágyi and Usynin (n 12) 44.

⁶⁰ See Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, p 2; Declaration of the Representatives of the Governments of the Member States, of 16 January on the Enforcement of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union, pp 2–3; Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the Legal Consequences of the Judgement of the Courts of Justice in *Achmea* and on Investment Protection in the European Union, p 3.

⁶¹ *Masdar Solar Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1 Award, 16 May 2018 [679]–[682]. The same reasoning can be found e.g. in *Foresight Luxembourg Solar 1 S. Á.R.L., et al v Kingdom of Spain*, SCC Case No. 2015/150 Final Award, 14 November 2018 [220].

⁶² *RWE v Spain* (n 21) [316]–[350].

member states Contracting Parties) nor can [it] be qualified as a practice establishing such an agreement between all ECT Contracting Parties'. The Tribunal, however, engaged in an assessment of the conflict between the ECT and EU law.⁶³ Thus, besides the rejection of the relevance of *Achmea* to the ECT cases, the tribunals have generally continued to assess the intra-EU objections in light of the investment treaty and international law, as was done before *Achmea*.⁶⁴

Assessing the concept of consent to arbitration, the Tribunal in *RREEF v Spain* noted that a judgment of a court is not able to undo a consent already given.⁶⁵ Similarly, the Tribunal in *Micula II v Romania* emphasised that its jurisdiction is based on international treaties, and even if *Achmea* has changed the domestic law of Sweden, it does not affect the consent given in the international treaties.⁶⁶ This argumentation is understandable, bearing in mind that in practice *Achmea* means that an international court of one international regime (the CJEU) tells international dispute settlement bodies of another international regime (the tribunals) that they do not have jurisdiction due to internal rules of the former regime.⁶⁷ However, one should recall the nature of the *Achmea* judgment: as it was a preliminary ruling on the interpretation of EU law, by definition it merely clarified the content of the law that already existed. Thus, *Achmea* could, in principle, have stronger effect on the jurisdiction of the tribunals in a treaty conflict analysis – in the event the tribunals were to find the subject matter of the treaties to be the same, as discussed above in Section 2.2.

Another specific jurisdictional objection which has gained importance, especially after *Achmea*, is the argument that the intra-EU awards are unenforceable under EU law as they are incompatible with the legal order and public policy of the EU and the Member States. This argument has, however, been clearly rejected by the tribunals.⁶⁸ Some tribunals have made a distinction between the questions of jurisdiction and the enforceability of awards, and argued that the fact that the award could not be enforced does not imply that the tribunal has no jurisdiction.⁶⁹ In *PV Investors v Spain*, the Tribunal stated that it 'must rule on the basis of the ECT and not on projections of hypothetical consequences of the award'.⁷⁰ Furthermore, the ad hoc Annulment Committee in *Antin v Spain*, discussing a possible stay of enforcement of the award, stated:

[W]hile the Committee appreciates the difficulties faced by the Applicant in resolving its legal quagmire, it is reluctant to find that this constitutes a prejudice requiring the granting of a stay. In the Committee's mind, it would be unfair to the Claimants if the Award was stayed due to a legal conundrum of the Applicant's own making. Insofar as the Applicant willingly chose to undertake international obligations that may conflict with each other, it cannot thereafter complain of prejudice once these conflicts arise.⁷¹

Thus, it seems that, although the hardship of the States in relation to complying with an award may be recognised, it is not accepted that the incompatibility of the award with EU law would lead to the invalidity of the jurisdiction of the tribunals.⁷²

⁶³*InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain*, ICSID Case No. ARB/14/12 Award, 2 August 2019 [256]–[267].

⁶⁴Perhaps an outlier in the line of the ECT cases rejecting the relevance of *Achmea* is *SolEs Badajoz v Spain*, where the Tribunal argued that it 'sees reason to doubt that the bilateral nature of the treaty ... was critical to the reasoning of the CJEU'. It also acknowledged the Commission's position, according to which the ECT is not applicable in intra-EU cases, and considered it 'prudent' to interpret art 344 TFEU to cover treaties such as the ECT (*SolEs Badajoz GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, 31 July 2019 [244]–[245]). Although the Tribunal ended up rejecting the intra-EU objection based on the assessment of the ECT in light of international law and the rules of treaty conflict, the argumentation shows that it could have given authority to *Achmea* even in an ECT case.

⁶⁵*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 Responsibility and on the Principles of Quantum, 30 November 2018 [213].

⁶⁶*Ioan Micula, Viorel Micula and others v Romania [II]*, ICSID Case No. ARB/14/29 Award, 5 March 2020 [268]–[272].

⁶⁷*Gáspár-Szilágyi and Usynin (n 12) 52*. See also *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No. ARB/17/27 Award, 13 November 2019 [208].

⁶⁸*The PV Investors v Spain*, PCA Case No. 2012-14 Final Award, 28 February 2020 [637].

⁶⁹See e.g. *Vattenfall v Germany (n 21) [230]–[231]*.

⁷⁰*The PV Investors v Spain (n 68) [637]*.

⁷¹*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 Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019 [76] (emphasis added).

⁷²See also Panos Koutrakos, 'The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension' (2016) 17 *Journal of World Investment Trade* 873, 879–80.

Some tribunals have also criticised *Achmea*. The judgment has been seen as inconclusive and leaving its actual effect uncertain, as well as employing an ambiguous line of interpretation. For example, the Tribunal in *9REN Holdings v Spain* stated that ‘there is much to understand’ in the ‘truncated’ judgment of the CJEU.⁷³ The Tribunal in *Hydro Energy v Spain*, in turn, argued that it is unclear whether the ‘preclusion’ of BITs under EU law means that the BITs are invalid and inapplicable, or that there is an obligation of the Member States to modify them. Furthermore, the Tribunal argued that ‘it is hard to read the *Achmea* ruling as a normal case of treaty interpretation’ and that ‘[t]he *Achmea* ruling is a decision on the constitutional order of the EU in support of the policy of European integration, rather than an orthodox application of the rules of treaty interpretation’.⁷⁴ Tribunals have indeed emphasised that *Achmea* – although being authoritative interpretation of EU law – remains silent about the treaty conflict in terms of international law.⁷⁵ This has led some tribunals to reject the relevance of the judgment to their jurisdiction, while perhaps still respecting the status and authority of the ruling under EU law. For example, the Tribunal in *Hydro Energy* stated:

As such the ruling of the CJEU is entitled to the greatest respect from an international arbitral tribunal. But such a tribunal is not in any sense bound by the ruling. Nor, consequently, can the Tribunal find that, on any normal basis of interpretation under customary international law codified in the VCLT, the dispute resolution provisions of the ECT are incompatible with Articles 267 and 344 TFEU.⁷⁶

Thus, returning to the logic that the tribunals operate primarily under *international law*, a judgment by the CJEU, which assesses the issue merely from the point of view of EU law, is generally not accepted to have authority as being binding on the tribunals and affecting their jurisdiction.

2.5. Recognition of the impact of EU law on the merits: the case of State aid

A separate issue to the use of EU law to object to the tribunals’ jurisdiction is the use of EU law in assessing the merits of the case and determining whether there has been a breach of the investment treaty by a State. A good example of this are cases concerning State aid law. The Tribunal in *AES v Hungary*, for example, took the EU’s competition law regime into consideration as a fact in the assessment of the merits of the case but noted that States are not allowed to breach their obligations under international law due to their domestic law.⁷⁷ This argument flows from Article 27 VCLT, according to which a ‘party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.⁷⁸ In contrast, the Tribunal in *AES* stated that the obligation to act under EU law may be taken into consideration in the assessment of ‘the “rationality”, “reasonableness”, “arbitrariness” and “transparency”’ of the disputed measure. However, the Tribunal emphasised that EU law should be taken into consideration merely as a fact. Hungary pleaded that one of the reasons for it taking the disputed measure was the fact that the EU Commission was conducting State aid investigations and there was likely to be an obligation on Hungary to recover State aid. The Tribunal argued that as the Commission had not yet rendered its decision, and thus Hungary had no obligation to act, the measures taken by Hungary were not motivated by ‘a rational public policy’ objective.⁷⁹ This would imply that had there been a binding EU law obligation – that is, the Commission’s Decision – EU law might have been accepted as a justification for the measure.

Similar argumentation to that in *AES* can be seen in relation to the Spanish renewables cases, where the question has risen whether the awards constitute illegal State aid under EU law. The Tribunal in *Charanne* rejected the relevance of the possibility of the award constituting illegal State aid for its jurisdiction. It noted, however, that the State aid issue ‘would be a matter of public policy which the

⁷³*9REN Holding v Spain* (n 50) [150].

⁷⁴*Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v Kingdom of Spain*, ICSID Case No. ARB/15/42 Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020 [498], [500]–[501].

⁷⁵See e.g. *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v Hungary*, ICSID Case No. ARB/13/35 Award, 9 October 2018 [210]; *Eskosol v Italy* (n 24) [178]–[180].

⁷⁶*Hydro Energy v Spain* (n 74) [500].

⁷⁷*AES Summit Generation Limited and AES-Tisza Erőmű Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22 Award, 23 September 2010 [7.6.6].

⁷⁸Art 27 VCLT.

⁷⁹*AES v Hungary* (n 77) [7.6.9], [7.6.12], [10.3.15]–[10.3.18].

Arbitral Tribunal shall take into account when deciding the dispute on the merits' but emphasised that no decision had yet been rendered by the Commission.⁸⁰

Several tribunals have decided cases also after the Commission rendered a Decision in 2017 regarding the Spanish renewable energy support scheme, according to which any compensation awarded for the investors based on the modification of the original State aid scheme would constitute State aid under EU law. As the tribunals do not have the competence to determine the legality of such aid under EU law, the awards would have to be notified to the Commission under Article 108 TFEU and are subject to a standstill obligation while the Commission assesses their legality under EU law.⁸¹ There is thus no specific decision yet rendered by the Commission which would declare the awards to constitute *illegal* State aid. The Tribunal in *PV Investors* argued that the 2017 Decision was not relevant in its case and that the 'Tribunal must rule on the basis of the ECT and not on projections of hypothetical consequences of the award'.⁸² The relevance of the Decision was rejected also by the Tribunal in *RWE v Spain* on the basis that the Decision did not concern the State aid regime being contested in the case, and that there had been no evidence implying that the disputed measure was taken by Spain due to the EU's State aid regime.⁸³ Thus, even if some of the tribunals have acknowledged that a State aid decision could be relevant in determining the case, they have emphasised the lack of a specific decision on the legality of the aid regime under dispute in the specific case.⁸⁴

In *Electrabel* the State aid had already been confirmed illegal under EU law.⁸⁵ The Tribunal, in turn, seemed ready to recognise the relevance of such decision:

Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary.⁸⁶

Thus, there appears to be a division between two types of cases on the recognition of the relevance of EU State aid law: the cases where there is no binding decision on the illegality of the State aid, and the cases where the Commission has adopted such a decision. This suggests that the clarity of the EU law rules plays an important role in order for EU law to be taken into consideration in the determination of the merits of the cases.

3. Mitigating conflicts through harmonious interpretation?

3.1. The (lack of) interpretation of international investment law in the light of EU law

Although the intra-EU BIT saga is coming to an end with the termination of the BITs,⁸⁷ the conflict between EU law and international investment law is far from being over. Essentially, the fate of the

⁸⁰ *Charanne v Spain* (n 39) [449].

⁸¹ Commission, 'Commission Decision, 10 November 2017, relating to State aid SA.40348 (2015/NN) Support for electricity generation from renewable energy sources, cogeneration and waste' C(2017) 7384 final, paras 165–6.

⁸² *The PV Investors v Spain* (n 68) [635]–[637].

⁸³ *RWE v Spain* (n 21) [356].

⁸⁴ See similarly *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 Award, 11 December 2013 [340]: 'It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered.'

⁸⁵ *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 [115].

⁸⁶ *Electrabel v Hungary* (n 19) [6.73], see also [6.72]–[6.76]. Similar reasoning was, at least partly, supported by the Tribunal in *Micula v Romania I* (n 84) [329].

⁸⁷ Agreement for the termination of bilateral investment treaties between the EU Member States (n 1), as well as the individual termination of their intra-EU BITs by Austria, Finland and Sweden (see respectively e.g. Abkommen zwischen der Republik Österreich und der Slowakischen Republik zur Beendigung des Abkommens zwischen der Republik Österreich und der Tschechischen und Slowakischen Föderativen Republik über die Förderung und den Schutz von Investitionen in der Fassung des Notenwechsels vom 22. Dezember 1993 und 14. Jänner 1994; Durchführung des Notenwechsels und Inkraftsetzung, 667 der Beilagen XXVII. www.parlament.gv.at/PAKT/VHG/XXVII/I/I_00667/fname_885647.pdf accessed 13 August 2021; Memorandum of the foreign Ministry, 3 March 2020 U 3/2020 vp (Valtioneuvoston U-kirjelmä U 3/2020 vp, Valtioneuvoston kirjelmä eduskunnalle Suomen Bulgarian, Kroatian, Latvian, Liettuan, Puolan, Romanian, Slovakian, Slovenian, Tšekin tasavallan, Unkarin ja Viron kanssa tekemien kahdenvälisten investointisuojaosopimusten irtisanomisesta (Suomen muiden EU-jäsenvaltioiden kanssa tekemien

intra-EU applicability of the ECT remains unresolved, and numerous cases are pending under the ECT, but also under the BITs. Thus, the following will turn to discuss whether the conflict could be alleviated through interpretation of the respective treaties, also paying closer attention to the other regime.

The tribunals have been criticised for not taking enough account of EU law. According to Koutrakos, instead of showing the acknowledgement necessary in 'the parallel adjudication of interlocking sets of transnational law', some arbitral tribunals have displayed a 'distinct lack of engagement with the practical realities' of the conflict between EU law and international investment law. For example, *Micula v Romania* could be criticised for not properly assessing the consequences of the accession of Romania to the EU and the applicability of the EU State aid rules, and thus not taking into consideration the compatibility of the award with EU law.⁸⁸ Furthermore, it has been claimed that the arbitral tribunals are ill-equipped to determine the core issues of EU law, and there might be a need for the tribunals to show 'self-restraint and deference' in relation to the questions of compatibility of investment treaties with EU law. According to Dimopoulos, the determination of the core issues of EU law should be left to the EU Courts, even when this might be contrary to the nature of investment arbitration.⁸⁹ This idea is in line with the view taken by the International Tribunal for the Law of the Sea (ITLOS) in the *Mox Plant* case, where the Tribunal noted that the dispute between Ireland and the UK included questions on the division of competences in the EU and the exclusivity of the CJEU's jurisdiction. Taking into consideration judicial comity and mutual respect between judicial institutions, the Tribunal maintained that these questions should be decided within the EU in order to avoid the risk of competing decisions, and suspended the proceedings.⁹⁰ It should be noted, however, that the United Nations Convention on the Law of the Sea (UNCLOS) explicitly supports this conclusion,⁹¹ whereas the BITs do not contain such provisions.

Nevertheless, the possibility for harmonious interpretation has been raised in several intra-EU arbitrations. A basis for such an interpretation could be found from Article 31(3)(c) VCLT, according to which 'any relevant rules of international law applicable in the relations between the parties' 'shall be taken into account, together with the context' when interpreting a treaty.⁹² In *Oostergetel v Slovakia*, the Tribunal noted that it 'will seek to interpret both the BIT and applicable EU law in a manner that minimises conflict and enhances consistency'.⁹³ Similarly, the possibility of EU law affecting the way the ECT is interpreted has been raised. In *RREEF v Spain*, the Tribunal noted that 'EU Law reflects the common understanding of 28 countries in such important matters as legitimate expectations' and that the Tribunal cannot 'disregard' that.⁹⁴

The Tribunal in *Electrabel* also argued that there is no 'general principle of international law compelling the harmonious interpretation of different treaties'.⁹⁵ It emphasised, however, that the situation was special in the intra-EU ECT case, when taking into consideration the close involvement of the EU and its Member States in the ECT as well as the origins of the Treaty. Thus, according to the Tribunal, the interpretation of the ECT should be 'in harmony with EU law'. While the Tribunal did not see the need for harmonisation of the dispute settlement provisions of the ECT with EU law as it did not consider there to be any inconsistency with EU law, it did engage in the assessment of what the (in the Tribunal's view hypothetical) inconsistency between the two regimes would entail in practice.

investointisuojasopimusten irtisanominen), 19 March 2020); Riksdagens protokoll 2018/19:74 Fredagen den 5 april Kl. 09.30–12.04, Ann Linde's answer to interpellation 2018/19:151, 28).

⁸⁸Koutrakos (n 72) 879–81. See *Micula v Romania I* (n 84) [340]–[341].

⁸⁹Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 334. On deference, see Esmé Shirlow, *Judging at the Interface – Deference to State Decision-Making Authority in International Adjudication* (CUP 2021).

⁹⁰*Ireland v United Kingdom (The Mox Plant Case)* PCA, Order No. 3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003 [20]–[30]; Case C-459/03 *Commission of the European Communities v Ireland (Mox Plant)* EU:C:2006:345, paras 42–6.

⁹¹See art 282 United Nations Convention on the Law of the Sea (UNCLOS) (1982) 1833 UNTS 397. Furthermore, the setting of intra-EU BITs and investment disputes cannot directly be compared to disputes in ITLOS, as in the latter the disputing parties are two States, and as the EU is a party to UNCLOS but not to the BITs.

⁹²Art 31(3)(c) VCLT. Although art 31(3)(c) is a mandatory part of treaty interpretation ('shall be taken into account'), it should be noted that it forms only a part of the 'toolbox' of interpretation and the logical starting point is the ordinary meaning of the terms in their context, taking into consideration the purpose and the objectives of the treaty (art 31(1) VCLT). See Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 290, 311; International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi A/CN.4/L.682 13 April 2006*, paras 425, 428.

⁹³*Oostergetel v The Slovak Republic* (n 36) [100].

⁹⁴*RREEF v Spain* (n 65) [210].

⁹⁵*Electrabel v Hungary* (n 19) [4.130].

It noted that there is no obligation to interpret conflicting treaties harmoniously and conducted the assessment in the light of the international rules on treaty conflict.⁹⁶ Similarly, the Tribunal in *Eskosol* argued that, as it is a tribunal acting under international law, it must resolve a treaty conflict based on the rules of international law and cannot replace those rules with 'a very different conflicts analysis derived from EU law'.⁹⁷ This suggests that the understanding of the need for harmonious interpretation reaches its limits in the question of jurisdiction.⁹⁸ Similar argumentation is put forward in the International Law Commission's Report on Fragmentation of International Law, according to which harmonisation might not be a suitable option for the resolution of a treaty conflict, if clear-cut rights or obligations laid down in the treaties are involved in the bargain.⁹⁹

Conversely, the reach of harmonious interpretation, or perhaps the idea of comity, to the jurisdiction of the tribunals has been supported by some commentators. In relation to *Achmea*, it has been argued that the tribunals should either decline their jurisdiction or, alternatively, dismiss the cases as inadmissible. In practice this would enhance 'the effective administration of justice'.¹⁰⁰ The idea is attractive when taking into consideration the procedural turmoil and uncertainty the parties face in the enforcement stage of the arbitration, if the tribunal renders an award based on an intra-EU investment treaty. Whether the tribunals would follow such a suggestion, and not continue to emphasise their mandate under international law, is another question.

An issue closely linked to the harmonious interpretation has been the possibility of the arbitral tribunals to refer questions of EU law to the CJEU for preliminary ruling, which was raised in the early intra-EU cases.¹⁰¹ The tribunals have, however, rejected such requests.¹⁰² Although there is no requirement and, even more importantly, no possibility for the investment arbitral tribunals to request a preliminary ruling from the CJEU on the interpretation of EU law,¹⁰³ another question is whether they should wait for such a ruling if a relevant case happens to be pending in the CJEU at the time of the arbitral proceedings taking place. There is no legally binding obligation under international law to do so, and the nature of arbitration as an independent, case-specific method of dispute settlement speaks against that. Furthermore, such a practice could potentially prolong the already rather lengthy arbitral proceedings. The Tribunal in *PL Holdings* found, in fact, that the pendency of *Achmea* in the CJEU did not remove the obligation of the Tribunal to decide the case in front of it, nor did it impose an obligation to address the possible consequences of the CJEU's ruling.¹⁰⁴ In contrast, such occasions could be seen as a possibility for comity, and as a way to avoid further conflicts between the two legal orders, as was recognised by the Tribunal in *Eureka*. Although it did not consider it necessary to wait for the conclusion of a pending infringement case as the facts of the case were not similar enough, it argued that it wished 'to organise its proceedings with full regard for considerations of mutual respect and comity as regards other courts and institutions'. Furthermore, the Tribunal stated that, were the facts of the cases to become 'so close as to be a cause of procedural unfairness or serious inefficiency, the Tribunal will reconsider the question of suspension'.¹⁰⁵

A similar question has arisen also in relation to the State aid issues in Spain's renewable energy cases: should the tribunals wait for the Commission to render its decision on the compatibility of the support

⁹⁶ibid [4.130], [4.146], [4.172]–[4.191].

⁹⁷*Eskosol v Italy* (n 24) [183].

⁹⁸See also *Micula I v Romania* (n 84) [318]–[329]; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11 Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019 [341]. The Tribunal in *Stadtwerke München v Spain* argued that EU law is not 'irrelevant' for the jurisdiction of the Tribunal. It noted that EU law, including the *Achmea* judgment, is part of applicable international law and may thus affect the interpretation of art 26 ECT. The Tribunal concluded, however, that *Achmea* does not apply to the ECT (*Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain*, ICSID Case No. ARB/15/1 Award, 2 December 2019 [138], [142]–[143]).

⁹⁹ILC 2006 (n 92) para 42.

¹⁰⁰Gáspár-Szilágyi and Usynin (n 12) 54.

¹⁰¹See e.g. *Rupert Joseph Binder v Czech Republic*, UNCITRAL Award on Jurisdiction, 6 June 2007.

¹⁰²See e.g. *Oostergetel v The Slovak Republic* (n 36) [105].

¹⁰³Case C-284/16 *Achmea* (n 54) [43]–[46]. However, certain Association Agreements between the EU and third States contain provisions according to which the arbitral panels established by the Association Agreement shall request a ruling on the interpretation of EU law from the CJEU. This obligation is relevant if the dispute concerns a provision in the Agreement, the content of which is defined through a reference to EU law. See Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L261/4, art 267; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L260/4, art 403.

¹⁰⁴*PL Holdings v Poland* (n 33) [316].

¹⁰⁵*Achmea B.V. v The Slovak Republic* (n 10) [292].

scheme with EU law? For example in *RWE*, the Commission stated that alternatively to declining its jurisdiction due to intra-EU objection 'should the Tribunal find that it has jurisdiction, the EC invites the Tribunal to stay the proceeding until the EC has issued its decision regarding the Respondent's State aid under the Special Regime'.¹⁰⁶ As noted above, the tribunals have tended not to accept the mere possibility of a future breach of EU law to be relevant to their decisions. Arguably, this could be a situation where a certain level of comity could mitigate the conflicts. If the tribunals were to wait for a binding decision from the Commission, the risk of their rendering an award in conflict with EU State aid law would be lower.¹⁰⁷ The rendering of awards regardless of their compatibility with the EU State aid law practically moves the conflict to the enforcement of the award. This, in turn, not only prolongs the dispute, but also further aggravates the conflict.

Regarding the intra-EU BITs and the issue of the validity of the jurisdiction of the tribunals, one could say that the ship has already sailed, and 'no amount of balancing of conflicting interests by intra-EU tribunals will gain constitutional acceptance by the Court of Justice'.¹⁰⁸ However, the issue of intra-EU applicability of the ECT remains unresolved, and there is a remarkable number of cases pending at the time of writing. Thus, the question of interpretation of the ECT in harmony with EU law remains relevant. Conversely, the issue might be more complicated in the context of multilateral treaties, such as the ECT. The Tribunal in *Vattenfall* emphasised the need for a uniform interpretation of the treaty text in light of the principle of *pacta sunt servanda* and argued that the interpretation of the ECT should not differ depending on which States are parties to specific disputes. Thus, the legal obligations – such as EU membership – into which each State has entered outside the ECT regime should not affect the interpretation of the provisions of the ECT in the light of international law.¹⁰⁹ Thus, even if harmonious interpretation might be a useful tool to ease the tensions between the two fields to a certain extent, it seems rather unlikely that the tribunals under the ECT would fully engage in it.

3.2. The (lack of) interpretation of EU law in the light of international law

The EU is committed to 'the strict observance and the development of international law', according to Article 3(5) TEU. Similarly, the CJEU has stated that the EU 'must respect international law in the exercise of its powers'.¹¹⁰ Thus, it can be argued that the principle of autonomy of EU law cannot operate in isolation from the acknowledgement of international law.¹¹¹ It has, however, been claimed that the CJEU sees the autonomy of the EU legal order as 'an absolute value' and not as something that allows balancing of interests.¹¹² Similarly, the CJEU's insistence on protecting the autonomy of EU law and the adjudication system of the EU legal order is alleged to be 'a little selfish', and not doing much to promote the development of international law.¹¹³ According to Klabbers, the mitigation of treaty conflicts by claiming the superiority of EU law leads to 'the Court's policy [being] that of the ostrich, aiming to avoid problems by sticking its head in the sand and pretending they do not exist'.¹¹⁴

A point of criticism in the conflict between investment law and EU law has, in fact, been the CJEU's point of view being strictly limited to EU law. As noted above, some intra-EU tribunals have criticised *Achmea* for neglecting the analysis of international law implications for the case and merely assessing the issue from the point of view of EU law.¹¹⁵ Thus, a question arises whether, for the sake of justifying its decisions also to the wider world, the CJEU should take better account of international law in matters dealing with the autonomy of EU law.¹¹⁶ As Odermatt argues, the '[a]utonomy is currently defined

¹⁰⁶*RWE v Spain* (n 21) [271].

¹⁰⁷The Commission Decision is not necessarily final as it can be appealed in the General Court of the EU.

¹⁰⁸Gáspár-Szilágyi and Usynin (n 12) 54.

¹⁰⁹*Vattenfall v Germany* (n 21) [154]–[156]. See similar argumentation in e.g. *Eskosol v Italy* (n 24) [125].

¹¹⁰Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* EU:C:1992:453, para 9.

¹¹¹Odermatt (n 7) 19.

¹¹²Eckes (n 17) 17–18.

¹¹³Bruno de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 46.

¹¹⁴Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 219.

¹¹⁵*UP and C.D Holding Internationale v Hungary* (n 75) [210].

¹¹⁶It should be borne in mind that, for example, the preliminary rulings by the CJEU are about the *interpretation of EU law*, and the inclusion of international law considerations might not easily fit the picture. The Court has, however, emphasised the compliance with international law rules of treaty termination, for example in relation to art 351 TFEU (See Koutrakos (n 72) 876).

primarily in terms of exclusion, even isolation, and not in terms of engagement and integration'.¹¹⁷ Arguably, it could also be asked whether there would be a place for a certain level of 'proportionality' of the claim of the autonomy of EU law. Especially dealing with the intra-EU BIT issue from the point of view of EU law has been characterised by a lack of discussion on whether the co-existence of the two regimes could have been established, and whether the termination of the treaties in fact is the only way to resolve the conflict.¹¹⁸

Another possibility for the international fora to be taken better into consideration by the EU legal order could be the clarification of internal rules. As discussed above in relation to the Spanish renewables cases, the Commission has not rendered a decision on the illegality of the support scheme under dispute but rather has subjected the awards to its State aid assessment. This has been challenged by *Abaco Energy SA v Commission* in the General Court of the EU with the argument that it enables the Commission to control the awards, as well as to move the intra-EU arbitral cases under the control of EU law.¹¹⁹ It is rather easy to see that a binding decision on the compatibility of the scheme with EU law – instead of a case-by-case assessment of the awards – would lower the level of uncertainty that now looms over the cases.¹²⁰

Perhaps a solution could be a certain degree of flexibility from both sides. Based on the *Bosphorus* case,¹²¹ Tietje and Wackernagel have suggested that the claims of superiority of both EU law and international law should be understood 'as a principle rather than a rule', which would enable the other legal order to be taken into consideration as far as 'factually and legally possible'.¹²² Thus, the flexibility could be used as long as it does not lead to a *contra legem* situation in either of the legal orders. However, both regimes appear to hold tight to certain claims – be it the international law basis of the tribunals' jurisdiction or the autonomy of EU law – and it seems unlikely that harmonious interpretation, comity, or other ways of consolidation of the conflict would entirely resolve the issues.

4. Implications for extra-EU cases

Although the most significant confrontations in the interplay between EU law and international investment arbitration have taken place in an intra-EU setting, the questions of the relevance of EU law cannot be ruled out in extra-EU cases either. Similar issues of the effect of EU law on the jurisdiction of the tribunals should not arise¹²³ but some examples can already be found where EU law has been relevant in the substantive assessment of cases resolved under BITs between an EU Member State and a third State.

The status and nature of EU law in an extra-EU setting is clearer compared to the intra-EU setting discussed above. Whereas the tribunals in intra-EU cases tend to see EU law as having a dual nature as both international and domestic law, and EU law as forming a part of 'the applicable international rules in force between the contracting parties',¹²⁴ this should logically not be the case in an extra-EU setting. In the latter, EU law should be understood more purely as domestic law of Member States – albeit that it originates from a supranational source. As such, EU law may become relevant in the assessment of the merits of the extra-EU cases.

The effect of EU law on the assessment of a breach of the substantive standards was discussed by the Tribunal in *Cargill v Poland*. The Tribunal noted that EU law may be taken into consideration as 'municipal law' as a fact, alongside the domestic law of Poland, and that EU law may be relevant in the assessment of whether the State's international responsibility materialises in the case. It was concluded that EU law imposed no obligation on Poland to take the disputed measures before its accession to the EU (the facts of the case pre-dated Poland's accession), and thus EU law could not be used as a justification for the

¹¹⁷Odermatt (n 7) 19.

¹¹⁸See Koutrakos (n 72) 876.

¹¹⁹Case T-186/18 *Abaco Energy SA v Commission* EU:T:2019:206, para 35.

¹²⁰Such clarity was called for also by the Tribunal in *Cube Infrastructure v Spain* in relation to the intra-EU BITs issue. It noted that had there been a clear 'general agreement' on the incompatibility of the BITs with EU law, the problem could have been 'easily' fixed (*Cube Infrastructure v Spain* (n 25) [150]).

¹²¹*Bosphorus Hava Yollari Turizm VE Ticaret Anonim Şirketi v Ireland* App. no. 45036/98 ECHR 2005-VI.

¹²²Tietje and Wackernagel (n 40) 247.

¹²³Although it does not seem impossible that Opinion 1/17 of the CJEU and the requirements set there for the acceptability of extra-EU ISDS under EU law could be used to challenge the jurisdiction of a tribunal based on an 'older-generation' BIT concluded by a Member State with a third country.

¹²⁴See e.g. *EURAM v Slovak Republic* (n 18) [69].

measures.¹²⁵ EU law was relevant also in *Maffezini v Spain*, where an Argentine investor argued, among other claims, that an allegedly public entity in Spain had pressured it to make an investment before final clearance of an Environmental Impact Assessment (EIA) had been given by the authorities. The Tribunal noted that EU law provides 'strict requirements' for EIA, and according to the relevant Directive, an EIA has to be concluded before the start of the project. The Tribunal concluded that the investor's claim should be rejected.¹²⁶ The Tribunal did not engage in detailed analysis of the content of EU law, but merely quoted the relevant provision of the EU Directive.

Furthermore, according to the Commission Report on the application of 'the Grandfathering Regulation',¹²⁷ the Commission has intervened or tried to intervene in three cases under the Member States' BITs with third countries since the initiation of the Grandfathering mechanism. These interventions were made in order 'to clarify the EU legal framework and procedures in connection with the facts of the disputes' and related to State aid rules, EU single resolution mechanism, and the implementation of the EU energy policy framework.¹²⁸ This confirms that there is a possibility for the extra-EU investment arbitral tribunals to also need to interpret and apply EU law, and the EU has an interest in this securing that the uniform interpretation and application adopted within the EU legal order is followed.

As noted above, the CJEU stated in Opinion 1/17 that the possibility of arbitral tribunals to take EU law into consideration 'as a fact' as domestic law of either the Member States or the EU is not in conflict with EU law.¹²⁹ The requirements of EU law to be treated as a fact, as well as a limitation of the effect of the awards within the EU legal order, have been included in the texts of the EU IIAs. For example, Article 8.31(2) CETA provides:

For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.¹³⁰

Similar language is not generally included in the 'older generation' extra-EU BITs concluded by the Member States with third countries.¹³¹ However, new BITs and the amendments of the existing ones should comply with the EU's new investment policy.¹³² According to the Commission Report on the application of the Grandfathering Regulation, the inclusion of 'provisions on the applicable law ensuring preservation of the autonomy' in investment agreements is part of the EU's new investment policy, and the new investment policy, in turn, 'is reflected as much as possible in the Commission's decisions authorising the conclusion of new bilateral investment agreements of Member States with third countries'.¹³³ Thus, 'the new generation treaty language' is likely to become more common in the Member States' BITs as well.¹³⁴ The negotiations of BITs are, however, long processes, and the old-generation treaties are likely to stick around for the time being, regardless of the Commission's encouragement for the Member States to take measures 'replacing older bilateral investment agreements with new ones reflecting modernised standards in line with the EU's reformed investment policy'.¹³⁵

¹²⁵ *Cargill, Incorporated v Republic of Poland*, ICSID Case No. ARB(AF)/04/2 Final Award, 29 February 2008 [228]–[229], [384].

¹²⁶ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7 Award, 13 November 2000 [44], [69], [71].

¹²⁷ Regulation (EU) No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40.

¹²⁸ Commission, 'Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries' COM(2020) 134 final, 7.

¹²⁹ Opinion 1/17 (n 3) paras 130–2, 136.

¹³⁰ Art 8.31(2) Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L11/ 23.

¹³¹ There are over 1,200 extra-EU BITs in force (Commission 2020 (n 128) note 3) and thus the issue is not marginal.

¹³² See e.g. Commission, 'Commission Implementing Decision of 29.5.2020 authorising the Kingdom of Spain to open formal negotiations to conclude a bilateral investment agreement with the Republic of Cote d'Ivoire' C(2020) 3400 final, Recital 9. Art 2(1)(g) of the Decision further specifies that the BIT should contain 'a clarification that the domestic law of the Kingdom of Spain, including EU law, is not part of the applicable law under the agreement in question'.

¹³³ Commission 2020 (n 128) 6–7.

¹³⁴ An example here is art 20(12) Netherland's Model BIT from 2019.

¹³⁵ Commission 2020 (n 128) 5–8. Similarly, recital 11 of the Grandfathering Regulation (Regulation (EU) No. 1219/2012 (n 128) provides: 'Member States are required to take the necessary measures to eliminate incompatibilities, where they exist, with Union law, contained in bilateral investment agreements concluded between them and third countries.'

The specific treaty language is already visible also in the EU's proposal for the revisions of the ECT. The proposal contains similar language to CETA and other EU IIAs on the status of domestic law as a fact, as well as on the interpretation of domestic law. Furthermore, it is suggested that a new article be included in the ECT, according to which an obligation flowing from membership in a Regional Economic Integration Organisation (i.e. the EU) to suspend the granting of subsidies (i.e. State aid) for an investor or to request the investor to reimburse them should not be considered a breach of the investment protection standards in the ECT or entail that the State would have to compensate the investors. Similarly, a breach of an obligation to compensate would not take place if such a suspension or request followed from an order of 'a competent court, administrative tribunal or other competent authority'. 'Other competent authority' is further clarified to mean the Commission or a court of a Member State.¹³⁶ This appears to be a direct answer to the uncertainty of the State aid cases discussed above, and it appears that the EU is increasingly taking measures to tackle the conflict between investment arbitration and the autonomy of EU law by including specific provisions in the investment treaties.

Even though the assessment of national law as a fact, or the limited effect of the interpretation by arbitral tribunals of national law provisions are not new ideas to the investment arbitration practice (as was seen above in Section 2), the inclusion of specific treaty language in the treaties arguably enhances legal certainty. Furthermore, it has been claimed that the acceptance of such treaty language in the EU IIAs by third countries shows that external actors are open to recognising the specific features of the EU's legal order and the EU as an international actor.¹³⁷ Thus, the Commission's encouragement for the Member States to include the 'new generation treaty language' also in their older BITs is favourable in order to ensure the consistency of the arbitral tribunals' understanding of the role and status of EU law and to mitigate the risk of arbitral practice running contrary to the principle of autonomy of EU law. In the meantime, it remains to be seen whether any issues will arise in the relationship between EU law and the older-generation extra-EU BITs, and how such issues would be handled by the tribunals.

5. Conclusion

The fact that the intra-EU arbitral tribunals have often engaged in rather detailed assessment of the treaty conflict between the intra-EU investment treaties and EU law shows that there is a certain level of recognition of the specific nature of the EU and its legal order in investment arbitration. The tribunals have, however, maintained that they are primarily *international* tribunals, and prioritised the point of view of international law, while rejecting the claim that EU law could render their jurisdiction invalid. A central aspect of this has also been the fact that the tribunals have not recognised that there is a genuine conflict in the lines of international treaty law between the investment treaties and EU law.¹³⁸ Whereas the tribunals could be criticised for not showing sufficient recognition of EU law, from the viewpoint of international law the demand from the EU for the jurisdiction to be denied appears to be rooted in the internal structures of the EU legal order. A comparison of this could, arguably, be drawn with the primacy of EU law in relation to national laws of the Member States. However, as international law operates primarily in a horizontal manner, there is little ground for claiming that EU law would prevail over other fields of international law if such a conclusion cannot be drawn from established rules of international law or treaty conflict.¹³⁹

Arguably, for the deprivation of jurisdiction to be acceptable also in the eyes of the tribunals, the specific features of EU law should be regulated in a manner that is valid also under international law and not only under the auspices of EU law.¹⁴⁰ In addition to the adoption of the agreement terminating the

¹³⁶See EU text proposal for the modernisation of the Energy Charter Treaty (ECT), 27 May 2020 https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf accessed 29 May 2020. Similar provision can also be found e.g. in art 2(2) of the Commission Decision authorising the Kingdom of Spain to open formal negotiations to conclude a bilateral investment agreement with the Republic of Cote d'Ivoire (n 132).

¹³⁷Luca Pantaleo, *The Participation of the EU in International Dispute Settlement: Lessons from EU Investment Agreements* (T.M.C. Asser Press 2019) 172.

¹³⁸Although the conflict is confirmed in *Achmea* from the viewpoint of EU law, it can still be questioned whether this entails that a conflict can be recognised under international law, outside the legal order of the EU.

¹³⁹See also Christina Binder and Jane A. Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' (2017) 8 *European Yearbook on International Law* 139, 189–91; *Eskosol v Italy* (n 24) [181].

¹⁴⁰An example of this is art 282 UNCLOS, according to which: 'If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that

intra-EU BITs,¹⁴¹ this is something that should be borne in mind in relation to the ECT as well. Indeed, it has been argued that as there are currently no general international rules covering the practice of international dispute settlement where a party is 'a composite legal subject', such as the EU, the specific rules required by such participation should be provided in the relevant legal instruments.¹⁴² Furthermore, the need for clear rules arises also when EU law is relevant in the determination of the merits of the disputes. Whereas it is generally accepted that EU law can be taken into consideration as domestic law, the relevant EU law rules need to be clear.

Arguably, the issue has its roots in the EU being, due to its constitutional structure, somewhat of a mismatch with international law. As international law traditionally deals with States and international organisations, the EU as a 'hybrid' in between¹⁴³ does not always fit the picture seamlessly. Whereas harmonious interpretation or a practice of comity could alleviate the conflicts to some extent, there is a clear need for the relationship between EU law and international (investment) law to be regulated through clear and binding instruments of international law.

Declarations and conflicts of interest

The author declares no conflicts of interest with this work.

such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.'

¹⁴¹Agreement for the termination of bilateral investment treaties between the EU Member States (n 1).

¹⁴²Pantaleo (n 137) 172.

¹⁴³See Allan Rosas and Lorna Armati, *EU Constitutional Law – An Introduction* (3rd edn, Hart Publishing 2018) ch 2.