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## Managing Inter-Legality

### *Conceptualizing the European Union's Interactions with International Investment Law*

PANOS KOUTRAKOS

#### 1 INTRODUCTION

In few areas does inter-legality present legal and policy challenges as starkly as in the interplay between international investment law and European Union (EU) law. Consider the facts of the ongoing *Micula* saga: prior to acceding to the EU, the Romanian authorities withdrew incentives for new foreign investments on the ground of incompatibility with EU state aid law. The investors brought proceedings before an International Centre for Settlement of Investment Disputes (ICSID) Arbitral Tribunal against Romania, arguing that the withdrawal of such incentives amounted to a violation of the 2002 Bilateral Investment Treaty (BIT) between Romania and Sweden. Once awarded \$250 million in damages, they brought a successful action before the Bucharest Tribunal seeking to enforce the award. In the meantime, Romania appealed unsuccessfully against the award before an ICSID ad hoc Committee.<sup>1</sup> The European Commission decided that the payment of the compensation awarded by the Arbitral Tribunal would be illegal under EU law as it would constitute state aid pursuant to Article 107(1) TFEU, and that Romania should recover any compensation it had already paid to the claimants in implementation of the award.<sup>2</sup> The investors challenged this decision before the General Court of the European Union<sup>3</sup> and have also brought actions before courts of a number of member states (Belgium,

<sup>1</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20 – Decision on annulment.

<sup>2</sup> Commission Decision 2015/1470 on State Aid SA. (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013 [2015] OJ L 232/43.

<sup>3</sup> Case T-694/15 and Case T-704/15 (pending).

Luxembourg, the United Kingdom<sup>4</sup> and France), as well as the United States,<sup>5</sup> in order to enforce the arbitral award.

The above overview illustrates how the interactions between international investment law and EU law give rise to legal disputes that emerge in a variety of procedural settings and in an ever-wider canvas, involving national and transnational courts and arbitral tribunals, as well as courts in third states. The *Micula* case is but one illustration of the specific legal challenges that inter-legality raises in the context of international investment and EU law.

There are at least three reasons that render this area worth exploring from the vantage point of inter-legality and its management. First, it touches upon the most fundamental characteristics of the EU legal order, including the primacy of its law, the exclusive jurisdiction of the Court of Justice of the European Union (CJEU), the central role of domestic courts in the application of EU law and the principle of non-discrimination.

Second, the above issues raised by inter-legality in this area have recently been brought to sharp relief in a range of legal contexts. In a public enforcement context, and in response to the short shrift that most member states have given the Commission's long-standing objection to intra-EU BITs,<sup>6</sup> the Commission initiated proceedings in June 2015 against five member states and has requested information from the remaining 21. Another context relates to the interactions between the Court of Justice and domestic courts: in response to a reference by the German Federal Court of Justice (*Bundesgerichtshof*), the Court of Justice held in *Achmea* that the provision of investor–state settlement dispute (ISDS) in the BIT between Czechoslovakia and the Netherlands was contrary to EU primary law.<sup>7</sup> Finally, there is also the context of the interactions between member state governments and the Court of Justice: Belgium requested an Opinion pursuant to Article 218(11) TFEU on the compatibility of the arbitration procedure laid down in the Comprehensive Economic and Trade Agreement between Canada and the EU and its member states (CETA) with EU primary law.<sup>8</sup>

Third, the above disputes and the fundamental questions they raise have emerged with increasing intensity and in a politically charged environment

<sup>4</sup> [2017] EWHC 31 (Comm) ([www.italaw.com/sites/default/files/case-documents/italaw8133\\_6.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw8133_6.pdf)).

<sup>5</sup> See the recent decision of the US Court of Appeal (2nd Cir) [www.italaw.com/sites/default/files/case-documents/italaw94011.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw94011.pdf).

<sup>6</sup> With the exception of Italy and Ireland, which have terminated their intra-EU BITs.

<sup>7</sup> Case C-284/16, *Slovak Republic v Achmea BV* EU:C:2018:158.

<sup>8</sup> Opinion 1/17 (pending).

where investment arbitration is viewed with distinct scepticism, if not outright hostility, by the wider public.<sup>9</sup>

The way, therefore, with which these issues have been dealt is not yet settled. This is an open debate, and seeking to provide answers, let alone to predict what the official institutional and judicial response would be, is to give a hostage to fortune. This chapter, instead, will draw on the existing practice of the EU's institutions, including its courts, in order to conceptualize different approaches to the management of inter-legality in the area. It will articulate three such approaches, ranging from conflict to integration to harmonious coexistence.

## 2 EXPANSION AND CONFLICT: SEEKING PRECEDENCE FOR EU LAW

Over the years, the European Commission has argued – quite forcefully – that EU law has rendered intra-EU BITs inapplicable. To that effect, it has intervened in a number of proceedings before arbitral tribunals, putting forward various arguments, including the automatic termination of the relevant agreements following accession to the EU by both its parties. The consistency with which this argument has been made varies. In *Eastern Sugar*, for instance, whilst the Czech Republic raised it, the European Commission put forward submissions that were viewed by the Arbitral Tribunal “for the most part diplomatic and ambiguous” and that suggested that automatic termination was not advocated.<sup>10</sup> In the more recent *Micula* case, however, the Commission argued that “the E.U. Treaties superseded the Sweden–Romania BIT as a result of Romania’s accession to the European

<sup>9</sup> This hostility was expressed most vociferously in the context of the now moribund Transatlantic Trade and Investment Partnership (TTIP). It was in response to it that the Commission has put forward its proposal for an investment court (European Commission, Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court). The debate about the problems of the arbitration system in international investment has given rise to voluminous literature. See, amongst others, J. Maupin, ‘Transparency in International Investment Law: The Good, the Bad, and the Murky’, in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge: Cambridge University Press, 2013), 142; J. E. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor–State Dispute Settlement System – Journeys for the 21st Century* (Leiden: Martinus Nijhoff, 2015); M. Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (The Hague: Kluwer, 2010).

<sup>10</sup> *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC Case No. 088/2004, Partial Award, para. 119 (the quote is from para. 120).

Union, terminating the latter, or, at the very least, rendering Articles 7 and 10 of that BIT inapplicable.”<sup>11</sup>

As a matter of principle, this objection<sup>12</sup> is not surprising. In normative terms, it draws on the principle of autonomy of EU law that, in the light of the recent case law of the Court of Justice (e.g., in Opinion 1/09<sup>13</sup> and Opinion 2/13,<sup>14</sup> let alone the judgement in *Achmea* itself, which will be examined below) has been construed in increasingly broad terms.<sup>15</sup> It is also about the competence of the Union to carry out an investment policy, not least pursuant to the amendments introduced by the Lisbon Treaty.<sup>16</sup> In policy terms, the EU has been seeking to define its investment policy in its negotiations with third countries, including the CETA and the Agreements with Singapore and Vietnam, the negotiation of investment chapters in agreements with India, Malaysia, Egypt, Jordan, Morocco and Tunisia and the negotiation of standalone agreements with China and Myanmar. This gradually emerging policy would be buttressed by comprehensive claims about the invalidity of existing intra-EU BITs.

There is, however, a whiff of maximalism about the argument of automatic termination of intra-EU BITs. It marginalizes the significance of the termination procedures in BITs. By disregarding the international law nature of the rules that it deems to be contrary to EU law, the Commission’s argument does not sit comfortably with the approach that the Court of Justice has adopted in a similar context. It is recalled that, in its effort to reconcile the pre-existing international obligations of member states with EU law pursuant to Article 351 TFEU, the Court places considerable emphasis on full compliance with the international rules on the termination of the relevant treaty concluded by the member state.<sup>17</sup> In doing so, the Court of Justice takes the rule laid down in

<sup>11</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20 – Decision on annulment, para. 330 (referring to para. 92 of the Commission’s submission). See also Commission Decision 2015/1470 [2015] OJ L 232/43 at para. 102. In another recent case, Poland did not make this argument: Partial Award in PCA Case No. 2013-01 *Enkev Beheer B.V. v Poland*.

<sup>12</sup> See the discussion in A. Reinisch, ‘Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations’, (2012) 39 *Legal Issues of Economic Integration* 157.

<sup>13</sup> ECLI:EU:C:2011:123.

<sup>14</sup> ECLI:EU:C:2014:2454.

<sup>15</sup> For an analysis of the principle in the context of investment law, see S. Hindelang, ‘The Autonomy of the European Legal Order – EU Constitutional Limits to Investor–State Arbitration on the Basis of Future EU Investment-Related Agreements’, (2013) 4 *European Yearbook of International Economic Law* 187.

<sup>16</sup> See P. Koutrakos, *EU International Relations Law*, 2nd edn (Oxford: Hart, 2015), at 30 ff.

<sup>17</sup> See, for instance, Case C-478/07 *Budvar*, ECLI:EU:C:2009:521.

Article 65 of the Vienna Convention on the Law of Treaties seriously. Viewed from this angle, the decision of the Commission to tackle the question of the compatibility of intra-EU BITs directly by bringing enforcement actions against certain member states is, in normative terms, preferable.<sup>18</sup>

The automatic termination argument is also at odds with the Court's own approach to succession of treaties as a matter of EU law. It is recalled that only in relation to GATT 1947 did the Court accept – back in the early 1970s – that the member states had passed on to the European Economic Community (as it then was) the rights and obligations they had assumed pursuant to GATT 1947.<sup>19</sup> Admittedly, the two cases are not entirely similar, as the latter case was about whether the Community was bound by an agreement concluded by its member states. There is, however, an analogy between the two legal contexts insofar as they tell us how the EU deals with the legal effects of successive international treaties of potentially overlapping scope. Put differently, at the core of both legal contexts, the main issue is whether an agreement concluded by the member states has been subsumed by EU law (in the case of intra-EU BITs rendering them invalid, whereas in the context of other agreements binding the EU itself).

It is recalled that, in dealing with the principle of treaty succession, the Court of Justice has adopted an extremely narrow approach.<sup>20</sup>

It is only where the EU has assumed “all the powers previously exercised by the Member States that fall within the convention in question” that the Union has succeeded the member states.<sup>21</sup> This case law suggests that the powers and obligations laid down in a treaty concluded by the member states would be subsumed by the Union pursuant to the EU Treaties only if there was a complete overlap between their provisions.

Is there such an overlap between the intra-EU BITs and the EU Treaties so as to suggest that the former are rendered invalid by the latter? In his Opinion in

<sup>18</sup> The Commission initiated proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden in June 2015 whilst it requested information from the remaining 21 member states (Ireland and Italy have terminated their intra-EU BITs).

<sup>19</sup> Joined cases 21–24/72, *International Fruit Company*, ECLI:EU:C:1972:115.

<sup>20</sup> See the analysis in Koutrakos, *EU International Relations Law*, 212–219, and R. Schütze, ‘The “Succession Doctrine” and the European Union’, in A. Arnulf et al. (eds.), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Oxford: Hart, 2011), 459.

<sup>21</sup> Case C-366/10 *Air Transport Association of America (ATAA)*, ECLI:EU:C:2011:864, para. 63 regarding the Convention on International Civil Aviation. See also C-301/09 *Bogiatzi*, ECLI:EU:C:2010:756 about the Convention for the Unification of Certain Rules Relating to International Carriage by Air; Case C-379/92 *Peralta*, ECLI:EU:C:1994:296, para. 16 and Case C-308/06 *Intertanko*, ECLI:EU:C:2008:312, para. 48, about the International Convention for the Prevention of Pollution from Ships of 1973, as supplemented by the Protocol of 17 February 1978; Case C-481/13 *Qurbani*, ECLI:EU:C:2014:2101 about Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees.

*Achmea*, Advocate General Wathelet argued forcefully and convincingly that the answer was negative.<sup>22</sup> And the Court of Justice in Opinion 2/15 on the conclusion of the EU–Singapore Free Trade Agreement held that Title IV, Chapter 4 TFEU on free movement of capital does not confer on the EU exclusive competence in relation to portfolio investment.<sup>23</sup> The invalidity objection raised in relation to intra-EU BITs is not, therefore, fully substantiated.

There is also a broader problem with the invalidity objection: it appears to conflate the issue of competence with that of compatibility. It does not follow that the existence or emergence of EU competence would necessarily and automatically render other rules binding on member states invalid.<sup>24</sup> This confusion between competence and compatibility with EU law in cases where EU law interacts with other international legal regimes is also apparent in other areas. For instance, the line of reasoning in the judgement of the Court of Justice in *Mox Plant*<sup>25</sup> is based on the same misguided premise. The judgement engages in an esoteric and convoluted analysis of what the conclusion of the United Nations Convention on the Law of the Sea (UNCLOS) signified for the exercise of the Union's competence, even though the wide scope of the duty of cooperation had already been established.<sup>26</sup>

The above overview illustrates a somewhat maximalist approach to the interactions between EU law and international investment law that seeks to establish the precedence of the former on the basis of an exceedingly broad construction of the Union's competence. This approach does not engage with the subtleties of the specific context within which the Court of Justice has articulated the unique features of the EU legal order, neither does it explore any alternatives that would introduce greater tolerance of other international legal regimes.

We find this approach in the recent *Achmea* judgement that the Court rendered in March 2018. This is the first case where the Court of Justice has been asked directly to rule on the compatibility of intra-EU BITs with EU law. The case arose from a reference from the *Bundesgerichtshof*, before which an annulment action had been brought against the final award by an arbitral tribunal constituted under the BIT between the Netherlands and

<sup>22</sup> Case C-284/16, *Achmea*, ECLI:EU:C:2017:699, paras 179–228. In its judgement, the Court of Justice did not deal with the issue.

<sup>23</sup> ECLI:EU:C:2017:376.

<sup>24</sup> See also P. Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Oxford: Hart, 2014), 217.

<sup>25</sup> Case C-459/03, *Commission v Ireland*, ECLI:EU:C:2006:345.

<sup>26</sup> See the criticism in Koutrakos, *EU International Relations Law*, 185–186.

Czechoslovakia. This case is not about a substantive incompatibility between the intra-EU BIT in question and EU law. In fact, no such argument was put forward. This case raises, instead, a broader question of a constitutional nature: does the ISDS mechanism provided for in the Agreement<sup>27</sup> and pursuant to which the arbitral tribunal rendered its award violate three of the main tenets of EU law, namely the principle of non-discrimination (Article 18 TEU), the preliminary reference procedure (Article 267 TFEU) and the exclusive jurisdiction of the Court of Justice (Article 344 TFEU)?

In its judgement, the Court held that the arbitration procedure laid down in the intra-BIT was contrary both to the preliminary reference procedure and the exclusive jurisdiction of the Court of Justice (it did not examine its compatibility with the principle of non-discrimination). This conclusion was reached on the basis of three main considerations. Firstly, as arbitral tribunals take account of domestic law and international treaties between the contracting parties and given that EU law forms part of both of these sets of rules, arbitral tribunals may be called on to interpret or apply EU law (including provisions on the freedom of establishment and free movement of capital). Secondly, arbitral tribunals may not refer questions about the interpretation and application of EU law to the Court of Justice because they do not constitute parts of the judicial system of the contracting member states. Their decisions, therefore, are not subject to the mechanisms that ensure the full effectiveness of EU law. Thirdly, the decisions of arbitral tribunals are not subject to full judicial review by domestic courts, which may not, therefore, refer EU law issues pertaining to such decisions to the Court of Justice.

The language in *Achmea* is couched at a high level of abstraction and the central thread that underlies the judgement is the principle of autonomy. Introduced in the early constitutionalizing case law in order to safeguard the normative features of the then-nascent legal order from challenges from domestic law,<sup>28</sup> autonomy has become prominent in later case law as a shield from interferences from international law.<sup>29</sup> It is on that later case law that the judgement draws, and in particular the much criticized Opinion 2/13,<sup>30</sup>

<sup>27</sup> Art. 8 of the BIT between the Netherlands and Czechoslovakia.

<sup>28</sup> See J. W. van Rossem, 'The Autonomy of EU Law: More Is Less?' in R. A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence – The EU Legal Order under the Influence of International Organisations* (Dordrecht: Springer, 2013), 13.

<sup>29</sup> See the overview in J. Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Oxford: Hart, 2018), 291.

<sup>30</sup> Opinion 2/13 (ECHR), ECLI:EU:C:2014:2454. See, amongst others, B. De Witte and Š. Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a



where the Court concluded that the draft agreement on the Union's accession to the European Convention on Human Rights (ECHR) was contrary to the principle of autonomy.

In its construction of the principle, the judgement in *Achmea* illustrates a most orthodox reading of the orthodoxy of EU law. This is characterized by a degree of formalism. Take, for instance, the argument that arbitral tribunals may rule on the interpretation or application of EU law. This may well be the case, however in practice the jurisdiction of arbitral tribunals is confined to the interpretation and application of the BITs pursuant to which a dispute has been brought before them, and their approach to EU law matters may not bind either the EU or the Member States as a matter of EU law. The judgement in *Achmea* may appear to suggest that every time an EU law issue pertains to a dispute before any international tribunal, the autonomy of the EU legal order would be at stake and the Court's exclusive jurisdiction would need to be triggered. The implications of such a maximalist position would be striking, especially in light of the nuanced approach of the Arbitral Tribunal itself in *Achmea*, which had pointed out that “[w]hat the ECJ has is a monopoly on the final and authoritative interpretation of EU law.”<sup>31</sup>

It follows from the above that the criterion we find in the judgement for ascertaining consistency with EU law (May an EU law issue related to the dispute be brought before an arbitral tribunal?) is too broad. As such, it enables the Court to construe the reach of the EU legal order in similarly broad terms and to articulate an antagonistic relationship with international investment law. A narrower criterion (May an arbitral award bind a member state to a given interpretation of EU law?) would provide a more nuanced picture of the interactions between EU, international and national law. It would also lead to a different approach to inter-legality: rather than conflict, it would be about managing the coexistence of EU and international investment law. Such an alternative approach is at least arguable. It was suggested by Advocate General Wathelet in his Opinion in *Achmea* (ignored completely by the Court) and will be examined in Section 4 below. It is also suggested by the Commission and the Council themselves, albeit in an extra-EU BIT: CETA includes a domestic law clause that makes it clear that the Investment

Foreign Human Rights Court’, (2015) 40 *European Law Review* 683; S. Peers, ‘The EU’s Accession to the ECHR: The Dream Becomes a Nightmare’, (2015) 16 *German Law Journal* 213; and E. Spaventa, ‘A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13’, (2015) 22 *Maastricht Journal of European and Comparative Law* 35.

<sup>31</sup> PCA Case No 2008-13, *Eureko B.V v Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), para. 282.

Tribunal established under its provisions would not bind the parties to any meaning it may give to domestic law.<sup>32</sup> The consistency of this clause with EU law is the subject matter of the pending request for an Opinion pursuant to Article 288(11) TFEU.

There is a thread, therefore, that brings together the Commission's approach to intra-EU BITs and the judgement in *Achmea*: it views inter-legality as a space for conflict between EU and international investment law, as a threat that EU law may only address on the basis of an expansive reading of what the Court understands the principle of autonomy to be about. The context within which this approach has been adopted – namely in treaty relations between member states – is quite specific: it highlights any potential conflict with EU law more starkly, given the constitutionalized setting within which relations between member states are regulated. In *Achmea*, for instance, we find references to the principle of mutual trust to which the intra-EU BIT provision for arbitration runs counter,<sup>33</sup> as well as an effort in the final paragraphs of the judgement to distinguish between intra-EU and extra-EU agreements.<sup>34</sup> The judgement, however, is couched in such abstract terms that it invites its own misreading. Be that as it may, the following sections will examine alternative approaches to inter-legality, where conflict may give way to pragmatism.

### 3 PRAGMATISM AND INTEGRATION: MANAGING THE INTERNATIONAL OBLIGATIONS OF THE MEMBER STATES

If we stepped beyond the intra-EU setting examined in the above section, we find another context within which the clash between international investment and EU law emerges in BITs concluded by member states with third countries (extra-BITs). The legal position of these agreements became controversial after the Treaty of Lisbon had entered into force. This was because investment had been included for the first time within the scope of the Common

<sup>32</sup> [2017] OJ L 11/23, Art. 8.31(2) CETA: “The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing 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.”

<sup>33</sup> Case C-284/16 *Achmea*, paras 34 and 58.

<sup>34</sup> *Ibid.*, para. 58,

Commercial Policy pursuant to Article 207 TFEU. As the EU had been endowed with express external competence in the area, and given the exclusive nature of this competence,<sup>35</sup> the power of the member states to retain investment agreements appeared to be incompatible with EU law. This was not an insignificant matter, given that approximately 1,400 agreements concluded by member states were in force.

And yet the EU did not demand that such agreements be revoked. Instead, it introduced a set of transitional arrangements that brought the management and amendment of the BITs that the member states had concluded within the scope of EU law. Adopted in 2012, Regulation 1219/2012 (the ‘Grandfathering Regulation’) provides for the maintenance in force and amendment of existing as well as the negotiation and conclusion of new BITs under certain conditions.<sup>36</sup> It establishes a procedural framework at the centre of which is the Commission itself. On the one hand, existing agreements are authorized by the Commission following their notification by all the member states. Such authorization may be granted notwithstanding the Union’s competence in the area<sup>37</sup> and without prejudice to other EU law obligations of the member states.<sup>38</sup> The Commission reviews the notified agreements in order to assess whether they are compatible with EU law, they overlap with an agreement that the Union negotiates or they constitute an obstacle to the development and implementation of the Union’s investment policies. These would also constitute grounds for withdrawal of an authorization by the Commission.

On the other hand, the amendment of an existing BIT or the conclusion of a new BIT is also subject to authorization following a notification by the member state concerned. Such notification<sup>39</sup> should be submitted at least five months prior to the commencement of the negotiations. This information is then disseminated to the other member states, and, within three months, the Commission ascertains whether to authorize the opening of formal negotiations. Such an assessment would depend on whether the opening of negotiations would be in conflict with EU law, whether it would be superfluous in the light of imminent negotiations of an EU agreement, whether it is inconsistent with the EU’s principles and objectives for external action or whether it

<sup>35</sup> Art. 3(1)(e) TFEU.

<sup>36</sup> Reg. 1219/2012 establishing transitional arrangements for bilateral investment agreements between member states and third countries, [2012] OJ L 351/40.

<sup>37</sup> See Preamble 3 and Art. 1 of Reg. 1219/2012.

<sup>38</sup> *Ibid.*, Art. 3.

<sup>39</sup> The notification should cover the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information.

constitutes a serious obstacle to the negotiation or conclusion of BITs with third countries by the EU. All BITs notified to the Commission are published annually.<sup>40</sup>

The Grandfathering Regulation is but an example of member states being empowered to exercise powers that primary law is deemed to have conferred on the Union. In fact, the notion of authorizing member states to act in areas of EU-exclusive competence is intrinsically linked to the notion of exclusivity. When the Court of Justice held – 33 years prior to the entry into force of the Lisbon Treaty – that the Union’s competence in Common Commercial Policy was exclusive, it also held that member states could act autonomously “only . . . by virtue of specific authorisation by the Community.”<sup>41</sup> Viewed from this angle, the approach illustrated by the Grandfathering Regulation is not novel. If we stepped back even farther, we would also find other contexts where, whilst acting autonomously under international law, member states act on behalf of the EU. This may be the case in the context of an international organization that covers an area that falls, even partly, within the Union’s competence, but whose membership is not open to other international organizations.<sup>42</sup> In such instances, whilst the EU may not become a member under international law, it relies on its member states that are members and are bound to pursue the Union’s interests in the context of the organization in question. In doing so, they are subject to rigorous duties that stem from the duty of cooperation and have been interpreted by the Court in exceedingly broad terms.<sup>43</sup>

What the Grandfathering Regulation does is lay down a set of rules and procedures of considerable scope and intensity in order to manage the interactions between member states and the Commission. It refers not only to the opening of negotiations and the signature and conclusion of BITs, but also to the application of such agreements. In the process of the negotiation of a BIT, for instance, the Commission may require that a member state include any appropriate clauses and may request to participate in the negotiations. As for the application of the agreement, the Commission must be kept informed without undue delay of all meetings under existing BITs and is entitled to

<sup>40</sup> For the more recent list, see [2018] OJ C 149/1.

<sup>41</sup> Case 41/76, *Donckerwolcke*, ECLI:EU:C:1976:182, para. 33.

<sup>42</sup> See, for instance, the International Labour Organisation.

<sup>43</sup> See Case C-45/07, *Commission v Greece (IMO)*, ECLI:EU:C:2009:81 and Opinion 1/13 (Hague Convention on the Civil Aspects of the International Child Abduction), ECLI:EU:C:2014:2303. See M. Cremona, ‘Member States As Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union’, in Arnulf et al. (eds.), *Essays in Honour of Alan Dashwood*, 435, and Koutrakos, *EU International Relations Law*, 196–200.

require that the member state concerned take a particular position. Similarly, any dispute that may arise about the application of a BIT must be notified to the Commission, which may even require that it participate in any settlement procedure. Its agreement is also required prior to the activation of any dispute settlement mechanisms included in the BIT by the member state concerned.

In other words, the Grandfathering Regulation does not reserve for the Commission the role of a distant and neutral assessor. Instead, it enables the Union's executive to be quite intrusive in all phases of the negotiation, conclusion and application of BITs concluded by member states. This role is viewed as flowing directly from the overall function of the Commission as the guardian of the EU Treaties. The degree of intensity that characterizes the regime governing the management of international treaties concluded by member states illustrates the strong integrating dimension of these rules. This model of integration does not amount to substituting international rules binding on member states with EU rules. Instead, it is about managing the application of international rules within an EU framework on the basis of an intensely proceduralized set of rules. In essence, therefore, integration in this case is about the coexistence of international rules that bind the member states, but not the EU, with EU law. Put differently, the Grandfathering Regulation is about managing inter-legality in a manner that would preserve the integrity of the EU legal order without interfering with the formal existence and application of international law.

There are two main factors that explain the emergence of this model of managing inter-legality. The first is legal and is about the extension of the Union's Common Commercial Policy (CCP) to cover investment at Lisbon. Article 207 TFEU refers to foreign direct investment, which is about the maintenance of lasting and direct links, and does not cover, therefore, portfolio investment, which is about the movement of private equity for personal gain and without the element of lasting influence. When the Treaty of Lisbon entered into force, however, the scope of the Union's exclusive competence to conclude international agreements in the area of investment was shrouded in uncertainty. On the one hand, the scope of foreign direct investment itself (which was covered by Article 207 TFEU) was not clear. For instance, would it cover only the admission of foreign investment and the establishment of investors, or would it also extend to the post-admission treatment of foreign investors, including the principle of fair and equitable treatment?<sup>44</sup> On the

<sup>44</sup> See A. Dimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press, 2011), 47–61. For a restrictive approach, see M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law After Lisbon*

other hand, the Commission was arguing that the Union's competence in the area of foreign investment had already become exclusive, as the EU rules on the free movement of capital, which applied to movement from and to a third country too, had given rise to implied exclusivity.<sup>45</sup> It follows from the above that the scope of what the Union could do post-Lisbon on the international scene in the area of investment was contested. This state of uncertainty had implications for the member states, as it would strengthen their determination to retain and exercise their power to apply their investment treaties.

The second factor that explains the integration model illustrated by the Grandfathering Regulation follows from the above, and is practical: the determination of investment policy may not come about on the basis of a single policy measure. It requires a careful weighing of various economic, policy and political considerations and entails a long and complex process that involves a range of different actors. In other words, the entry into force of the Lisbon Treaty on 1 December 2009 and the endowment of the Union with exclusive competence in certain areas of foreign investment by no means gave rise to a Union investment policy. Practical exigencies, therefore, would have rendered the possibility of a member state revoking parts of its BITs in the light of the Union's exclusive competence and in anticipation of a Union approach inconceivable. Investors could not possibly be left in a vacuum, as legal uncertainty would undermine investor confidence.

The significance of the above practical considerations was acknowledged by the Commission. In a communication it adopted in July 2010, it suggested that the determination of the Union's investment policy is a 'gradual and targeted' process that requires time and needs to take a number of factors into account:<sup>46</sup> "While it is the Union's responsibility to promote the European model and the single market as a destination for foreign investors, . . . it seems neither feasible nor desirable to replace the investment promotion efforts of Member States, as long as they fit with the common commercial policy and remain consistent with EU law."<sup>47</sup>

This practical factor suggests that pragmatism was paramount for dealing with the interactions between the international obligations of the member states on the one hand, and the emerging policy of the Union on the other

(Oxford: Oxford University Press, 2012), 292, at 303–304. For a broad approach, see P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford: Oxford University Press, 2011), 64–65.

<sup>45</sup> COM (2010) 343 fin *Towards a Comprehensive European International Investment Policy* (Brussels, 7 July 2010), at 8.

<sup>46</sup> *Ibid.*, at 2.

<sup>47</sup> *Ibid.*, at 6.

hand. The central role of pragmatism in the area also emerges clearly in relation to the legal factor outlined above. This becomes apparent in the aftermath of Opinion 2/15 on the signing and conclusion of the Free Trade Agreement between the EU and Singapore.<sup>48</sup> In this ruling, the Court of Justice interpreted the scope of foreign direct investment under Article 207 TFEU broadly, whereas it held that the TFEU provisions on movement of capital did not give rise to implied exclusive competence in the area of portfolio investment.

It is noteworthy that the main question that this division of powers has raised for policy-makers is in relation to future agreements that the EU negotiates: should these be concluded as mixed agreements (given that, in addition to portfolio investment, the Court held in Opinion 2/15 that provisions on ISDS fall beyond the Union's exclusive competence)? Or should the investment provisions be removed from free trade agreements in order to enable the EU to conclude the latter without the participation of the member states?<sup>49</sup> The emphasis of the post-Opinion 2/15 debate is not on the implications of the ruling for the international obligations that the member states have already assumed. These are deemed to have been dealt with satisfactorily pursuant to the model of integration illustrated by the Grandfathering Regulation. In other words, the clarification of the legal landscape has not done away with the pragmatic function of the transitional arrangements already agreed upon in relation to member states' extra-EU BITs.

The analysis of the model of integration discussed in this section raises a further question: does the term 'integration' sit comfortably with the maintenance of both the existing agreements and the power of the member states to amend them? Put differently, does the approach adopted in the Grandfathering Regulation not question the extent to which the management of the international obligations of the member states have been Europeanized? The answer to this question is negative on two grounds. First, the intensity of the procedural duties that the Regulation imposes on national authorities and the direct involvement of the Commission in the process of application, amendment and negotiation of the relevant BITs suggest a rigorous legal context within which international investment law and EU law interact. Second, the agreements dealt with by the Grandfathering Regulation are viewed by the Union's institutions as fully within the EU's emerging

<sup>48</sup> ECLI:EU:C:2017:376.

<sup>49</sup> After the writing of this chapter was completed, the agreement with Singapore was split into two: a trade agreement to which only the EU is a party and an investment protection agreement that is mixed.

investment policy. This is illustrated by the Commission's proposal for the negotiation of a Convention establishing a multilateral court for the settlement of investment disputes that refers to the above agreements expressly.<sup>50</sup>

#### 4 ACCEPTANCE AND COEXISTENCE: ENSURING THE HARMONIOUS INTERACTIONS BETWEEN EU LAW AND INTRA-EU BITS

The analysis has explored two different approaches to the management of inter-legality in the area of international investment and EU law that emerge in different contexts. In the context of intra-EU BITs, we find an understanding of inter-legality in conflictual terms, which is underpinned by a strong concern for the autonomy of the EU legal order. In the context of extra-EU BITs, a pragmatic understanding of the limits of EU action prevails and is translated in a set of rigorous substantive and procedural rules that govern the coexistence of international and EU law.

It is not, however, context that necessarily dictates the Union's response. In fact, a more harmonious construction of inter-legality is possible even in the context of intra-EU agreements. This was illustrated by the Opinion of Advocate General Wathelet in *Achmea*.<sup>51</sup> While ignored by the Court, this Opinion is worth examining, as it articulates a thoughtful understanding of managing inter-legality in the area. It suggests that the right of investors to rely upon arbitral tribunals in order to enforce intra-EU BITs is in full compliance with EU law. The main thrust of his argument is threefold. First, the principle of non-discrimination is not violated, as intra-EU BITs are similar to double taxation treaties, which have been viewed by the Court as consistent with EU law.<sup>52</sup> Second, arbitral tribunals established by an intra-EU BIT meet all the requirements necessary for them to be considered courts or tribunals in the meaning of Article 267 TFEU<sup>53</sup> and, as they are common to the two member states that are parties to the treaty in question,<sup>54</sup> they are

<sup>50</sup> COM (2017) 493 fin *Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes* (Brussels, 13 September 2017).

<sup>51</sup> Case C-284/16, *Achmea*, ECLI:EU:C:2017:699.

<sup>52</sup> Case C-376/03, *D*, ECLI:EU:C:2005:424. This was a point that was not examined by the Court.

<sup>53</sup> The requirements are set out in Case C-54/96, *Dorsch Consult*, ECLI:EU:C:1997:413, para. 23, and have been reaffirmed ever since (e.g., Case C-394/11, *Belov*, ECLI:EU:C:2013:48, para. 38).

<sup>54</sup> See Case C-337/95, *Parfums Christian Dior*, ECLI:EU:C:1997:517, para. 21, where a court established under an international treaty concluded between the BENELUX countries was deemed to be in the same position as courts of tribunals in the meaning of Art. 267 TFEU. Advocate General Wathelet had expressed this view briefly in his Opinion in CJEU, Case C-567/14, *Genentech*, ECLI:EU:C:2016:177, footnote 34 (considering arbitral tribunals as



bound by this provision as far as the application and interpretation of EU law is concerned. Third, the role of arbitral tribunals pursuant to intra-EU BITs does not violate the Court's exclusive jurisdiction under Article 344 TFEU, as they are required to respect the principles of EU law, failing which the member states would be liable in damages<sup>55</sup> and subject to enforcement actions by the Commission and other member states.<sup>56</sup>

The Opinion was viewed at the time as “shockingly firm”<sup>57</sup> and “a remarkable defence of ISDS.”<sup>58</sup> From the point of view of inter-legality, the approach adopted by Advocate General Wathelet illustrates a symbiotic relationship between intra-BITs and EU law. It understands them as two distinct legal spheres, the interactions of which need not threaten the functioning of either. In developing this approach, his line of reasoning is characterized by two main features. The first is a strong realist streak that anchors the Opinion on the practice of arbitral tribunals set up under intra-EU BITs. This is apparent in different contexts. Advocate General Wathelet points out that “the systemic risk which, according to the Commission, intra-EU BITs represent to the uniformity and effectiveness of EI law is greatly exaggerated”<sup>59</sup>; he refers to United Nations Conference on Trade and Development's (UNCTAD) statistics, according to which investors have been successful in only 16.1 per cent of intra-EU BIT arbitral proceedings over several decades,<sup>60</sup> and he points out that in none of these cases were arbitral tribunals required to review the validity of EU measures or the compatibility of domestic measures with EU law.<sup>61</sup> Furthermore, he refers to *Micula* as the single case where an arbitral award is viewed as contrary to EU law (and even that case he views as irrelevant as EU law was not applicable, given that Romania had not acceded to the EU when the arbitration commenced).<sup>62</sup>

The second feature of the analysis in the Opinion is the avoidance of grand teleological arguments. This is in stark contrast to the judgement of the Court

courts common to a number of member states for the purposes of Art. 267 TFEU “could help to ensure the correct and effective implementation of EU law”).

<sup>55</sup> Case C-224/01, *Köbler*, ECLI:EU:C:2003:513.

<sup>56</sup> Arts 258 and 259 TFEU.

<sup>57</sup> I. Dimitrov, ‘Digesting the AG Wathelet Opinion in Case C-284/16 *Slowakische Republik v Achmea BV*. Is It a Trap?’ Available at <http://arbitrationblog.kluwerarbitration.com/2017/10/07/digesting-ag-wathelet-opinion-case-c-28416-slowakische-republik-v-achmea-by-trap>.

<sup>58</sup> A. Carta and L. Ankersmit, ‘AG Wathelet in C-284/16 *Achmea*: Savind ISDS?’ Available at <https://europeanlawblog.eu/tag/ag-wathelet-in-c-28416-achmea>.

<sup>59</sup> Para. 44 of the Opinion, and again in para. 45.

<sup>60</sup> Para. 44 of the Opinion.

<sup>61</sup> Para. 45 of the Opinion.

<sup>62</sup> Para. 45 and n49 of the Opinion.

and the high level of abstraction in which it is couched. Whilst setting out an open approach to the coexistence of intra-BITs and EU law, the Advocate General puts forward arguments that are based on the strict and textual wording of the law. For instance, he argues that Article 344 TFEU does not support the exclusive jurisdiction argument because it refers to member states only, and therefore does not cover actions brought by individuals (a point that was ignored by the Court in its judgement).<sup>63</sup> In a similar vein, his construction of the intra-EU BITs as being in a symbiotic relationship with EU law draws upon the limited purview of the jurisdiction of arbitral tribunals that does not cover the validity of EU measures under EU law. It is also based on the capacity of EU law to deal with any threats to autonomy that may emerge, as the structures and principles laid down in the Treaties are sufficient to absorb any tensions that may arise, such as in the context of the preliminary reference procedure (Article 267 TFEU) and the principle of state liability.

There is a thread that brings together the approach outlined above and the position that the Court of Justice took in the *Kadi* litigation regarding the application of EU law human rights standards to EU measures adopted pursuant to United Nations Security Council (UNSC) resolutions.<sup>64</sup> It is recalled that this line of case law is based on the assumption that the Court of Justice lacks jurisdiction to review the lawfulness of a UNSC resolution, even on grounds of compliance with *jus cogens*, and that therefore:

... any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.<sup>65</sup>

The approach set out in *Kadi* was criticized as ‘inward-looking’ and at odds with “the self-presentation of the EU as an organization which maintains particular fidelity to international law and institutions.”<sup>66</sup> And yet, the logic of this approach is based on the premise that the special status of the Treaties establishing the EU and the autonomy of the EU legal order would not be

<sup>63</sup> See also his narrow reading of Opinion 2/13, which had found a violation of Article 344 TFEU in relation to actions brought between member states or by member states against the EU, but not by individuals: paras 151–152 of the Opinion (with reference to paras 201–214 of Opinion 2/13).

<sup>64</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundations*, ECLI:EU:C:2008:461.

<sup>65</sup> *Ibid.*, para. 288.

<sup>66</sup> G. de Búrca, ‘The ECJ and the International Legal Order: A Re-Evaluation’, in G. de Búrca and J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012), 105, at 140.

seen as a threat to the principle of international law and the hierarchies that this has introduced.<sup>67</sup> Put differently, the latter may coexist with the EU legal order without diluting the unique features of either, especially given the context within which this approach was adopted and the widely contested nature of the UN listing rules in question.<sup>68</sup> This understanding of the interactions between public international law and EU law, which underpins the entire body of the Court's case law on smart sanctions,<sup>69</sup> is also borne out by the practical implications of *Kadi* insofar as at no point during the long saga was the EU forced to ignore the UN measures requiring that member states freeze the relevant assets.<sup>70</sup> The pronouncement of the illegality of the EU implementing regulations did not, therefore, entail a violation of international law by the member states.

It is this notion of coexistence that we see in the Opinion in *Achmea* on the interactions of international investment law and EU law. The approach adopted by Advocate General Wathelet may appear somewhat paradoxical: whilst he acknowledges the dispute settlement regime laid down in intra-EU BITs as autonomous from and in compliance with the EU legal order, this is so because the latter is viewed as powerful enough to impose its discipline on arbitral tribunals. After all, the possibility of state liability for a violation of EU law is about bringing the conduct of arbitral tribunals into the purview of the EU legal order. Does this not condition the coexistence that the learned Advocate General appears to sanction by subjugating one legal regime to the other?

The answer to this question is negative. After all, we see a similar approach to the coexistence of intra-EU BITs with EU law in arbitral Tribunals. In *Euram*, for instance,<sup>71</sup> whilst the Tribunal rejected all the jurisdictional objections put forward by both the Commission and Slovakia about the application of the BIT to Austrian investors, it made it clear that it had no

<sup>67</sup> See also the analysis in G. Pavlakos and J. Pauwelyn, 'Principled Monism and the Normative Conception of Coercion under International Law', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart, 2011), 317.

<sup>68</sup> This point is analysed in Koutrakos, *EU International Relations Law*, 223–226.

<sup>69</sup> See Case C-548/09 P, *Bank Mellî Iran v Council*, ECLI:EU:C:2011:735, para. 105, and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518, para. 67.

<sup>70</sup> The point is made in J. Larik, 'EU Counter-Terrorism and the "Strict Observance" of International Law: Sewing the Seamless Coat of Compliance', in E. Herlin-Kamell and C. Matera (eds.), *External Dimension of the EU Counter-Terrorism Policy* (2014) CLEER Working Paper 2014/2 33.

<sup>71</sup> *European American Investment Bank AG v Slovakia*, PCA Case No. 2010-17, Award on Jurisdiction (22 October 2012), at para. 263.

power to determine the validity of an act of an EU institution. It also pointed out that “if a Member State were minded to enforce an arbitral award that would violate EU law, tools remain in the hands of the EU institutions – and particularly the ECJ – to ensure a proper application of EU law.”<sup>72</sup> We find this approach in *Achmea* too, where the Arbitral Tribunal refers to its “clear and fixed limitation on [its] jurisdiction,” which does not extend the power to rule on alleged breaches of EU law.<sup>73</sup> It is this line of reasoning that we see in the Advocate General’s Opinion in *Achmea* too.

In any case, whilst understood as two separate legal regimes, ISDSs under intra-EU BITs and EU law are connected by a factor that they have in common and is essential to their functioning, namely domestic courts. In his Opinion, Advocate General Wathelet stresses the role of domestic courts in the enforcement of arbitral awards and therefore in ensuring that no incompatibility with EU law would arise. As for their contribution to EU law, it is not for nothing that they have been described as ‘the powerhouse’ of the EU legal order.<sup>74</sup> After all, the Court of Justice itself refers to them as “guardians of th[e EU] legal order and the judicial system of the European Union.”<sup>75</sup> Their position in the management of inter-legality will be examined in the following section.

## 5 THE ROLE OF DOMESTIC COURTS

The role of domestic courts emerges as a significant component of managing the symbiotic relationship between international investment protection and EU law. It is recalled, for instance, that the case in *Achmea* arose from a preliminary reference by the German *Bundesgerichtshof*. After all, it is domestic courts that are often caught in the middle when it comes to the parallel application of these two legal regimes.

The role of domestic courts is illustrated with striking clarity in the *Achmea* case, albeit from two contrasting perspectives. In the judgement, it emerges as the main reason for rejecting the legality of intra-EU BITs under EU law. It is their jurisdiction to interpret and apply EU law under Article 19 TEU that the Court claims to protect, as the binding nature of arbitral awards is deemed to prevent them from exercising unlimited judicial review and

<sup>72</sup> *Ibid.*, para. 264.

<sup>73</sup> PCA Case No. 2008-13, *Achmea*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), para. 290.

<sup>74</sup> D. Edward, ‘National Courts – The Powerhouse of Community Law’, (2002–2003) 5 *Cambridge Yearbook of European Legal Studies* 1.

<sup>75</sup> Opinion 1/09 (*European and Community Patents Courts*), ECLI:EU:C:2011:123, para. 66.

making a reference under Article 267 TFEU.<sup>76</sup> There is delicious irony in the Court's concern that ISDSs would deprive domestic courts of their jurisdiction to refer, given that the *Achmea* judgement itself was in response to a reference by the *Bundesgerichtshof*. This is not the first time that the Court of Justice has stressed the rights of domestic courts in order to substantiate its own strong reading of autonomy of EU law. In fact, this is a thread that underpins the more recent rulings on the interactions between EU and international law. A case in point is Opinion 1/09 where a draft agreement on a unified patent litigation system was found to impinge on the rights of domestic courts to refer issues of EU law to the Court of Justice under Article 267 TFEU.<sup>77</sup> There is no analysis of Article 344 TFEU in the *Achmea* judgement. Instead, the Court appears to be a zealous guardian of the jurisdiction of domestic courts.

At the other end of the spectrum, Advocate General Wathelet suggests that the existing rules enable domestic courts to play a central role in the management of inter-legality. After all, it is they that enforce arbitral awards and, in the process, may be faced with difficult questions about the relationship between international investment and EU law. And it is they that may control the enforcement of such awards on the basis of their compatibility with public policy.<sup>78</sup> In other words, the role with which international investment law endows domestic courts enables the latter to rely upon EU law and act as EU law courts, hence safeguarding the autonomy of the EU legal order.

There is a recent case that illustrates quite how domestic courts may assume this constructive role. This has arisen in the context of the *Micula* litigation (which makes it all the more interesting given that, according to Advocate General Wathelet, *Micula* is the only case so far suggesting that the enforcement of an arbitral award pursuant to an intra-EU BIT might give rise to a substantive incompatibility with EU law). Having obtained an arbitral award in their favour, the claimants sought to enforce it before, amongst others, English courts. The award was registered in the High Court by means of an

<sup>76</sup> See *Achmea*, paras 36, 50 and 55.

<sup>77</sup> Opinion 1/09; see P. Koutrakos, 'The Court of Justice as the Guardian of National Courts – Or Not?' (2011) 36 *European Law Review* 319.

<sup>78</sup> In Case C-126/07, *Eco Swiss*, ECLI:EU:C:1999:269, it was held that a domestic court could refuse to enforce an arbitral award on public policy grounds, including compliance with the EU's competition and state aid rules. This public policy exception is allowed under international rules governing investment arbitration (Art. V (2)(b) of the 1958 Convention for the Recognition and Enforcement of Foreign Arbitral Awards), but not all of them (Art. 53(1) International Centre for Settlement of Investment Disputes Convention).

Order pursuant to the domestic law implementing the International Centre for the Settlement of Investment Disputes (ICSID) Convention in the United Kingdom.<sup>79</sup> The Order was challenged by the Romanian Government, supported by the Commission, on EU law grounds.

In January 2017, the High Court rejected the Romanian appeal, but granted a stay of enforcement proceedings pending the resolution by the General Court (the first-instance court of the EU) of the annulment action against the Commission's Decision that had found the enforcement of the award to constitute payment of unlawful state aid.<sup>80</sup> This decision was based on a distinction between registration and enforcement of the arbitral award: while necessary under domestic law implementing ICSID, registration did not amount to enforcement and could not, therefore, give rise to the risk of a conflict between decisions of domestic and EU institutions. This was not the case with the enforcement of the award, as it hinged on the determination of issues pending before the EU courts. Mr Justice Blair equated the award, following its registration under English law, to a final domestic judgement. As domestic courts are bound by EU law and the duty of cooperation, the High Court

... cannot therefore proceed to enforce the judgment consequent on registration of the Award in circumstances in which the Commission has prohibited Romania from making any payment under the Award to the claimants because in doing so, the court would, in effect, be acting unlawfully. This does not (in the court's view) create a conflict with the international obligations of the UK as contained in the 1966 Arbitration Act implementing the ICSID Convention in UK law, because a purely domestic judgment would be subject to the same limitation.<sup>81</sup>

This is an elegant and deeply pragmatic approach: on the one hand, it seeks to comply with EU law and take seriously the obligations under which domestic courts function; on the other hand, it is faithful to the letter of the international commitments assumed by the United Kingdom in the context of ICSID. This is by no means the only example of a domestic court seeking to reconcile the obligations that result from different supranational legal regimes, neither is international investment protection and EU law the only case where domestic courts are called upon to engage in this at times delicate exercise. Another case in point is the position of domestic courts in the area of asylum

<sup>79</sup> Arbitration (International Investment Disputes) Act 1966.

<sup>80</sup> After the writing of this chapter was completed, the Court of Appeal upheld the judgement ([2018] EWCA Civ 1801) and found its conclusion "pragmatic" and "principled" (para. 249).

<sup>81</sup> *Ibid.*, para. 132.

protection and in the light of the ECHR and EU law.<sup>82</sup> This is an area where two at first sight irreconcilable strands of case law have emerged. On the one hand, the Court of Justice has interpreted the principle of mutual confidence, which is the very foundation of the Dublin Regulation that governs asylum applications,<sup>83</sup> broadly and would only allow deviations in the light of systemic deficiencies, a term that it has construed narrowly.<sup>84</sup> On the other hand, the European Court of Human Rights (ECtHR) appeared to prescribe a considerably lower threshold, as it required “a thorough and individualized examination of the situation of the person concerned” in the context of transfers under the Dublin Regulation.<sup>85</sup> In doing so, the ECtHR did not refer to the strict approach to exceptions from the principle of mutual trust adopted by the Court of Justice in Case C-394/12, *Abdullahi*. How is this circle to be squared? English courts have been trying to square this circle by reading both lines of case law narrowly and within their specific factual and legal contexts.<sup>86</sup> In doing so, they show acute awareness of the need to comply with the international obligations assumed by the state whilst bringing any differences that emerge from parallel developments of international case law under different legal regimes.

The examples mentioned above illustrate the comity that domestic courts may show in order to manage compliance with international obligations that may appear to be, at first sight, irreconcilable. Whilst comity by international and transnational tribunals is essential for the tensions between different legal regimes to be managed effectively without compromising the integrity of the respective sets of rules,<sup>87</sup> it is also necessary for the function of domestic courts. After all, had the *Bundesgerichtshof* declined to refer in *Achmea* and had the High Court refused to stay proceedings in *Micula*, the challenges of the

<sup>82</sup> On the challenges of inter-legality and human rights protection, see Chapter 14.

<sup>83</sup> Regulation 343/2003 [2003] OJ L 50/1.

<sup>84</sup> See Case C-411/10, NS, ECLI:EU:C:2011:865, paras 80–86; Case C-4/11, *Puid*, ECLI:EU:C:2013:740, para. 30, and *Abdullahi*, para 60.

<sup>85</sup> *Tarakhel v Switzerland*, Application No. 29217/12, 4 November 2014, para. 104.

<sup>86</sup> See MS, NA, SG v *The Secretary of State for the Home Department* [2015] EWHC 1095 (Admin) paras 137–138, and R (*Yosief Weldegaber*) v *Secretary of State for the Home Department* [2015] UKUT 70(IAC), para. 15. See also the Supreme Court’s judgement in *EM (Eritrea)* [2014] UKSC 12, where the CJEU’s judgement in *Abdullahi* is not taken into account, even though it had been rendered two months earlier.

<sup>87</sup> See P. Koutrakos, ‘The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension’, (2016) 17 *Journal of World Investment and Trade* 873. For comity in relation to the role of the Court of Justice, see A. Skordas, ‘Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers’, in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2011), 115.

symbiosis between intra-EU BITs and EU law would have been felt more acutely. Similarly, had the English courts become more creative and selective in ensuring compliance with ECHR and EU obligations, the application of the Dublin Regulation would have been undermined and the ECtHR and the Court of Justice would have been put in a difficult position. This is, after all, yet another practical reason that underlines the role of domestic courts in the functioning of inter-legality: they give the transnational courts both the opportunity and space to shape the interactions between their respective legal orders.

## 6 CONCLUSION

This chapter examined an area that is still evolving. The interactions between international investment law and EU law give rise to challenges that are yet to be dealt with fully and are currently under review by both domestic courts and the courts of the EU. Drawing on recent policy and judicial practice, the analysis here conceptualized three possible approaches to the interactions between these areas of law. Ranging from conflict to integration to harmonious coexistence, these approaches emerge in different contexts and are still under development.

Their analysis raises three main points. First, there are no hard and fast rules as to what inter-legality entails in different areas of interacting legal regimes. In the field covered in this chapter, different facets of these interactions give rise to different challenges, and their management depends on, amongst others, the legal, political and policy circumstances that may prevail at the time and therefore give rise to context-specific answers. There is, in other words, a certain fluidity that characterizes what inter-legality means in practice, and this has consequences for our effort to articulate general rules about how best to deal with it.

Second, the management of inter-legality may entail reliance upon strikingly contrasting approaches. Principled objection and pragmatic coexistence may offer different – albeit parallel – ways of tackling the challenges of inter-legality. The well-documented quest by certain EU institutions for broadening the Union's competence both in law and in fact does not rule out a more conciliatory approach to the ways in which EU law interacts with international investment law on the basis of political constraints and practical considerations.

Third, while this chapter suggested subtler ways of achieving coexistence between the two sets of rules on the basis of mechanisms of mutual accommodation that would not undermine the fundamental features of either, to



strive for harmonious coexistence is to make a leap of faith. It is to assume that the main actors in each legal regime would show comity and avoid tensions that would challenge the limits of each other's authority. In his approach in *Achmea*, for instance, Advocate General Wathelet assumes that arbitral tribunals would be willing to play the role that he envisages for them in the context of the application of Article 267 TFEU. He also assumes that, just because there has not been a major substantive clash between intra-EU BITs and EU law, there would not be one in the future. No such leap of faith was envisaged by the Court of Justice, where even the theoretical possibility of a clash would render the coexistence of the jurisdiction of arbitral tribunals and EU law mechanisms intolerable. Put differently, the notion of harmonious coexistence requires a shared understanding of how best to manage interacting sets of rules. And this may not always be taken for granted.