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DISENTANGLING CONFLICTS OF LAWS IN EU AND MEMBER STATES' INVESTMENT AGREEMENTS

Ottavio Quirico[*]

I. INTRODUCTION

The European Union ("EU") is integrated into global markets via an open investment regime, which has fostered the development of wide economic relations. In 2019, the net investment outflow from EU Member States toward third countries[1] totaled $42,6761 million, while inflow totaled $47,3196 million.[2] To regulate investment disparities since the establishment of the common market in the 1950s, EU Member States have concluded about 1400 multilateral investment treaties ("MITs") and bilateral investment treaties ("BITs") with third countries.[3] EU Member States have also negotiated around 190 MITs and BITs *inter se*, or intra-EU investment agreements.[4] Since the adoption of the Lisbon Treaty in 2009, the EU has negotiated international investment agreements with economies such as Australia, Canada, China, Vietnam, Singapore, and the United States.[5] Among these agreements, the Energy Charter Treaty ("ECT") is both an intra-EU and extra-EU investment agreement,[6] to which both the EU and Member States are parties. It is therefore of critical importance to establish a predictable legal framework governing investments within and outside of the EU.

The European Commission and respondent EU Member States in international litigation have several times supported the supremacy of EU law over EU Member States' investment agreements.[7] This stance is based on Article 351 of the Treaty on the Functioning of the EU ("TFEU"),[8] which establishes an implicit primacy of

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1. 'Third countries' are countries that are not parties to the EU.
2. OECD, FDI in Figures 10 (2020).
3. These may also be referred to as 'extra-EU investment agreements.' They are made of agreements between an EU Member State or States and a State or States that are not part of the EU.
4. *EU Foreign Direct Investment Flows in 2018*, EUROSTAT (July 17, 2019), https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20190717-1. (Last visited Feb. 26, 2021).
5. See *Negotiations and Agreements*, EU, https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (Last updated Jan. 22, 2021).
6. Adopted December 17, 1994, in force April 16, 1998. The Energy Charter Treaty, United Nations, Dec. 17, 1994, 2080 U.N.T.S. 95.
7. *See, e.g.*, Charanne and Construction Investments (Neth. & Lux.) v. Spain, SCC V 062/2012 ¶ 208 (Jan. 21, 2016).
8. As amended by the Lisbon Treaty, opened for signature December 13, 2007, in force on December 1, 2009.

the EU founding treaties over EU Member States' investment agreements.[9] A similar interpretation applies under TFEU Article 218(11), which establishes the supremacy of the EU founding treaties over international investment agreements concluded by the EU.[10] This approach clashes with the generally accepted regulation of international investment via bilateral and multilateral treaties. International arbitral tribunals have opposed the primacy of EU law, arguing in favor of the supremacy of international investment agreements.[11] Many international investment agreements imbed supremacy clauses, such as ECT Article 16.[12]

This Article explores the relationship between EU law and international investment agreements by examining the conflict of supremacies of both intra-EU and extra-EU investment agreements. Whereas the supremacy of EU law in intra-EU investment disputes as regulation of the internal market is more apparent, there is also a conflict over the supremacy of law for external agreements. The discussion in this Article unfolds based on key international principles and rules, particularly under the Vienna Convention on the Law of Treaties ("VCLT") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("VCLTIO").[13]

This article proceeds in four parts. First, section II presents the different stances of various stakeholders on the issue of whether EU law or investment agreements concluded by the EU and its Member States should prevail in governing foreign investment. Second, section III defines the scope of the conflict, by outlining a hierarchy for the sources of EU law and contextualizing them within international law. Third, section IV addresses the conflict of supremacies between priority clauses under the EU founding treaties and intra-EU and extra-EU investment agreements. Fourth, section V explores relevant implications of substantive priority for adjudication and enforcement, which allows inferences on the validity of arbitral tribunals under the current Investor-State Dispute Settlement ("ISDS") system and their decisions.

II. CONFLICTS OF LAWS

Problems of consistency for governing law in internal and external investment agreements concern the most-favored-nation ("MFN") treatment, national treatment ("NT"), and fair and equitable treatment ("FET").[14] The MFN entails that State A must give a foreign investor from State B the most favorable treatment it accords to foreign investors from State C.[15] The NT compels a state not to

9. *See* PHILIP STRIK, SHAPING THE SINGLE EUROPEAN MARKET IN THE FIELD OF FOREIGN DIRECT INVESTMENT 21 (2014).

10. *Id.* at 215, 223.

11. Charanne & Construction Investments, SCC V 062/2012 at ¶ 430.

12. Supremacy rules resolve conflicts of laws by prioritizing a hierarchically superior rule. *See* RREEF Infrastructure (G.P.) Ltd. & RREEF Pan-European Infrastructure Two Lux Sàrl v. Kingdom of Spain, ICSID Case No. ARB/13/20, Decision on Jurisdiction, June 6, 2016 ¶ 87 [hereinafter *RREEF*].

13. Vienna Convention on the Law of Treaties, May 22, 1969, 155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, A/CONF.129/15 [hereinafter VCLTIO].

14. Teis Tonsgaard Andersen & Steffen Hindelang, *The Day After: Alternatives to Intra-EU BITs*, 17 J. WORLD INV. & TRADE 984, 992-95 (2016).

15. U.N. Conference on Trade and Development, *Most-Favoured-Nation Treatment*, U.N. Doc UNCTAD/DIAE/IA/2010/1 (2010).

discriminate between foreign and domestic investors.[16] The FET requires a state to treat foreign investment according to a minimum standard of fairness and equity.[17] An example concerning both NT and FET, is TFEU Articles 107 and 108, which allow states to regulate, subsidize, or otherwise aid the internal market, but only if duly approved by the European Commission. In *Electrabel SA v. Hungary*, an Arbitral Tribunal established under the International Centre for the Settlement of International Disputes ("ICSID") considered that state aid given without approval of the European Commission is not a breach of a foreign investor's legitimate expectations.[18] Another example concerning FET, is a situation where investor X in State A invests in State B and recoups dividends, which under investment treaties are usually freely transferable to State C. This situation is lawful under international investment agreements, but according to the European Commission, it conflicts with the power of EU institutions to restrict free transfers under TFEU Articles 65(1) and 215.[19] A further example is BITs prohibiting indirectly discriminatory taxation, where EU law only prohibits directly discriminatory taxation.[20] Under these circumstances, the question arises whether EU regulation should prevail or the investment treaty, provided both are applicable, according to conflict of laws rules.

A variety of opinions have been forwarded about what laws are supreme, supporting either the primacy of EU law or that of investment agreements. For instance, in *Eastern Sugar BV v. Czech Republi*c, foreign investors in the Czech Republic claimed a breach of FET following new regulation on the sugar sector after the accession of the Czech Republic to the EU.[21] The European Commission alleged that the then "Community law," including the founding treaties and secondary legislation, prevailed over intra-EU investment agreements under Article 307 of the Treaty establishing the European Community ("EC"),[22] which provided that "where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions–or should the EU adopt such rules in the future–Community law will automatically prevail over the non-conforming BIT provisions."[23] According to the Commission, the application of intra-EU BITs could lead to a more favorable treatment for investors in EU Member States covered by a BIT, thus discriminating against investors from other Member States, contrary to the fundamental principles governing the free movement of capital in the internal market.[24] Despite the

16. Don Wallace, Jr. & David B. Bailey, *The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions*, 31 CORNELL INT'L L.J. 615 (1998).

17. Organization for Economic Co-operation and Development, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment, 20004/03 (2004).

18. Electrabel SA v. Hungary, ICSID Case No. ARB/07/19, Decision of Jurisdiction, Applicable Law and Liability, ¶¶ 6.66-.69, 6.91 (Nov. 30, 2012).

19. Eureko B.V. v. The Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, ¶ 248; Letter from Margrethe Vestagar, Member of the European Commission, to Alfonso María Dastis Quecedo, the Spanish Minister of Foreign Affairs and Cooperation (Nov. 10, 2017). https://jusmundi.com/en/document/decision/en-achmea-b-v-formerly-eureko-b-v-v-the-slovak-republic-i-award-on-jurisdiction-arbitrability-and-suspension-tuesday-26th-october-2010#decision_341

20. SD Myers, Inc. v. Canada, Partial Award, ¶ 259 (Nov. 10, 2000).

21. Eastern Sugar B.V. (Neth.) v. Czech Republic, Partial Award, SCC No. 088/2004, ¶ 20 (Mar. 27, 2007).

22. Treaty Establishing the European Community, OJ C 325, December 24, 2002, 33-184.

23. SECIL v. Fazenda Pública, C-464/14, ¶ 54 (Nov. 24, 2016).

24. Eastern Sugar B.V. (Neth.) at ¶ 119.

affirmation of the "automatic" prevalence of EU law, the Commission invited EU Member States to terminate intra-EU investment agreements.[25] The Arbitral Tribunal rejected the argument of the Commission that EU law prevails over investment agreements, and thus affirmed its jurisdiction over the dispute.[26]

In *Charanne and Construction Investments v. Spain*, the claimants invoked a breach of the FET standard by Spain for altering the regulatory framework existing at the time of the investment, by passing new legislation between 2010 and 2013 which created a situation of instability, contrary to ECT Article 10(1).[27] The claimants argued that, by adopting RD 1565/2010 and RDL 14/2010,[28] Spain had infringed the legitimate expectations of investors under prior regulation.[29] According to Spain, as the respondent, EU law should have applied, rather than the ECT, to resolve the dispute under TFEU Article 351 (ex EC 307).[30] Spain argued that "intra-European investment relations are subject to the specific regulatory framework of the EU, which thoroughly deals with all matters governed by investment treaties, including those covered by the ECT," so that "the ECT is not applicable to investments made within the EU by nationals of EU Member States and does not confer any right to such nationals."[31] Thus, the primacy of EU law would automatically make EU investment agreements at least inapplicable,[32] which was the position of the European Commission acting as *amicus curiae*. However, relying on principles of contract law and the agreement between the parties, the Arbitral Tribunal considered the ECT applicable to the dispute.[33]

In *Electrabel*, the Petitioner claimed in an ICSID Arbitral Tribunal that there had been a breach of the FET standard under the ECT, based on the decision by Hungary to terminate a power purchase contract.[34] The European Commission developed a different argument compared to *Eastern Sugar* and *Charanne*, alleging that ECT Article 16, which prioritizes the ECT over agreements that are less favorable to investors or investment, only applies to the extent that the ECT is compatible with the Act of Accession to the EU and, therefore, with EU law.[35] Under Article 2, EU Member States have excluded the application *inter se* of the conflict rule embedded in ECT Article 16, thus prioritizing the general supremacy rule under EU law.[36] The arguments of the Commission found the support of the Arbitral Tribunal, which concluded that not only did the EU founding treaties prevail but also EU law generally when a material inconsistency arises.[37] The Arbitral Tribunal noted that

25. *Id.*

26. *Id.* at ¶¶ 143-181.

27. Charanne & Construction Investments, *supra* note 7, at ¶ 80.

28. Real Decreto-ley 14/2010 established measures to correct a tax deficit in the electric sector, aiming at increasing revenues from access to the electric grid in order to cover State expenses related to the transport and distribution of energy.

29. Charanne & Construction Investments, SCC V 062/2012, at ¶ 80.

30. *Id.* at 222.

31. *Id.* at 208.

32. STRIK, *supra* note 9, at 213; August Reinisch, *The EU on the Investment Path–Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements*, 12 SANTA CLARA J. INT'L L. 111, 150 (2013).

33. Charanne & Construction Investments, *supra* note 7, at 438.

34. Electrabel, ICSID ARB/07/19, Final Award (November 25, 2015), at 124.

35. Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, May 1, 2004, 46 O.J. 236.

36. Electrabel, ICSID Case No. ARB/07/19, at ¶ 4.109.

37. *Id.* at ¶ 4.191.

"the pre-eminence of EU law applies not only to pre-accession treaties between EU Members but also to post-accession treaties between EU Members, as EU Members cannot derogate from EU rules as between themselves."[38]

Regarding extra-EU investment agreements, in 2006 the European Commission commenced infringement proceedings under EC Articles 10, 226, and 307 against Austria, Finland, and Sweden, among other countries.[39] The action addressed the free transfer of investment-related payments under BITs entered into with third States before accession to the EU, in breach of EC Articles 57(2), 59, and 60(1), which established temporary exceptions to free movement of capital under the economic and monetary union. The European Court of Justice ("ECJ") upheld the arguments of the Commission and held Austria, Finland, and Sweden obliged to bring the BITs into conformity with EU law or to terminate them.[40] After the entry into force of the Lisbon Treaty, these views have been expanded in EU Regulation 1219/2012.[41] The Regulation vests the Commission with the power to determine whether a pre-Lisbon extra-EU BIT constitutes a "serious obstacle" to the negotiation of a BIT between the EU and third countries, envisioning a progressive replacement (Articles 5-6).[42] The Commission can also subordinate Member States' negotiations with third countries to the amendment of BIT clauses that are inconsistent with EU investment policy, EU law, or EU negotiations (Articles 8-9).[43]

This overview shows that there is widespread uncertainty as to what norms should prevail. Scholars, politicians, and other professionals have advocated for resolving issues of compatibility, arguing that the "time has come for a clarification on the issue."[44] This is particularly relevant because an unpredictable legal framework may have a chilling effect on investments.[45] Essentially, two problems arise. The first issue concerns the scope of the conflict between the supremacy of laws. Some stakeholders advocate the supremacy of the EU founding treaties over international investment agreements, or vice versa, whereas others extend the conflict to EU law more broadly. Second, the question arises concerning what regulation should effectively prevail, whether the international or rather EU regulation controls.

38. *Id.* at ¶ 4.186.

39. Case C-205/06, Commission v. Republic of Austria, 2009 O.J. (C 102) 2 (May 1, 2009); Case C-249/06, Commission v. Kingdom of Sweden, 2009 O.J. (C102) 2 (May 1, 2009); Case C-118/07, Commission v. Finland, 2010 O.J. (C24) 3 (Jan. 30, 2010).

40. Case C-205/06, Commission v. Republic of Austria, 2009 O.J. (C 102) 2 (May 1, 2009); Case C-249/06, Commission v. Kingdom of Sweden, 2009 O.J. (C102) 2 (May 1, 2009); Case C-118/07, Commission v. Finland, 2010 O.J. (C24) 3 (Jan. 30, 2010).

41. Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries, 2012 O.J. (L 351) 42.

42. *Id.*

43. *Id.* at 42-43.

44. Andersen & Hindelang, *supra* note 14, at 986.

45. *Id.* at 987-988.

III. SCOPE OF THE CONFLICT

A. Sources of EU law

To clarify the relationship between EU regulation and intra-EU and extra-EU investment agreements, it is necessary to adopt a paradigm to frame the sources of EU law in a descending hierarchy.[46]

The EU has three sources of law. The primary sources of EU law are the founding treaties, such as the Treaty on European Union ("TEU") and TFEU.[47] After the adoption of the Lisbon Treaty in 2009, primary EU law also includes the EU Charter of Fundamental Rights ("EUCFR").[48] These are integrated by the general principles of EU law, which are inferred from fundamental domestic or international rules.[49] Secondary sources ground their validity in primary law and encompass acts passed by EU institutions, notably regulations, directives, and decisions, which create binding legal obligations. Conversely, other acts, recommendations, and resolutions are not binding and thus cannot be considered sources of the law. These sources are complemented by the third source, the acts passed by States implementing EU acts, the validity of which is grounded in primary or secondary EU law. The framework is completed by the international agreements of the Union, whereby the EU founding treaties override international agreements concluded by the EU,[50] whereas EU Member States' agreements rank below secondary EU law.[51] Mixed agreements are considered hierarchically equivalent to conventions concluded by the EU in matters where the Union has exclusive competence, but superior to EU Member States' treaties in matters of shared competence or exclusive Member States' competence.[52]

In practice, after the Lisbon Treaty, most extra-EU investment agreements are to be concluded as mixed agreements,[53] progressively replacing existing EU Member States' investment treaties, according to Regulation 1219/2012.[54] In the

46. Roland Bieber & Isabelle Salomé, *Hierarchy of Norms in European Law*, 33 COMMON MKT. L. REV. 909, 909 (1996).

47. PAUL CRAIG & GRAINNE DE BÚRCA, EU LAW: TEXTS, CASES AND MATERIALS 142 (7th ed. 2020).

48. Treaty on European Union, art. 6(1), Oct. 26, 2012, 55 O.J. (C 326) 16 [hereinafter TEU].

49. European Parliament Resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EUR. PARL. DOC. 2009/2241(INI) (2010); PHILIPPE MANIN, DROIT CONSTITUTIONNEL DE L'UE 473 (2004); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 4-5 (2013); GRAINNE & DE BÚRCA, *supra* note 47, at 142-143.

50. Case C-61/94, Commission v. Federal Republic of Germany, 1996 E.C.R. I-03989, ¶ 52; STRIK, *supra* note 9, at 159; Van Rossem, *The EU at Crossroads: A Constitutional Inquiry into the Way International Law Is Received within the EU Legal Order*, *in* INTERNATIONAL LAW AS THE LAW OF THE EUROPEAN UNION 58, 68 (Canizzaro, Palchetti & Wessel eds., 2011).

51. Van Rossem, *supra* note 50, at 76; Allan Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, 34 FORDHAM INT'L L.J. 1304, 1314 (2011).

52. Eleftheria Neframi, *Mixed Agreements as a Source of European Union Law*, *in* INTERNATIONAL LAW AS THE LAW OF THE EUROPEAN UNION, 325, 348-349 (Canizzaro, Palchetti & Wessel eds., 2011).

53. European Parliament Resolution of 26 October 2017 Containing the Parliament's Recommendation to the Council on the Proposed Negotiating Mandate for Trade Negotiations with Australia, EUR. PARL. DOC. 2017/2192 (INI); 2015 O.J. (C 363) (May 16, 2017) (*Accord de libre-échange 2/15*); STRIK, *supra* note 9, at 169.

54. Freja Baetens, Gerard Kreijen & Andrea Varga, *Determining International Responsibility under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 VAND. J TRANSNAT'L L. 1203, 1217 (2014).

meantime, EU Member States are voluntarily phasing out their intra-EU investment treaties.[55] On January 15, 2019, twenty-two EU Member States issued a Declaration on Investment Protection in the EU,[56] to the effect that European Union law overrides BITs concluded between the Member States, including the ECT.[57] Nonetheless, Finland, Luxembourg, Malta, Slovenia, Sweden, and Hungary believe that all intra-EU BITs must be terminated on a bilateral or multilateral basis, save the ECT.[58] In fact, these States noted that the judgment of the Court of Justice of the European Union ("CJEU") in *Slovak Republic v. Achmea*, which posits the supremacy of EU law over EU Member States' investment agreements, is silent on the ECT.[59] On May 12, 2020, the majority of the EU Member States signed an agreement to terminate bilateral intra-EU BITs,[60] with the exclusion of Austria, Ireland, Finland, and Sweden.

Schematically, a framework to systematize the sources of EU law and its relationship to Member States' law includes:

1) TEU, TFEU, EUCFR and general principles of EU law (primary EU law);
2) EU international treaties;
3) EU regulations, directives and decisions (secondary EU law);
4) EU Member States' international treaties; and
5) EU Member State's legislation.

Such a hierarchy is perfectly viable from the internal standpoint of EU law, as stated by the Arbitral Tribunal in *RREEF Infrastructure*, where, adjudicating upon state energy reforms affecting the renewables sector, it was considered that the EU is internally free to define an internal hierarchy.[61] The ECJ and CJEU have supported the primacy of EU law.[62] In principle, according to a "neo-monistic" approach,[63] all these sources have a direct or indirect vertical and horizontal effect within EU Member States, which means that they produce not only vertical obligations between EU Member States and other legal persons, but also horizontal obligations between legal persons within such States.[64] This is subject to the criteria of clarity and non-conditionality established by the ECJ in *Van Gend en Loos*.[65] Therefore, where sufficiently clear and precise, international agreements concluded by the EU and the Member States have direct application in EU Member States.[66]

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55. Press Release, European Comm'n, *Capital Markets Union: Comm'n Provides Guidance on Protection of Cross-border EU Invs.*, IP/18/4528 (July 19, 2018).

56. Press Release, European Comm'n, *Declaration of the Representatives of the Gov's of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court of J. in Achmea and on Inv. Prot. in the European Union* (Jan. 17, 2019).

57. *Id.* at 1.

58. *Id.* at 4; Press Release, *Declaration of the Representative of the Gov't of Hungary on the Legal Consequences of the Judgment of the Court of J. in Achmea and on Inv. Prot. in the European Union* (Jan. 16, 2019).

59. Slovak Republic v. Achmea, C-284/16 (Mar. 6, 2018).

60. *Agreement for the Termination of Bilateral Inv. Treaties between the Member States of the Eur. Union*, OFFICIAL J. OF THE EUR. UNION, OJ L169/1 (May 29, 2020).

61. *RREEF Infrastructure*, *supra* note 12, at ¶ 72.

62. *Costa v. ENEL* [1964] C 6/64 ECR 1141.

63. Enzo Canizzaro, *The Neo-Monism of the Eur. Legal Order*, INT'L L. AS L. OF THE EU 35, 38 (Canizzaro, Palchetti & Wessel eds., 2011).

64. Beatrice Bonafe', *Direct Effect of Int'l Agreements in the EU Legal Order: Does It Depend on the Existence of an Int'l Dispute Settlement Mechanism?*, INT'L L. AS L. OF THE EU 229, 237 (2012).

65. Van Gend en Loos [1963] Case C-26/62 ECR 1, ¶ 76.

66. Demirel v. Stadt Schwäbisch Gmünd [1987] 12/86 ECR 3719, ¶ 14; Merck Genericos–Produtos Farmaceuticos v. Merck [2007] C-431-05 ECR I-7001. *See also* Pierre Pescatore, L'ORDRE JURIDIQUE

Within this framework, TFEU Article 218(11) (ex EC 300) provides that, if the CJEU gives a negative opinion as to whether an agreement concluded by the EU is consistent with the EU founding treaties, "the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."[67] TFEU Article 216(2) confirms that "[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States."[68]

Regarding the relationship between the EU founding treaties and EU Member States' international treaties, TFEU Article 351 (ex EC 307) provides that "[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."[69] However, "[t]o the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established."[70]

TFEU Articles 218(11) and 351 have given rise to different interpretations. An ICSID Arbitral Tribunal, in *Vattenfall v. Germany*,[71] held that not only TFEU Article 218(11) but also TFEU Article 351, mentioning the necessity "to eliminate the incompatibilities established," can be read as prioritizing international investment agreements over the EU founding treaties, thus requiring a modification of the founding treaties, rather than that of inconsistent international investment treaties.[72] This approach is consistent with the stance of the EU Court of First Instance in *Kadi and Al Barakaat v. Council*.[73]

However, TFEU Articles 218(11) and 351 establish the EU founding treaties as *lex superior* to the Member States' and the EU's internal and external investment agreements.[74] Notably, TFEU Article 351 provides that the EU founding treaties do not override investment agreements concluded by EU Member States with third countries before the adoption of the EU founding treaties, or accession to such treaties.[75] Nonetheless, Member States must bring prior external investment

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DES COMMUNAUTES EUROPEENNES: ETUDE DES SOURCES DU DROIT COMMUNAUTAIRE 151 (1975); Christina Eckes, *Int'l Law as Law of the EU: The Role of the Court of J.*, *in* INT'L L. AS L. OF THE EU, 361, 360-61 (2010).

67. *Information and Notices*, OFFICIAL J. OF THE EU, Oct. 26, 2012, at 146.

68. *Id.* at 144.

69. *Id.* at 196.

70. *Id.*

71. Vattenfall v. Germany [2018] ICSID ARB/12/12, ¶ 228.

72. *See also* Pescatore, *supra* note 66, at 153 & 156; Jan Klabbers, *The Validity of EU Norms Conflicting with Int'l Obligations*, INT'L L. AS L. OF THE EU, 111, 120-21 (Canizzaro, Palchetti & Wessel eds., 2011).

73. Kadi & Al Barakaat v. Council & Comm'n, [2005] T-315/01 ECR II-3649, ¶¶ 213-32; Yusuf and Al Barakaat v. Council & Comm'n [2005] T-306/01 ECR II-3533, ¶¶ 264-82. In these cases, the Court of First Instance dealt with the validity of EC Council Regulation 881/2002, imposing restrictive measures on suspect terrorists, in accordance with resolutions taken by the UN Security Council. The ECJ held the Regulation valid, despite the fact that it implemented rights in breach of fundamental EU principles.

74. Commission v. Italy [1962] C-10/61 ECR 1, ¶ 2; Annunziata Matteucci v. Communauté française of Belgium and Others [1988] 235/87 ECR 5589, ¶ 22; Exportur SA v LOR SA and Others [1992] C-3/91 ECR I-5529, ¶ 8. *See also* Strik, *supra* note 9, at 215 & 223.

75. OFFICIAL J. OF THE EU, *supra* note 67, at 196.

agreements into conformity with the EU founding treaties.[76] Along the lines of the "unionization" of international law,[77] this implies (*a contrario*) that the EU founding treaties override external investment treaties concluded by EU Member States with third countries after the adoption of or accession to the founding treaties.[78] Furthermore, the EU founding treaties would implicitly (*a contrario*) override investment treaties concluded by EU Member States *inter se*, either before or after the adoption of or accession to the founding treaties.[79] Thus, in *Kadi*, the ECJ took an anti-monistic stance diametrically opposed to the Court of First Instance[80] and upheld the primacy of the EU founding Treaties over international law.[81]

Nonetheless, the ECJ considered that former Article 234 of the treaty establishing the European Economic Community ("EEC"),[82] now TFEU Article 351, does not apply to treaties between EU Member States.[83] Furthermore, according to the ECJ, the prohibition under TFEU Article 351 cannot be extended to agreements concluded by EU Member States with third countries after they accede to the EU.[84] Concerning treaties concluded by the EU itself, scholars assume the necessary consistency of international obligations of the Union contracted under the exercise of exclusive competence, or mixed agreements in the case of shared competence, with the EU founding treaties.[85]

As TFEU Articles 218(11) and 351 only refer to international agreements, it is unclear what the relationship is between secondary EU law, EU Member States' law, and international investment agreements.[86] According to the CJEU, investment agreements concluded by the EU rank above secondary EU law.[87] According to a scholarly view, international investment agreements concluded by EU Member States rank below national law.[88] More precisely, this depends on whether a State directly implements international norms within its legal order (monism) or requires the adoption of national legislation to that effect (dualism). If an EU Member State takes a monistic approach, its international investment agreements should prevail over national law. Vice versa, if an EU Member State takes a dualistic approach, national law should prevail over international investment agreements. However, the non-implementation of an international investment agreement does not exclude the international responsibility of an EU Member State under that convention.

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76. Commission v. Republic of Austria, *supra* note 39, at ¶ 37; Case C-249/06, Commission v. Kingdom of Sweden, *supra* note 39, at ¶ 38; STRIK, *supra* note 9, at 155.

77. Van Rossem, *supra* note 50, at 68.

78. Comm'n v. Belgium & Luxembourg [1998] C-176 & 177/97 ECR I-3557; Procureur Général v. Arbelaiz-Emazabel [1981] 181/80 ECR 2961, ¶ 31; STRIK, *supra* note 9, at 163.

79. STRIK, *supra* note 9, at 218-219. See also *Vattenfall*, *supra* note 71, ¶ 225.

80. *Kadi*, *supra* note 73, at ¶¶ 213-32; Yusuf & Al Barakaat v. Council of the Eur. Union [2005] Case T-306/01 ECR II-3533, ¶¶ 264-82.

81. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Comm'n [2008] joined Cases C-402/05 P and C-415/05 ECR I-06351, ¶¶ 285-330.

82. 1987 O.J. (L 169) 7.

83. Community v. Italy, 1962 ECR 1.

84. Commission v. Belgium and Luxembourg, 1998 ECR I-03557.

85. KLAUS-DIETER BORCHARDT, ABC OF EU LAW 80 (EU 2010).

86. 2012 O.J. (C 326 145-146 and 195-196), November 26, 2012.

87. Germany v. Council, 1994 93 ECR 4973, ¶¶ 103-105 and 111; *see also* MANIN, *supra* note 49, at 474; KPE LASOK & D. LASOK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION, 132 (2001).

88. BORCHARDT, *supra* note 85, at 80.

B. EU law and international law

In light of the "internal" EU legal framework, the starting point for disentangling conflicts between EU law and other applicable law is determining which law is applicable to an investment dispute, under "conflict of laws" rules.[89] When, according to the will of the parties or established international principles, such as *lex loci acti*, *lex domicilii*, or *lex fori*,[90] the law applicable to an international investment dispute is domestic law, then several different scenarios arise. If the law applicable to the controversy is that of a non-EU Member State, a conflict could arise during enforcement in an EU Member State. If, conversely, the law of an EU Member State applies to a foreign investment contract, the question is whether an international investment agreement should apply to resolve the dispute and enforce the decision, rather than EU law or the law of a Member State.[91] More precisely, the question is whether the international investment agreement should adapt to EU law or vice versa.

Contrary to the stance of the European Commission,[92] these questions must be approached from the standpoint of "public" international law, considering the conflict between international investment agreements and the EU founding treaties, rather than all the sources of EU law. There is a legal conflict for an EU Member State that is a party to an investment agreement and the EU founding treaties.[93] There is also a legal conflict for the EU when the Union is a party to an international investment agreement, given that, while the Union has not ratified its founding treaties, all its legislation is grounded in such treaties. These conflicts must be resolved in light of the VCLT and VCLTIO, as stated by the Arbitral Tribunal in *RREEF Infrastructure*.[94] In other words, the conflict between an EU or Member State's international investment agreement and the EU founding treaties shifts the focus from the internal system of the sources of EU law to the system of the sources of international law. From the standpoint of "public" international law, the "hierarchy" is external to EU law and is as follows: EU Member States' international (investment) treaties, including the TEU, TFEU, EUCFR, and EU international treaties.

Since the EU remains an international organization,[95] its founding treaties must be coordinated with other international agreements. This is confirmed by the recent adoption of the Agreement for the Termination of Bilateral Investment Treaties.[96] If the TEU and TFEU were superior to BITs concluded by EU Member States *inter se*, a treaty aiming to terminate them would be unnecessary. Alternative approaches "obstruct the proper functioning of international law," and, "seen from the angle of

89. Vives, *Shaping the EU Investment Regime: Choice of Forum and Applicable Law in International Investment Agreements*, 6 CUADERNOS DE DERECHO TRANSNACIONAL 269, 279 (2014).

90. Rome Convention on the Law Applicable to Contractual Obligations, adopted June 19, 1980, 19 ILM 1492, in force April 1, 1991.

91. Vives, *supra* note 89, at 281 and 291; Pohl, *Intra-EU Investment Arbitration after the* Achmea *Case*, 14 EU CONST L. REV. 767, 783-784 (2018).

92. *See* Section II above.

93. STRIK, *supra* note 9, at 163.

94. RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Jurisdiction, ¶ 75 (June 6, 2016).

95. Van Rossem, *supra* note 50, at 88.

96. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 2020 O.J. (L 169/1).

international law," are "not always valid."[97] Viewing the EU as a "constitutional" order in the absence of a formal constitution does not foster predictability.[98] Claiming that the EU legal system is autonomous under the idea of "plurality" echoes a dualistic approach to international law.[99] This means that by applying international investment agreements rather than EU law to resolve an investment dispute, the results affect the internal law of the EU Member States. In this respect, it is problematic to assume that "it is EU law itself that determines the status of international agreements within it."[100] The EU can take a dualistic approach to international investment agreements,[101] but this is in breach of EU conventional obligations and triggers the international responsibility of the Union. This approach is valid not only for extra-EU investment treaties but also for intra-EU investment agreements because there are international conventions that subject these agreements to general principles of international law, particularly the VCLT and VCLTIO.

IV. RESOLVING CONFLICTS: SUPREMACY AND COUNTER-SUPREMACY

To resolve a conflict between the EU founding treaties and international investment agreements concluded by the EU and its Member States, scholars have invoked VCLT and VCLTIO Article 30 (Application of Successive Treaties Relating to the Same Subject Matter), Article 31 (Interpretation of Treaties), and Article 59 (Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty). However, Article 59 is inapplicable, to the extent that there is usually no such overlap and inconsistency to claim that either international investment agreements intend to terminate the EU founding treaties or that, vice versa, the EU founding treaties intend to terminate international investment agreements.[102] In fact, the EU requested that its Member States terminate intra-EU investment agreements;[103] this means that the EU founding treaties have not terminated or suspended these conventions. Conversely, VCLT and VCLTIO Articles 30 and 31 are quite pertinent.

VCLT and VCLTIO Article 31(3)(c) establish the principle of "systemic integration," where treaties and international rules must be interpreted in accordance with each other to a feasible extent. This is the prevailing rule to resolve conflicts between international obligations, as it fundamentally excludes any possible conflict.[104] Thus, the Arbitral Tribunal in *RREEF Infrastructure* supported the

97. Van Rossem, *supra* note 50, at 89.

98. On EU constitutionality, see Ramses Wessel, *Monism, Dualism and the European Legal Order–Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?*, INT'L L. AS THE L. OF THE EU 5, 24 (Canizzaro, Palchetti & Wessel eds., 2011).

99. *Id.* at 27; Van Rossem, *supra* note 50, at 62-64.

100. Christina Tietje & Clemens Wackernagel, *Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration*, 16 JWIT 205, 209 (2015).

101. Eckes, *supra* note 66, at 360-61.

102. *See, for instance*, Eureko BV v. The Slovak Republic, Award of October 26, 2010, ¶¶ 233 and 239-244; August 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*, 39 LIEI 157, 168 (2012).

103. European Commission, *supra* note 53.

104. ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682 (2006), 25; *See also* Tarcisio Gazzini, *Bilateral Investment Treaties*, INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 99, 122 (Tarcisio Gazzini & Eric De Brabandere eds., 2012).

harmonious interpretation of the EU founding treaties and international investment agreements, whereby "to the extent possible" two treaties "equally, or unequally, applicable" must "be interpreted so as not to contradict each other."[105] According to TFEU Article 207(3), which requires the EU Council and Commission to grant that "the agreements negotiated are compatible with internal Union policies and rules" the Tribunal in *Electrabel* held that it would make "no sense for the EU" to become a Party to the ECT "if that had meant entering into obligations inconsistent with EU law."[106]

When a harmonious interpretation is impossible, however, the chief principle to resolve a conflict between international agreements is that of *lex superior*. Thus, if an investment agreement concluded by the EU or a Member State does not include a supremacy clause, the EU founding treaties prevail under TFEU Articles 218(11) and 351 interpreted as supremacy clauses. Considering the sources of EU law, this scenario presents two different options. For investment treaties concluded by the EU, supremacy only extends to primary EU law, given that EU investment agreements override secondary EU law.[107] Concerning EU Member States' investment agreements, the supremacy of EU law also extends to secondary EU law.

Conversely, if an investment agreement concluded by the EU or Member States embeds a supremacy clause, a "conflict of supremacies" arises for the EU founding treaties. This is exemplified by ECT Article 16 (Relation to Other Agreements), which provides that, when a State is a party to both the ECT and other international agreements, Parts III (Investment Promotion and Protection) and V (Dispute Settlement) of the ECT override the norms of other international agreements covering the same subject matter, to the extent that they are "more favorable to the Investor or Investment."[108] This clause establishes the primacy of the treaty that is more favorable to an investor, which can be either an EU founding treaty or an investment agreement concluded by the EU or Member States.

A conflict arises between TFEU Articles 281(11) and 354 and ECT Article 16. As the Tribunal noted in *RREEF Infrastructure*, "EU law does not and cannot 'trump' public international law."[109] VCLT Article 27 provides that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[110] It is possible to interpret the MFN treatment under ECT Article 16 as a "disconnection clause" prioritizing the ECT over the EU founding treaties, to the extent that the ECT affords more favorable treatment to intra- and extra-EU investors.[111] This is consistent with the fact that investment agreements are more favorable to foreign investors than the EU founding treaties.[112] It is also worth noting

105. RREEF Infrastructure, *supra* note 12, at (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Jurisdiction, ¶ 76 (June 6, 2016).

106. Electrabel, ICSID Case No. ARB/07/19, at ¶ 4.133 (November 30, 2012).

107. STRIK, *supra* note 9, p. 219; Dimopoulos, *The Compatibility of Future EU Investment Agreements with EU Law*, 39 LIEI 447, 451-452 (2012).

108. The International Energy Charter Consolidated Energy Charter Treaty with Related Documents art. 16, Jan 15, 2016, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

109. RREEF Infrastructure, *supra* note 12, at ¶ 87. *But see* STRIK, *supra* note 9, at 218-20.

110. VCLT, *supra* note 13, at 339.

111. RREEF, *supra* note 12, at ¶¶ 60, 87; *see also* AES Summit Generation Ltd. and AES-Tisza Eromu Kft v. The Republic of Hungary, ICSD Case No. ARB/07/22, Award (Sep. 23, 2010), at ¶ 7.6.7.

112. Matthew Happold & Thomas Roe, *The Energy Charter Treaty*, *in* INT'L INV. L. 69, 72 (Tarcisio Gazzini & Eric De Brabandere eds.,, 2012); Maylouda Sattorova, *Inverstor Rights Under EU Law and International Investment Law*, 17 J. WORLD INV. & TRADE 895, 917 (2016).

that, during the drafting of the ECT, the EU proposed a disconnection clause that prioritized EU law, but the option was rejected.[113]

Concerning *inter se* relations between equal ranking subsequent treaties and ensuing international rights and duties covering the same subject matter, in the absence of *lex superior*, two principles apply: *lex specialis* and *lex posterior*. The preeminence of *lex specialis* over *lex posterior* has been recognized by the International Law Commission[114] and confirmed by the *Vattenfall* Tribunal. "[T]he general rule of *lex posterior* contained in Article 30 VCLT is a subsidiary one" and "where a treaty includes specific provisions dealing with its relationship to other treaties, such as appear in Article 16 ECT, the *lex specialis* will prevail."[115] In this respect, the Arbitral Tribunal in *Marfin Investment Group Holdings and Others v. Cyprus* considered that the ECT and the EU founding treaties "do not have the same subject-matter."[116] However, this stance is questionable, as there is significant overlap between these agreements regarding both market access and investment protection.[117] Therefore, it is necessary to assess how VCLT and VCLTIO Article 30 regulate the relationship between such conventions.

According to the *lex specialis* principle, more specific treaties override (*prior* or *posterior*) general conventions governing the same subject matter.[118] In this regard, it seems that international investment agreements are more specific than the EU founding treaties. This is not so much since international investment agreements, notably BITs, include a more limited number of parties than the EU founding treaties (*ratione personarum*).[119] The ECT includes a high number of member parties. It is rather a matter of content (*ratione materiae*), as the EU founding treaties cover a broader, less detailed subject area than investment agreements.[120] Thus, the Arbitral Tribunal in *Eureko* held that FET standards under the 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic "extend beyond the protections afforded by EU law."[121] In this context, the MFN clause under ECT Article 16 becomes a conflict clause and prevails over conflicting TFEU Articles 218(11) and 351 by its nature as *lex specialis*, addressing energy regulation rather than economic regulation. Thus, the *Vattenfall* Tribunal held that "the Contracting Parties to the ECT, including the EU, specifically and explicitly agreed that *prior* or *subsequent treaties* that they enter into with each other" shall not be interpreted "so as to derogate from any provision in Part III ('Investment Promotion and Protection,' including substantive protections) or Part V ('Dispute Settlement') ECT,

113. Draft Basic Agreement for the European Energy Charter, Comment 27.18, Aug. 12, 1992, 84 https://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/8_-_BA_15__12.08.92_.pdf.
114. Report on Fragmentation, *supra* note 104, at ¶ 36.
115. Vattenfall, *supra* note 71, at ¶ 217.
116. Marfin Investment Group Holdings and Others v. Cyprus, ICSID ARB/13/27, at ¶ 595 (2018).
117. Jan Kleinheisterkamp, *Investment Protection and EU Law: The Intra- and Extra- EU Dimension of the Energy Charter Treaty*, 15 J. INT'L ECON. L 85, 99 (2012).
118. Report on Fragmentation, *supra* note 104, at ¶ 65.
119. Christina Binder, *A Treaty Law Perspective on Intra-EU BITS*, 17 J. WORLD INV. & TRADE 964, 973 (2016).
120. Reinisch, *supra* note 32, at 169-71; Happold & Roe, *supra* note 112, at 85; Panos Koutrakos, *The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension*, 17 J. WORLD INV. & TRADE 873, 878 (2016); Klabbers, *supra* note 72, at 119.
121. Eureko B.V. v. The Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, at ¶ 263.

where a provision is more favorable to the Investor or Investment."[122] The Tribunal added that "the clearer conflict rule in Article 16 ECT must prevail over a rule derived from an *a contrario* interpretation of Article 351 TFEU which cannot be found in the text of the TFEU itself."[123]

According to the subsidiary principle of *lex posterior*, the subsequent source and ensuing obligations prevail. Under VCLT and VCLTIO Article 30(3), this principle explicitly applies to subsequent treaties between the same parties covering the same subject matter "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59."[124] The text of TFEU Article 351 is identical to Article 234 of the 1957 EEC Treaty and is almost identical to the text of Article 307 of the 1992 EC Treaty. Article 16 of the 1994 ECT can thus be considered *lex prior* or *posterior*, depending on what reference is considered for the EU founding treaties.

In sum, a conflict could be avoided by including a clause within the investment contract, specifying the law the parties chose to govern the contract.[125] Absent such a clause, conflict of laws rules apply. If a harmonious interpretation is impossible, in the case of hierarchical equality the principles of specialty and temporality should apply: 1) Harmonious interpretation, 2) Hierarchy (*lex superior*), 3) Specialty (*lex specialis*), and 4) Inter-temporality (*lex posterior*). On the basis of these principles, the ECT should be interpreted harmoniously with EU law. If this proves impossible, the ECT in principle prevails as *lex superior*, *specialis,* and *posterior*, although a case-by-case assessment of specific rules embedded in the different treaties may be required.

V. PROCEDURAL IMPLICATIONS

A. Dispute settlement

International investment disputes are settled via different mechanisms. For instance, ECT Article 26 establishes adjudication by domestic courts, international arbitrators, or conciliators.[126] It is controversial whether the conflict of supremacy between the EU founding treaties and international investment agreements concluded by the EU and the Member States has any procedural implications. The question has been discussed regarding international arbitration, within the context of the new EU policy aimed at reforming the current ICSID-centered system.[127] However, the same issues arise within the framework of other dispute settlement mechanisms applicable under the conflict of laws rules and concern domestic

122. Vattenfall v. Germany [2018] ICSID ARB/12/12, at ¶ 193, emphasis added.
123. *Id.* at ¶ 227.
124. VCLT, *supra* note 13, at 339; United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, *Documents of the Conference*, 100, U.N. Doc. A/CONF.129/15 (1986).
125. Patrick Dumberry, *International Investment Contracts*, *in* INT'L INV. L. 215, 220, 223-24 (Tarcisio Gazzini & Eric De Brabandere eds.,, 2012).
126. Vives, *supra* note 89, at 276-77; Puig & Scheffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 12 AMER. J. INT'L L. 361, 387 (2018).
127. Puig & Scheffer, *supra* note 126, at 397-399; *Working Group III: Investor-State Dispute Settlement Reform*, UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state (last visited Feb. 26, 2021).

adjudication and the envisaged Permanent Investment Court,[128] when EU law is the law applicable to resolve a dispute.[129]

The Arbitral Tribunal in *Eureko* disjoined substance and procedure, thus concluding that the application of EU law rather than investment agreements on substance does not exclude the jurisdiction of arbitral tribunals.[130] Similarly, the Tribunal in *Electrabel* affirmed the primacy of EU law over EU and Member States' investment agreements but established its exclusive jurisdiction over the hierarchically inferior ECT.[131]

In a majority of cases, conflicts of laws bring together substantive law and interconnected procedures. This has led EU institutions and Member States to prioritize EU dispute settlement mechanisms over other ISDS procedures. Notably, in *Eastern Sugar* the European Commission argued that "[t]he primacy of EU law and its definite interpretation by the European Court of Justice" could conflict with "a legal instance (arbitration) in another jurisdiction arriving at a different conclusion, even in an international agreement;" the Commission thus requested the termination of existing intra-EU investment agreements "in order to avoid any legal problem with regard to an arbitration procedure."[132] In *Charanne*, Spain argued that the primacy of EU law must be regarded as "including in particular the right to resolve disputes through arbitration."[133] Accordingly, in *Achmea* the CJEU held that EU law overrides Member States' investment agreements based on considerations of a jurisdictional nature, prioritizing the CJEU and excluding that arbitral tribunals can interpret and apply EU law in international investment disputes, as these are not subject to the preliminary ruling procedure under TFEU Article 267.[134] Such arguments aim to preserve the CJEU's role as the "ultimate interpreter" of the EU as an autonomous constitutional order, per TEU Article 19.[135]

The priority of EU dispute settlement mechanisms is not uncontroversial. The Arbitral Tribunal in *Masdar v. Spain* sought to limit the scope of application of the jurisdictional argument developed by the CJEU in *Achmea*, considering that the CJEU only addressed intra-EU BITs concluded by EU Member States inter-se, not extra-EU BITs and investment treaties concluded by the EU.[136] However, the rationale of *Achmea* can extend to all internal and external investment treaties concluded by the EU and its Member States.

Under both internal and external BITs and MITs, tribunals can potentially interpret and apply EU law, excluding the preliminary ruling procedure under TFEU

128. Gisèle Uwera, *Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle?*, 15 L. & PRAC.INT'L CT.& TRIBUNALS 102, 138 (2016).

129. *But see* Pohl, *supra* note 91, at 789.

130. Eureko B.V. v. The Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, at ¶¶ 279, 288.

131. Electrabel, ICSID Case No. ARB/07/19 at ¶¶ 5.37 and 5.38.

132. Eastern Sugar B.V. (Neth.) v. Czech Republic at ¶ 119.

133. Charanne & Construction Investments, SCC V 062/2012 at ¶ 208.

134. Slovak Republic v. Achmea, *supra* note 50, at ¶¶ 56-59.

135. Markus Burgstaller, *Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems*, 15 J. WORLD INV. & TRADE 551, 564 (2014); Van Rossem, *supra* note 51, at 66; Uwera, *supra* note 128, at 110-11, 131.

136. Masdar Solar & Wind Cooperatief UA v. Kingdom of Spain, ICSID ARB/14/1, Award (16 May 2018), ¶ 680. https://www.italaw.com/cases/6608

Article 261.[137] For example, under Article 42(1) of the ICSID Convention, a tribunal decides a dispute "in accordance with such rules of law as may be agreed by the parties," otherwise applying "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."[138] Thus, according to the *Achmea* principle that internationally agreed dispute settlement mechanisms are incompatible with EU law if the autonomy of EU law is not respected,[139] in Opinion 1/17, the CJEU considered valid the establishment of an ISDS mechanism under Chapter VIII (Investment) of the Comprehensive Economic Free Trade Agreement ("CETA") concluded between the EU itself and Canada.[140] Specifically, the Court considered that the CETA Tribunal and Appellate Tribunal can only apply the domestic law of the Parties, including EU law, as a matter of fact, and according to the interpretation of national courts, excluding the need for a preliminary ruling by the CJEU. The Court therein prioritized EU courts over the CETA Tribunals.[141]

More substantially, the ICSID Tribunal in *UP v. Hungary* considered its jurisdiction grounded in the ICSID Convention, a multilateral treaty that is not based on a national or regional context.[142] The argument is based on the observation that no EU rule provides that obligations under the ICSID Convention are "inconsistent with EU law," or that obligations under the ICSID Convention "have been terminated or replaced by the accession to the EU."[143] However, as we have seen,[144] substantive inconsistency between international investment agreements and the EU founding treaties cannot be excluded, which was confirmed by the *Vattenfall* Tribunal with regard to adjudication of investment disputes.[145] Conversely, it can be argued that the duties under the ICSID Convention are not overridden by obligations under the EU founding treaties. Arguably, in the international legal framework, the substantive priority of the EU founding treaties is preliminary to affirming the jurisdictional priority of the CJEU over other investment dispute settlement mechanisms. Thus, if international investment agreements are prioritized over the EU founding treaties, investor-state arbitration should apply or other adjudication mechanisms determined by the parties or conflict of laws rules, excluding the jurisdiction of the CJEU. In other words, the same logic of integration, hierarchy, specialty, and inter-temporality that applies to substantive obligations under the EU founding treaties and international investment agreements also applies to jurisdictional obligations under the same treaties. In fact, nothing limits the application in time of a supremacy clause such as EC Article 16 or the *lex specialis* and *lex posterior* principles.

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137. *See* Gavrilovic v. Croatia, ICSID ARB/12/39, Award (25 July 2018) ¶ 427; Quentin Declève, Achmea*: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, 4 *European Papers* 99, at 103 ff. (2019). https://www.italaw.com/cases/1966

138. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature March 18, 1965, 575 UNTS 159, in force October 14, 1966, 186.

139. Slovak Republic v. Achmea, C-284/16, at ¶ 57 (Mar. 6, 2018).

140. Opinion 1/17, CJEU, (April 30, 2019).

141. *Id.* at ¶¶ 131 and 134.

142. UP and CD Holding Internationale v. Hungary, Award, ¶ 253 (October 9, 2018). https://www.italaw.com/cases/6902

143. *Id.* at ¶ 259.

144. *See supra* Sections III, IV.

145. Vattenfall, *supra* note 71, at ¶ 194.

The *Vattenfall* Tribunal addressed the question analytically within the context of the decision on the *Achmea* issue. The Tribunal considered that "the corpus of EU law derives from treaties that are themselves a part of, and governed by, international law,"[146] including questions of adjudication.[147] Within this framework, the Tribunal affirmed that ECT Article 26 constitutes "the primary law applicable to the Tribunal's jurisdiction."[148] More specifically, the Tribunal held that "Article 26 ECT . . . must be read in the context of Article 16 ECT,"[149] whereby "Article 26 ECT, granting the possibility to pursue arbitration, would be understood as 'more favorable to the Investor,' insofar as the EU treaties are interpreted to prohibit that avenue of dispute resolution."[150] In other words, "ECT Article 16 is *lex specialis* as a conflict of laws rule" under public international law, it "poses an insurmountable obstacle" to the "argument that EU law prevails over the ECT" and "confirms the effectiveness of Article 26 and the Investor's right to dispute resolution, notwithstanding any less favorable terms under the EU Treaties."[151] Thus, ECT Article 16 prevents construing the EU treaties in derogation from an investor's right to access dispute resolution means under ECT Article 26, to the extent that the EU treaties and the ECT cover the same subject matter.[152] The Tribunal, therefore, concluded that the EU founding treaties cannot be interpreted to exclude ISDS under ECT Article 26, which would deprive investors of their right to dispute resolution.[153]

Furthermore, the *Vattenfall* Tribunal underscored an inextricable link between substance and procedure, because ECT Article 2 aims to create a free flow of investment in the energy field, which dispute settlement means under ECT Article 26 decisively contribute to establishing.[154] Excluding dispute resolution avenues under ECT Article 26 would run against the aim of liberalizing investment in energy under ECT Article 2.[155] The Tribunal thus concluded that ECT Article 26 does not establish a disconnection clause in favor of EU law.[156] This analysis is complemented by considerations on the impossibility of reconciling the construction of ECT Article 26 as a disconnection clause in favor of EU law with VCLT and VCLTIO Article 31(1), whereby a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[157]

From a temporal perspective, according to the *lex posterior* principle, the *Vattenfall* Tribunal considered that ECT Article 26 is law subsequent to TFEU Articles 267 and 344, establishing the exclusive jurisdiction of the CJEU. TFEU Article 267 indeed corresponds to 1992 EC Article 234 and 1957 EEC Article 177, with the only addition of the obligation to proceed without delay in delivering a

146. *Id.* at ¶ 146.
147. *Id.* at ¶ 148.
148. *Id.* at ¶ 169. *See also* Gloria Alvarez, *Redefining the Relationship Between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension*, 33 ICSID REVIEW 560, 572 (2018).
149. Vattenfall, *supra* note 71, at ¶ 192.
150. *Id.* at ¶ 194.
151. *Id.* at ¶ 229.
152. *Id.* at ¶ 195.
153. *Id.* at ¶ 196.
154. *Id.* at ¶¶ 197-198.
155. Vattenfall, *supra* note 71, at ¶¶ 198.
156. *Id.* at ¶ 202.
157. *Id.* at ¶¶ 166-67.

preliminary ruling, when the case *a quo* concerns a person in custody. TFEU Article 344 corresponds to EC Article 292 and EEC Article 219.[158]

The situation would have been different if, as argued by the European Commission in *Vattenfall* and other cases, particularly in *Electrabel*,[159] the EU Member States had concluded an agreement carving out the application of dispute settlement mechanisms under ECT Article 26 *inter se* and for the EU. The Arbitral Tribunal in *Vattenfall*, however, excluded this hypothesis.[160] The ICSID Tribunal in *Landesbank Baden-Württemberg and Others v. Spain* recently supported these arguments.[161] Interestingly, the *Landesbank* Tribunal excluded the possibility of carving out intra-EU ECT relationships from the network of multilateral relationships established by the ECT.[162]

B. Enforcement

In *Micula and Others v. Romania*, a Swedish investor was dispossessed of financial support granted by Romania for investment in disfavored regions and subsequently reintegrated into the supporting scheme by an ICSID Arbitral Tribunal for a breach of the FET standard under Article 7 of a BIT concluded in 2002 between Romania and Sweden.[163] Romania, supported by the European Commission acting as *amicus curiae*, prevented recognition and enforcement of the award within its territory, considering this in breach of State aid rules under EU law, and Micula brought suit in the ECJ.[164] The Court held that EU law could not override a BIT pre-dating accession of Romania to the Union and allowed enforcement.[165] Thus, conflicts of rules on enforcement must be resolved in light of the principles of harmonization, hierarchy, *lex specialis*, and *lex posterior*, which indeed have no limited application in time.[166]

International investment agreements often include supremacy clauses addressing enforcement. For instance, ECT Article 26 provides that "[t]he awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute" and "[e]ach Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards." An implied primacy clause is included in ICSID Convention Article 54, providing that "[e]ach Contracting State shall recognize an award rendered . . . as binding and enforce the pecuniary obligations imposed by that award within

158. *Id.* at ¶ 218.
159. *See supra* Section II.
160. Vattenfall, *supra* note 71, ¶ 188.
161. Landesbank Baden-Württemberg and Others v. Spain, ICSID ARB/15/45, Decision on the 'Intra-EU' Jurisdictional Objection, February 25, 2019, ¶¶ 101, 150, 168-169, and 182-184. See also Spain v. Novenergia, where the Svea Court of Appeals recently rejected a request for a CJEU preliminary ruling on the applicability of the ECT in intra-EU investment disputes (Spain v. Novenergia II, Svea Court of Appeal, T 4658-18, Decision of April 25, 2019).
162. Landesbank Baden-Württemberg, at ¶ 148.
163. Micula and Others v. Romania, ICSID Case No. ARB/05/20, Award, ¶ 827. (Dec. 11, 2013).
164. Micula v. Commission, T-704/15 and T-694/15, Judgment of the General Court (Jun. 18, 2019). *See also* Koutrakos, *supra* note 120, at 880; Hanno Wehland, *The Enforcement of Intra-EU BIT Awards: Micula v. Romania and Beyond*, 17 JWIT 942, 944 and 959-961 (2016); Tietje and Wackernagel, *supra* note 100, at 235 (positing the supremacy of EU primary law over international investment agreements in light of TFEU Articles 216(2) and 351).
165. Micula v. Commission, Judgment, at ¶¶ 92 and 100-111. (Jun. 18, 2019).
166. STRIK, *supra* note 9, at 245.

its territories as if it were a final judgment of a court in that State."[167] Also, international agreements governing the enforcement of foreign decisions include supremacy clauses. For instance, Article III of the 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards[168] provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." Article 4 of the Hague Convention on the Recognition and Enforcement of Foreign Judgments[169] establishes that "[a] judgment given by a court of a Contracting State (State of origin) shall be recognized and enforced in another Contracting State (requested State)."[170]

While the ICSID Convention does not admit exceptions, under Article (V)(1)(b) of the New York Convention and Article 7(c) of the Hague Convention exceptions to enforcement are limited to specific circumstances, such as public policy imperatives. Thus, at the State level, only if it was considered to be against public policy imperatives, could the enforcement of a foreign judgment or award be refused, leaving little margin for discretion.[171]

Scholars have argued that, as the EU is not a party to the ICSID, New York, and Hague Conventions, primary and secondary EU law could prevent enforcement.[172] In the context of commercial arbitration, in *Eco Swiss China Time Ltd v Benetton International NV*, the ECJ held that EU law also accepts the enforcement of arbitral awards that are based on an erroneous application of EU law, as long as such enforcement is not against a "fundamental provision . . . essential for the accomplishment of the tasks entrusted to the Community."[173] According to the *Bosphorus* doctrine,[174] given that investors' protection under international investment agreements is "equivalent" to that granted under EU law, only in cases of "gross" violations of EU law, should EU Member States' courts refuse enforcement of a foreign judgment or award.[175] This is again a dualistic approach, but from the perspective of international law, an EU Member State is bound by the ICSID, New York, and Hague Conventions in the same way it is bound by the EU founding treaties. So long as the clauses embedded in the former instruments prevail, the EU founding treaties should be disregarded.

VI. CONCLUSION

The legal order of the EU covers, *inter alia*, matters of investment liberalization and protection. This raises problems of consistency for internal and external investment agreements concluded by the EU and its Member States regarding MFN, NT, and FET. Such issues have given rise to a variety of disparate opinions, prioritizing

167. Tietje and Wackernagel, *supra* note 100, at 225.
168. Adopted June 10, 1958, 330 U.N.T.S. 3, (entered into force Jun. 7, 1959).
169. Adopted July 2, 2019.
170. Hague Conference on Private International Law, *opened for signature* Feb. 1, 1971, (entered into force Aug. 20, 1979), https://www.hcch.net/en/instruments/conventions/full-text/?cid=78.
171. *See* STRIK, *supra* note 9, at 221-223; Wehland, *supra* note 164, at 953; Pohl, *supra* note 91, at 784-785.
172. Tejtie and Wackernagel, *supra* note 100, at 213.
173. Eco Swiss China Time Ltd v Benetton International NV, C-126/97, ECR I-3055, ¶¶ 35-36 (1999).
174. Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland, Application 45036/98, Judgment, ¶ 155 (Jun. 30, 2005).
175. Tejtie and Wackernagel, *supra* note 100, at 244.

either the EU founding treaties and EU law more generally or international investment agreements.

Uncertainty concerning the scope of the conflict arises in light of the sources of EU law as part of international law. Notably, when a harmonious interpretation under VCLT and VCLTIO Article 31(3)(c) is barred, TFEU Articles 218(11) and 351 can be interpreted as establishing an implicit (*a contrario*) general priority of the EU founding treaties over the international agreements of the EU and its Member States. This priority is valid from the internal standpoint of the Union, establishing EU law as *lex superior*. However, a conflict arises under public international law between the EU founding treaties and international investment agreements concluded by the EU and its Member States, when the latter includes a primacy clause, such as ECT Article 16, giving rise to a conflict of supremacies among equal ranking conventions.

Given the impossibility of applying the principle of supremacy (*lex superior*), under public international law conflicts between international investment agreements concluded by the EU and its Member States and the EU founding treaties must be resolved in light of the principles of specialty (*lex specialis*) and inter-temporality (*lex posterior*). This requires a case-by-case assessment, but essentially, even when they are not *lex posterior*, international investment agreements concluded by the EU and its Member States, such as the ECT, are *lex specialis* because the EU founding treaties cover a much more general subject area. A different outcome is only possible if the parties to a specific investment agreement explicitly prioritize EU law in an investment contract.

Determining applicable substantive law has critical procedural implications. The same principles that govern substantive rights apply to dispute settlement and enforcement. This entails that EU adjudication does not exclude other dispute settlement means, such as ISDS. Furthermore, decisions delivered via extra-EU dispute settlement mechanisms should be enforceable within the EU, save public policy imperatives.