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The Relevance of EU Law for Arbitral Tribunals – (Not) Managing the Lingering Tension

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Abstract

The tensions between intra-EU BITS and EU law have become increasingly visible: they involve national and transnational courts, arbitral tribunals and courts in third states, and arise in a variety of procedural settings and with increasing intensity. Written at time when questions about the very foundations of the interactions between EU and intra-EU BITS have been raised before the European Court of Justice, this article highlights the legal and policy factors that may explain the intensity of the current dilemmas. It reflects on the maximalist and polemical approach that a number of actors have adopted over the years, and points out the pitfalls of ignoring the usefulness of pragmatism and comity.

Keywords

comity; EU; European Court of Justice; intra-EU BITS; maximalism; Micula

1 Introduction

The entry into force of the Lisbon Treaty and the attribution of express external competence to the European Union (EU) in the area of foreign direct investment added a layer of complexity to the relationship between EU and international investment law. This has been compounded by the increasingly prominent, seductively ill-defined and apparently ever expanding principle of autonomy of EU law that has emerged from the case-law of the European Court of Justice. Coupled with the confident approach of the European Commission to the development of the EU's investment policy and the, at times, aloof response of arbitral tribunals to EU-law based arguments, these developments have thrown the challenges of the interactions between EU and international investment law into sharp relief. At the time of writing, there are cases pending before the Court of Jus-

tice about the fundamentals of the relationship between intra-EU bilateral investment treaties (BITs) and EU law. The fact that these cases have arisen in different disputes and in various procedural settings (enforcement actions, preliminary reference, annulment proceedings) illustrates the topicality and urgency of the underlying issues.

This article does not aim to provide a comprehensive and detailed analysis of the various arguments about the role of EU law in disputes brought before investment tribunals. This has been done frequently and well.¹ Instead, the aim of this analysis is narrower. On the one hand, it will tease out some broad themes from the position that a number of actors in intra-EU BITs disputes have taken on the relevance of EU law. On the other hand, it will highlight the legal and policy factors that may explain the intensity of the current dilemmas on the interactions between EU and international investment law.

2. The One End of the Spectrum: The Maximalist Flavor of the Inapplicability Objection

The consistency with which Member States and the European Commission have raised the objection of inapplicability of intra-EU BITs in arbitration proceedings may only be compared to the consistency with which arbitral tribunals have rejected it. Different arguments have been put forward to substantiate this objection, a striking one being the automatic termination of the relevant agreements following accession to the EU by both its parties. The force and 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 which were viewed by the Arbitral Tribunal ‘for the most part diplomatic and ambiguous’ and which suggested that automatic termination was not advocated.² 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

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¹ For post-Lisbon analysis, see, for instance, Jan A Bischoff, ‘Just a Little *BIT* of “Mixity”? The EU’s Role in the Field of International Investment Protection Law’ (2011) 48 CMLRev 1527, Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011), Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart 2014).

² *Eastern Sugar BV (Netherlands) v The Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007), para 119 (the quote is from para 120).

the European Union, terminating the latter, or, at the very least, rendering Articles 7 and 10 of that BIT inapplicable'.³

As a matter of principle, this objection⁴ may not be surprising in the light of normative and policy considerations. The former are about the principle of autonomy of EU law that, in the light of the recent case-law of the Court of Justice (for instance in Opinion 1/09⁵ and Opinion 2/13⁶) has been construed in increasingly broad terms.⁷ The policy factor is about the competence of the Union to carry out an investment policy, not least pursuant to the revamped provision of Article 207(1) TFEU. It is also about the emerging policy that the EU has been seeking to define both internally and externally. The former is shaped by the grandfathering⁸ and financial responsibility⁹ Regulations as well as the

³ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Decision on Annulment (26 Februar 2016) 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: *Enkev Beheer B.V. v Poland*, PCA Case No 2013-01, Partial Award (29 April 2014)

⁴ See the discussion in 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' (2012) 39 LIEI 157.

⁵ CJEU, Case C -1/09, *Opinion delivered pursuant to Article 218(11) TFEU - Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties* [2011] ECR I-1137.

⁶ CJEU, Case C- 2/13, *Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties* ECLI:EU:C:2014:2454.

⁷ For an analysis of the principle in the context of investment law, see Steffen 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 Eur YBIEL 187.

⁸ Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2013] OJ L 351/40.

⁹ Regulation 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257/121. See Jan Kleinheisterkamp, 'Financial Responsibility in European International Investment Policy' (2014) 63 ICLQ 449.

policy document *Towards a comprehensive European international investment policy*.¹⁰ The latter relate to the investment chapters in the Comprehensive Economic and Trade Agreement with Canada 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 this objection. On the one hand, this approach raises the wider issue of how the EU places itself in relation to other international legal regimes: in a widely decentralized and multilayered international order, the invalidity objection seeks to eliminate a form of international adjudication central to this policy area without ensuring first that no other way of co-existence would be possible. As such, it appears to support claims about the uneasiness of the EU's executive and judiciary regarding the Union's place in the wider international legal order (I shall return to this point below).

On the other hand, the argument about the automatic termination of intra-EU BITs may raise some more specific legal issues. First, it marginalises the significance of the termination procedures in BITs. By disregarding the international law nature of the rules which 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 of the international rules on the termination of the relevant treaty concluded by the Member State.¹¹ In doing so, the Court of Justice takes the rule laid down in 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 compatibil-

¹⁰ COM (2010) 343 (Brussels, 7 July 2010).

¹¹ See, for instance, CJEU, Case C-478/07, *Budvar* [2009] ECR I-7721.

ity of intra-EU BITs directly by bringing enforcement actions against certain Member States is, in normative terms, preferable.¹²

Secondly, the objection of invalidity is 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 the European Economic Community, as it then was, the rights and obligations they had assumed pursuant to GATT 1947.¹³ Admittedly, the two cases are not entirely similar: the latter case was about whether the Community was bound by an agreement concluded by its Member States, whereas, in relation to intra-EU BITs, the Commission has been seeking to fend off challenges against Member States pursuant to an international treaty by arguing for the invalidity of the latter in the light of EU law. There is, however, an analogy to be made between the two legal contexts in so far 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:¹⁴ 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 in relation to the rights and obligations laid down in the latter.¹⁵ This strand of case-law suggests that

¹² 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).

¹³ CJEU, Joined Cases 21 to 24/72, *International Fruit Company* [1972] ECR I-1219.

¹⁴ See the analysis in Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart 2015) 212-219 and Robert Schuetze, 'The "Succession Doctrine" and the European Union' in Anthony Arnall et al (eds), *A Constitutional Order of States? Essays in Honour of Alan Dashwood* (Hart 2011) 459.

¹⁵ CJEU, Case C-366/10, *Air Transport Association of America (ATAA)* [2011] ECR I-13755 para 63 regarding the Convention on International Civil Aviation. See also CJEU, C-301/08 *Bogiatzi* [2009] ECR I-10185. about the Convention for the Unification of Certain Rules Relating to International Carriage by Air; Case C-379/92, *Peralta* [1994] ECR I-3453 para. 16. and Case C-308/06, *Inter-*

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 if there is a complete overlap between the provisions of the former and the latter.

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? The answer is far from clear-cut, as the legal landscape of investment policy as a matter of EU law is somewhat elusive. The Commission is keen to stress the wide scope and exclusive nature of the Union’s competence in the area of investment and to underline the significance to that effect of the entry into force of the Lisbon Treaty. However, the scope and nature of the Union’s competence is far from clear, a fact that the pending request for an Opinion on the conclusion of the EU-Singapore Free Trade Agreement illustrates rather starkly.¹⁶ To raise a specific point about Title IV Chapter 4 on capital and payments: is the competence these provisions confer on the EU exclusive in relation to portfolio investment? Article 64(2) TFEU confers competence ‘in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets’. Measures adopted on the provision of financial services or the admission of securities to capital markets govern aspects of portfolio investment and may, therefore, have an impact on the rules governing it. They do not, however, cover all aspects of portfolio investment,¹⁷ the latter being defined by the Court ‘the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (‘portfolio’ investments)’.¹⁸ The scope of regulatory measures, therefore, that may affect portfolio investment is broad and does not appear to be covered fully by the competence conferred in Article 64(2) TFEU. In the light of the

tanko [2008] ECR I-4057, 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.

¹⁶ CJEU, *Opinion 2/15, EU-Singapore Free Trade Agreement* (pending).

¹⁷ See Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 150.

¹⁸ CJEU, Case C-182/08, *Glaxo Wellcome* [2009] ECR I-8591 para 40

above, the invalidity objection raised in relation to intra-EU BITs is not fully substantiated.

Thirdly, the invalidity objection 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.¹⁹ 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 judgment of the Court of Justice in *Mox Plant*²⁰ is based on the same misguided premise. The judgment 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.²¹

3 The Other End of the Spectrum: The Lack of Comity in the Application of BITs

The above section highlighted a maximalist quality which characterises a specific line of attack against intra-EU BITs. Arbitral tribunals, however, have been similarly difficult in their approach to the coexistence of the EU legal order with BITs.

The *Micula* saga is a case in point. A first point of tension appears in the approach of the Arbitral Tribunal to the issues of enforceability of the award and the interpretation of EU law. In relation to the former, both Romania and the European Commission raised concerns about the award of damages. On the one hand, Romania stressed the state aid nature of any damages award and the ensuing obligation of national authorities to inform the Commission in accordance with the Union's state aid rules. On the other hand, the Commission underlined the public order nature of the EU competition rules, already stressed in *Eco Swiss*,²² and pointed out the difficulties that national courts would face when asked to enforce the award: whilst bound by Article 54(1) of the ICSID Convention

¹⁹ See also Strik (n 1) 217.

²⁰ CJEU, Case C-459/03, *Commission v Ireland* [2006] ECR I-4635.

²¹ See the criticism in Koutrakos (n 14) 185-6.

²² CJEU, Case C-126/97, *Eco Swiss* [1999] ECR I-3055 paras 36-39.

to treat the award as if it were a final judgment of a national court, they would also be bound by the supremacy of EU law and their duty to refer to the Court of Justice. The Commission also pointed out a further complicating factor, that is the fact that, whilst the Union's Member States were bound by the ICSID Convention, the EU itself was not.

The Arbitral Tribunal did not address these concerns. In fact, it did not engage with either their substance or their implications. Instead, it considered them irrelevant, as it held as follows: 'it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered'.²³

Instead, the Arbitral Tribunal merely duplicated the text of Articles 53 and 54 ICSID Convention.²⁴ By distinguishing between the legality of national conduct under the BIT rules and the practical difficulties of enforcing the arbitral award, the Tribunal may appear to focus on the narrow issue of compliance with international law. Its approach, however, as illustrated by the striking economy of the above extract, is unduly formalistic. It ignores the fiendishly complex legal framework within which national courts would be called upon to enforce the award whilst they would struggle to identify their obligations under parallel and interacting sets of rules. The Tribunal refused to engage with this

²³ *Micula*, ICSID Case No. ARB/05/20, Award (11 December 2013) para. 340.

²⁴ Article 53 ICSID Convention reads as follows: '(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52'. Article 54 ICSID Convention reads as follows: '(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.'

legal context, hence providing no assistance to either the State which was found to have violated its BIT obligation, or the national court.

A similar lack of engagement is provided in the reasoning of both the Arbitral Tribunal and the ICSID *ad hoc* Committee in *Micula* regarding the interpretation of substantive EU law. In particular, there are two problems with their approach. The first is about the Tribunal's understanding of the application of EU law in Romania. The European Commission relied upon the state aid provisions of the Europe Agreement between the then EEC and its Member States and Romania²⁵ in order to stress the legal context within which the Sweden-Romania BIT should be interpreted (and which the Arbitral Tribunal had allegedly ignore). Admittedly, some of these provisions were somewhat vague and imposed only an obligation of result. For instance, Article 69 of the Europe Agreement with Romania provided as follows:

The Parties recognize that an important condition for Romania's economic integration into the Community is the approximation of Romania's existing and future legislation to that of the Community. Romania shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

Similarly, Article 70 referred specifically to competition law as an area where approximation should be achieved. Article 64 of the Agreement, however, refers expressly to state aid and the specific criteria set out in the Union's primary rules. Whilst, the latter rules were not applicable as such to Romania prior to its accession to the EU, they were intrinsically linked to the set of international rules laid down in the Europe Agreement. As such, they placed Romania's legislation in a specific legal context. To ignore this, as the Arbitral Tribunal did in *Micula*, was unduly formalistic. It was also inconsistent with the Tribunal's own pronouncements about the place of EU law in its award. It held, for instance, that 'the general context of EU accession must be taken into account when interpreting the BIT' and that 'the overall circumstances of EU accession may play a role in

²⁵ [1994] OJ L 357/2 *Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part.*

determining whether Romania breached its BIT obligations.²⁶ In this vein, it held that ‘the overall context of EU accession in general and the pertinent provisions of EU law in particular may be relevant to the determination of whether, *inter alia*, Romania’s actions were reasonable in light of all the circumstances, or whether Claimants’ expectations were legitimate’.²⁷ And yet, the award is characterized by a distinct lack of engagement with this context. This lack of engagement is also striking in the *ad hoc* Committee’s Decision on Annulment.

The analysis in this article does not suggest that arbitral bodies ought to accept the arguments put forward by the Commission in order to buttress the supremacy of EU law in its interactions with international investment law. It points out, however, the distinct lack of engagement with the practical realities within which these complex legal issues are raised. This is problematic in the complex system of parallel and interacting legal regimes. As Bermann points out, ‘[a]ccommodation techniques play a vital role in a world populated with multiple international legal orders and multiple first principles’²⁸.

After all, this lack of engagement is by no means the only option for the arbitral bodies. A case in point is the approach of the Arbitral Tribunal in *European American Investment Bank AG v Slovakia*.²⁹ Whilst the Tribunal rejected all the jurisdictional objections put forward by both the Commission and Slovakia, it engaged with them and its award on jurisdiction illustrated an understanding of the concerns that may be raised in the EU context. For instance, it addressed the arguments about the force of the Court of Justice’s rejection of the jurisdiction of a Patent Court in *Opinion 1/09* and made it clear that it had no power to determine the validity of an act of an EU institution.³⁰ In doing so, the Arbitral Tribunal adopts an approach similar to that underpinning the *Kadi* case-law of the Court of Justice: it is recalled, that in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, the Court distinguished between the international legal order (the

²⁶ *Micula* (n 23) para 327.

²⁷ *ibid* para 328.

²⁸ George Bermann, ‘Navigating EU Law and the Law of International Arbitration’ (2012) 28 *Arbitration International* 397, 445.

²⁹ *European American Investment Bank AG v Slovakia*, PCA Case No 2010-17, Award on Jurisdiction (22 October 2012).

³⁰ *ibid* para 263.

rules of which were set out in UN Security Council Resolutions and implemented by the EU on the basis of the contested secondary measures) and the Union legal order (within which the EU Courts enjoy exclusive jurisdiction).³¹ It was in the light of that separation that the Court held that its power to rule on the consistency of EU measures implementing a UNSC resolution with a higher rule of law in the EU legal order would not entail any power to rule on the legality of the UN Resolution itself.

The engagement of the Arbitral Tribunal in *European American Investment Bank AG v Slovakia* with the EU law is illustrated in other ways too. The Tribunal pointed out that, within the UNCITRAL framework, ‘it is possible to have infringement proceedings in the case of awards of arbitral tribunals constituted under the BIT like this Tribunal, at the stage of enforcement in the European Union’³² and stressed that ‘the ECJ maintains the possibility, through different mechanisms, to have the final and authoritative word on the interpretation of EU law’.³³ In fact, it is interesting that the Tribunal should go out of its way to suggest that the existence of a parallel arbitration-based mechanism need not raise problems for either the interpretation or application of EU law.³⁴ This approach illustrates a clear nod to comity that needs to underpin the relationship between independent judicial bodies entrusted with the parallel adjudication of interlocking sets of transnational law.

The lack of engagement with EU law characterizing the approach of the Arbitral Tribunal and the ICSID *ad hoc* Committee in *Micula* also extends, somewhat bizarrely, to national courts. Once the Arbitral Tribunal in *Micula* awarded the claimants \$250m in damages, they brought an action before the Bucharest Tribunal seeking to enforce the award. In May 2014, the national court allowed the execution of the award. Once the Romanian authorities challenged this decision, the Bucharest Tribunal stayed the execution of the Award pending a decision on the merits of the challenge. The Commission intervened in these proceedings and argued that either the enforcement of the award should be annulled or that a reference should be made to the Court of Justice pursuant to

³¹ CJEU, Case C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paras 287-288.

³² *ibid.*

³³ *ibid* para 266

³⁴ *ibid.*

Article 267 TFEU. On 13 October 2014, the Bucharest Tribunal declined to refer to the Court of Justice (and five weeks later it also rejected Romania's main action against the execution of the Award). The refusal to refer followed two weeks after the Commission had opened the formal investigation procedure against Romania pursuant to Article 108(2) TFEU in respect of the partial implementation of the Award by Romania that took place in early 2014.³⁵

It is clear that the Bucharest Tribunal was not in an easy position. The award was binding pursuant to Article 54 of the ICSID Convention and the national court ought to deal with it as if it were a final judgment of a Romanian court. Furthermore, as a court of first instance, it enjoyed complete discretion as to whether to refer to the Court of Justice under Article 267 TFEU.³⁶ It is, however, striking that the Bucharest court should not have felt the need to refer for a matter of such legal complexity.³⁷ This is all the more so given the initiation of the state aid investigation by the Commission which had rendered the concrete clash between EU and international investment law all but inevitable. This conduct of the national court amounted to a breach of the duty of cooperation that is laid down in Article 4(3) TFEU and lies at the core of the preliminary reference procedure. The Court of Justice has repeatedly emphasized the central role of national courts in the Union's system of judicial architecture: in *Opinion 1/09*, it referred to them as 'the guardians of [the Union] legal order and [its] judicial system',³⁸ and held that 'the tasks attributed to [them] are indispensable to the preservation of the very nature of the law estab-

³⁵ State aid SA.38517 (2014/C) (ex 2014/NN) [2014] OJ C 393/27 *Procedures Relating to the Implementation of the competition policy, State aid Romania*.

³⁶ See, amongst others, CJEU, Case C-166/73, *Rheinmühlen* [1974] ECR I-33, para 4 and Case C-251/11, *Huet* ECLI:EU:C:2012:133 para 24.

³⁷ For the view that national courts ought to take into account EU law and refer to the Court of Justice in the context of ICSID disputes, see Markus Burgstaller, 'European Law Challenges to Investment Arbitration' in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 455, 473, Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58 ICLQ 297 and Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 CMLR 383, 428.

³⁸ CJEU, Case C-1/09 *Opinion delivered pursuant to Article 218(11) TFEU - Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties* [2011] ECR I-1137 para 66.

lished by the Treaties'.³⁹ It is nothing short of staggering that the Bucharest Tribunal should have felt sufficiently confident to ignore the controversial issues raised by the interactions between EU and international investment law in the dispute before it and to consider it unnecessary to rely upon the judicial dialogue avenue open to it pursuant to Article 267 TFEU.

This section has referred to bodies responsible for the application and interpretation of international rules and has outlined instances of distinct reluctance to engage with the subtleties and complexities raised by the interaction of these rules with EU law. Such an approach may appear to be, at best, not receptive and, at worst, hostile to any claim to legal exceptionalism that the EU may be seen to make for itself. As such, it may appear to be justifiable in the light of what many view as the increasingly strident approach of the Court of Justice – a court which is prepared to show deference to international law only in so far as it suits the strengthening of its own jurisdiction. The charge is that the Court acts as ‘the gatekeeper’⁴⁰ which chooses which parts of international law may penetrate the EU legal order and be enforced against secondary measures, as, in fact, it is ‘highly reluctant to give any effect to international law’.⁴¹ This criticism has been levelled not only in relation to the direct effect of international agreements within the EU legal order but also in other fields where EU law interacts with international law. In particular, two areas have attracted considerable criticism, namely the Court’s approach in the *Mox Plant* case,⁴² and the endlessly discussed *Kadi* line of cases.⁴³ The latter has been criticised as ‘inward-looking’ and at odds with ‘the self-presentation of the EU as an or-

³⁹ *ibid* para 85.

⁴⁰ See Marise Cremona, ‘External Relations and External Competence of the European Union’ in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 217, 242.

⁴¹ Jan Klabbers, *The European Union in International Law* (Pedone 2012) 77. See also Giorgio Gaja, ‘Trends in Judicial Activism and Judicial Self-Restraint Relating to Community Agreements’ in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer 2002) 118, 128–30.

⁴² CJEU, Case C-459/03, *Commission v Ireland* [2006] ECR I-4635.

⁴³ CJEU, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-6351 and subsequent case-law.

ganization which maintains particular fidelity to international law and institutions’,⁴⁴ and the latter is viewed as indicative of a broader approach which enables the Court of Justice to be, at best, selective in its reliance upon and application of international law.⁴⁵

The picture that emerges from the Court’s case-law, however, is somewhat subtler. A case in point is the judgment in *Mox Plant* (a reflection on the *Kadi* case-law will be offered in the following section). This judgment is relied upon frequently in order to substantiate the exclusivity of the Union’s judiciary in relation to any other international adjudication system where EU law may pertain to an international law dispute. Whilst the judgment in *Mox Plant* is unnecessarily complex and its analysis esoteric,⁴⁶ it ought to be viewed within the specific legal and factual context within which it was rendered. First, this was a judgment rendered in an interstate dispute, and in particular a dispute that involved two Member States. This was not a dispute about an individual seeking to enforce rights conferred by an international treaty against a State. Secondly, the international treaty in question that set up an independent dispute settlement system sanctioned, as an alternative, recourse to the EU enforcement proceedings.⁴⁷ Thirdly, at no point was there any doubt that the Irish government had submitted a number of EU secondary measures to the Arbitral Tribunal so that the latter would interpret and apply them to the dispute before it. In other words, what the Court of Justice dismissed as illegal in *Mox Plant* was recourse to a dispute settlement system which would create the risk of disjunction between the interpretation of EU law by the Court of Justice and the Arbitral Tribunal in a context where international law itself had rendered such a risk entirely avoidable. Viewed from this angle, there is no reason why the Court should not have exercised its jurisdiction to interpret and apply EU law and the duty of cooperation between Member States in that context.

⁴⁴ Grainne de Búrca, ‘The ECJ and the International Legal Order: A Re-evaluation’ in Grainne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 105, 140.

⁴⁵ Jan Klabbbers, ‘*Volkerrechtsfreundlich?* International Law and the Union Legal Order’ in Panos Koutrakos (ed), *European Foreign Policy—Legal and Political Perspectives* (Edward Elgar 2011) 95.

⁴⁶ See Panos Koutrakos (n 14) 184-191.

⁴⁷ Art 282 UNCLOS.

In the light of the above, the lack of engagement illustrated by Arbitral Tribunals and national courts alike in *Micula* undermine the smooth management of the interactions between international investment law and EU law whilst lacking in understanding of the subtleties of the EU courts' approach to the international law.

4 Testing the Limits in a Politically Charged Environment

The Arbitral Tribunal Award in *Micula* has given rise to a series of responses which have challenged the relationship between EU and international investment law in different ways and before various *fora*. On the one hand, 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.⁴⁸ It also held that Romania should recover any compensation it had already paid to the Micula brothers in implementation of the award. This Decision has been challenged by the Micula brothers before the General Court of the European Union, alleging, amongst others, violation of Article 351 TFEU and general principles of law, as well as incorrect application of the state aid rules.⁴⁹

On the other hand, the Micula brothers have sought to enforce the award before national courts in United Kingdom, Belgium, France, and Luxembourg, as well as in Romania. They have also brought proceedings in the United States where the District Court of the Southern District of New York recognised the award, a judgment which is under appeal by Romania. In the proceedings before the US Court of Appeals for the Second Circuit, the European Commission has submitted an *amicus curiae* brief in which it argues that the judgment under appeal was 'jurisprudentially imprudent', as it ignored the principle of international comity.⁵⁰

In the light of the proliferation of disputes between different *fora*, the *Micula* saga reveals the tensions between EU and international investment law in unusually stark colours. This development may be explained by the reluctance of the dispute settlement bod-

⁴⁸ 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.

⁴⁹ GC, Case T-694/15, *Micula/Commission* and GC, Case T-704/15 *Micula and others/Commission*.

⁵⁰ <http://www.italaw.com/sites/default/files/case-documents/italaw7096.pdf>, p18.

ies involved to engage with the complex legal context of the case, and the refusal of Romanian courts to have recourse to the preliminary reference procedure. Another factor which has contributed to the testing of the limits of the relationship between EU and international investment law is the non-applicability of a public policy clause, similar to that of Article V(1)(c) and (3) and II(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) which could have given a way out of the impasse on the basis of the *Eco Swiss* judgment.⁵¹

As far as the European Commission is concerned, its willingness to test the limits of the interactions between EU law and international investment of law ought to be viewed within a wider policy context. This has been dominated by both activism about the development of the Union's international investment policy and confidence about the reach and nature of that policy. These characteristics are apparent at policy-making and judicial levels. As far as the former is concerned, the Commission's intense activity in negotiating investment chapters with third countries (negotiations have been finalized regarding the Comprehensive Economic and Trade Agreement with Canada and the Agreements with Singapore and Vietnam) is matched by its efforts to introduce a new system of investment dispute settlement which would replace arbitral tribunals with an investment court.⁵² The provisions of the Comprehensive Economic and Trade Agreement (CETA) and the Agreement with Vietnam provide for the establishment of an investment court for investor-State disputes.⁵³ In fact, the new provisions on investor-State dispute settlement in CETA include provisions which appear to cater for the type of situation we are now

⁵¹ CJEU, Case C-126/97, *Eco Swiss China Time Ltd* [1999] ECR I-3055.

⁵² Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (12 November 2015).

⁵³ See Frank Hoffmeister and Gabriela Alexandru, 'A First Glimpse of Light on the Emerging Invisible EU Model BIT' (2014) 15 *JWIT* 379.

facing in *Micula*.⁵⁴ The Commission has, furthermore, argued that the Union's international investment policy falls within the Unions' exclusive competence pursuant both to Article 207 TFEU on the Common Commercial Policy and the TFEU provisions on movement of capital (currently examined in *Opinion 2/15* in the context of the EU's Free Trade Agreement with Singapore). At the time of writing, the case is still pending. Suffice it, however, to make two points. First, in its submissions in *Opinion 2/15*, the European Commission puts forward a remarkably broad construction of foreign direct investment under 207 TFEU and of portfolio investment under Article 63 TFEU and it articulates it with notable force. Secondly, this is an issue of acute sensitivity for Member States: it is recalled, for instance, that in its Lisbon Treaty judgment, the German Constitutional Court expressly rejected a broad reading of the Union's exclusive competence in the area of investment.⁵⁵

Viewed along the enforcement actions against five Member States for the alleged incompatibility of their BITs with other Member States, this activity illustrates the Commission's confidence about the Union's emerging role as an international investment actor and the role of EU law in the development of the broad scope and intensity of this policy.

On the other hand, the tensions that emerge from the interactions between EU and international investment law may put Member States in an unenviable position. The *Micula* case illustrates this in stark terms, as compliance with its international obligations pursuant to its BIT with Sweden would entail for Romania a violation of the EU's state aid law and the principle of supremacy. The Arbitral Tribunal, the ICSID *ad hoc* Committee, its

⁵⁴ Art 8.9(3) of Ceta-Text: 'For greater certainty, a Party's decision not to issue, renew or maintain a subsidy: (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or (b) in accordance with any terms of conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach of the provisions of this Section'. Article 8.9(4): 'For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor.'

⁵⁵ German Federal Constitutional Court, 2 BvE 2/08, Judgment (30 June 2009) para 379.

national courts, and the European Commission appear to pull Romania in opposite directions by requiring that it comply with seemingly irreconcilable legal positions.

This phenomenon, however, is by no means unique where interacting legal orders raise fundamental questions about EU law and its position in the international system. One may recall, for instance, the case-law in *Kadi* where in effect, EU law was criticized for rendering it impossible for Member States, as a matter of EU law, to comply with their international law obligations under the UN Charter to give effect to the UN Security Council Resolutions setting out the smart sanctions regime against private parties. This is not, however, what happened in practical terms. Mr Kadi was listed in October 2001, the Court of Justice rendered the judgment in *Kadi I* in September 2008, and Mr Kadi was delisted in October 2012,⁵⁶ that is nine months before the Court rendered its judgment in *Kadi II*.⁵⁷ At no point during this long period was the EU forced to ignore the UN measures requiring that Member States freeze his assets.⁵⁸ The pronouncement of the illegality of the EU implementing regulations, therefore, did not entail a violation of international law by the Member States. In fact, at no point during the long period of the *Kadi* saga were either the EU or the Member States forced to ignore the UN measures requiring that national authorities freeze the assets of the applicants.

Instead, the case-law of the Court of Justice on *Kadi* provided the catalyst for the development of the sanctions system at UN level and its gradual adjustment in order to become more transparent and fair. There is another factor at play here which makes this parallel quite interesting: when the judgment in *Kadi I* was rendered, there had already been considerable disquiet amongst international lawyers and policy-makers about the design and functioning of the UN sanctions system. Viewed from this angle, far from signaling detachment from international law, the case-law on *Kadi* illustrates active engagement with its development.

⁵⁶ Commission Implementing Regulation (EU) 933/2012 [2012] OJ L278/11, following a decision by the Sanctions Committee (SC/10785 of 5 October 2012).

⁵⁷ CJEU, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518.

⁵⁸ The point is made in Joris Larik, 'EU Counter-Terrorism and the "Strict Observance of International Law": Sewing the Seamless Coat of Compliance' in Ester Herlin-Karnell and Claudio Matera (eds), *External Dimension of the EU Counter-Terrorism Policy* (2014) CLEER Working Paper 2014/2 33.

There is an interesting similarity in the charged and strongly politicized context within which the EU courts are asked to adjudicate on the issues in the *Kadi* litigation, on the one hand, and those raised by the EU-international investment dispute settlement cases, on the other hand. The former questioned the transparency of international and supranational mechanisms which impinged on fundamental human rights. The latter has emerged at a time of a lively debate about the very function of arbitral tribunals in international relations, including issues about the transparency of their work, the absence of appellate procedures, their impingement on the States' right to regulate and their broad construction of indirect expropriation and fair and equitable treatment. Whilst by no means novel,⁵⁹ this crisis has attracted considerable attention beyond the confines of academia and legal practice in the context of the negotiation of the Transatlantic Trade and Investment Partnership between the EU and the United States. So overwhelming had the disquiet been, that the Commission carried out an online opinion survey in 2014 about the investor-State dispute settlement (ISDS) provisions in the Transatlantic Trade and Investment Partnership (TTIP). In its report, the Commission pointed out that the 'collective submissions reflect a wide-spread opposition to investor-State dispute settlement ... in TTIP or in general'.⁶⁰

It is against the above politically charged and controversial context⁶¹ that the Commission has sought to reshape the Union's approach to ICSID by doing away with the traditional role of arbitral tribunals and by proposing a permanent investment court in its

⁵⁹ See Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham LRev* 1521 and Julie Mau-pin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 142.

⁶⁰ European Commission Report on online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD (2015) 3 final (13 January 2015) 14.

⁶¹ For a contribution to the debate about a reformed ISDS system see Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System – Journeys for the 21st Century* (Brill Nijhoff 2015).

negotiations with third countries.⁶² Viewed from this angle, it is interesting that the Joint Statement of the EU Trade Commissioner Cecilia Malmström and the Canadian International Trade Minister Chrystia Freeland should have explained the reformed settlement system in CETA as follows: ‘We have responded to Canadians, EU citizens, and businesses with a fairer, more transparent, system’.⁶³ In the light of the above, it is also interesting that the European Commission should have chosen to address directly the problems raised by the interactions between EU and intra-EU BITs by challenging head-on both the arbitral award in *Micula* and the existing BITS of certain Member States.

In the light of the above, the Court of Justice has been asked to adjudicate on the foundations of the interactions between EU law and investor-State dispute settlement rules in two ways: first, pursuant to the annulment actions brought in *Micula* under Article 263 TFEU against the EU Decision declaring the enforcement of the arbitral award illegal state aid; secondly, pursuant to the enforcement actions under Article 258 TFEU against Austria, the Netherlands, Romania, Slovakia and Sweden about the failure of the latter to terminate their intra-EU BITs. There is a third context in which similar questions have been raised, that is the preliminary reference procedure under Article 267 TFEU. In March 2016, the German Federal Court of Justice (*Bundesgerichtshof*) made a reference about the compatibility with EU law of the dispute settlement mechanism laid down in the BIT between Czechoslovakia and the Netherlands. This reference was made in the context of the *Eureka* dispute where an arbitral tribunal ruled that Slovakia was had breached the above BIT and was liable for compensation of € 22.1m, excluding interest.⁶⁴ The *Bundesgerichtshof* raised questions about the compatibility of the dispute settlement system set out in the intra-EU BIT with the exclusive jurisdiction of the Court of Justice (Article 344 TFEU), the preliminary reference procedure (Article 267 TFEU), and the non-discrimination principle (Article 18 TFEU).

⁶² See the comment in Ingo Venzke, ‘Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication’ (2016) 17 JWIT 374.

⁶³ Joint statement/15/446, 29 February 2016 http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf.

⁶⁴ *Achmea BV v The Slovak Republic (formerly Eureka B.V. v. The Slovak Republic)*, PCA Case No 2008-13, UNCITRAL, Final award (7 December 2012).

The reference from the *Bundesgerichtshof* suggests that the decentralised system of application of EU law is sufficiently flexible to avoid open and irreversible conflicts. It is recalled that the referring court was involved because of an appeal against a judgment of the Higher Regional Court of Frankfurt which had dismissed the objection of inapplicability raised by Slovakia.⁶⁵ It had held, instead, that Slovakia was bound by the BIT in question and had to comply with the arbitral award. The Frankfurt court had not considered it necessary to refer to the Court of Justice, as it had found the interpretation of the EU law issues raised by Article 344 TFEU inapplicable. By relying upon Article 267 TFEU, the *Bundesgerichtshof* brought the EU law issues pertaining to the dispute before the most appropriate forum for their resolution.

Comment [R1]: Incomplete sentence!

5 The Quest for Managing the Relationship Effectively

It follows from the above analysis that the interactions between intra-EU BITs and EU law play out in an ever wider canvass (involving courts in third states as well as national and transnational courts and arbitral tribunals), in a variety of procedural settings, with increasing intensity and in a politically charged environment.

A persisting question is how to square the circle that the increasingly polemical approach of the actors involved may appear to make almost impossible. It has been argued that a viable way to manage the relationship of EU law and arbitral awards is a principle similar to that underpinning the relationship between the EU and the ECHR. In particular, it has been suggested that the *Bosphorus* principle⁶⁶ may well provide a compass which would enable both strands of law to develop whilst not impinging upon each other.⁶⁷

⁶⁵ OLG Frankfurt am Main, Judgment of 10 May 2012, Case 26 SchH 11/10 (<http://www.italaw.com/sites/default/files/case-documents/ita0931.pdf>).

⁶⁶ *Bosphorus v Ireland*, App No 45036/98 (ECtHR, 30 June 2005).

⁶⁷ Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards' (2015) 16 JWIT 205.

Such a principle would enable the two systems to develop in harmony and would only bite in cases of gross violations.⁶⁸

Whilst this principle illustrates a comity-based *modus vivendi* between international courts, it is worth-pointing out the specific context within which it has emerged. It is by no means easy to define the outer limits of a principle which would enable the relevant judicial actors to co-exist in harmony. In the case of the EU-ECHR relationship, the *Bosphorus* principle was developed against the backdrop of the long and steady case-law of the Court of Justice on human rights: first introducing them and then rendering them at the very core of the EU legal order under the watchful eye of national constitutional courts.⁶⁹

More generally, even in international legal systems long accustomed to coexisting on the basis of comity, tensions emerge which test the relationship and place both national and international courts in a difficult position. The Response of the Court of Justice, for instance, to the EU's accession to ECHR in *Opinion 2/13* illustrates this point all too clearly.⁷⁰ Another case in point is, again, the EU-ECHR relationship in the light of the application of the Dublin Regulation⁷¹ which has given rise to two strands of case-law which may appear at first sight to be irreconcilable. On the one hand, the Court of Justice has interpreted the principle of mutual confidence, that is the very foundation of the Regulation, broadly and would only allow deviations in the light of systemic deficiencies, a term which it has construed narrowly.⁷² On the other hand, the European Court of Human

⁶⁸ Tietje and Wackernagel construe a gross violation as a complete lack of legitimate expectations on the part of the investor and complete ignorance of the tribunal regarding the relevance of EU state aid law for the dispute, misrepresentation of EU state aid rules, and the application of an unjustifiable and biased standard for damages under the relevant IIA.

⁶⁹ For an overview, see Grainne de Búrca, 'The Evolution of EU Human Rights Law' in Craig and de Búrca (n 40) 465.

⁷⁰ CJEU, Case C-2/13, *Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties* ECLI:EU:C:2014:2454.

⁷¹ Regulation 343/2003 [2003] OJ L 50/1.

⁷² See CJEU, Case C-411/10, *NS* [2011] ECR I-13905, paras 80-86; Case C-4/11, *Puid* ECLI:EU:C:2013:740, para 30 and Case C-394/12, *Abdullahi* ECLI:EU:C:2013:813, para 60.

Rights (ECtHR) appeared to prescribe a considerably lower threshold, as it required ‘a thorough and individualised examination of the situation of the person concerned’ in the context of transfers under the Dublin Regulation.⁷³ 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*. What complicates matters further is that, in that specific context, national authorities applying the Dublin II rules would not be subject to the *Bosphorus* presumption about protection equivalent to ECHR standards, as the presumption applies in areas where Member States do not enjoy discretion under EU law, which is not the case under the Dublin Regulation.⁷⁴

How are national courts to square this circle between two seemingly irreconcilable approaches? English courts have been trying to do so by reading both lines of case-law narrowly and within their specific factual and legal context.⁷⁵ The reluctance, however, of the ECJ and ECtHR to engage expressly with the points of tension between the two strands of their case-law puts national courts in a difficult position. No international legal system would benefit if national courts were tempted to engage in an idiosyncratically creative interpretation in order to avoid choosing between seemingly conflicting requirements.

Another option that has been raised in order to ensure a more efficient management of the interactions between EU and international investment law is the establishment of direct linkages between arbitral tribunals and the Court of Justice. In particular, it has been suggested that the former should be deemed to constitute courts in the meaning of Article 267 TFEU and, therefore, should have the right to refer to the Court of Justice.⁷⁶

⁷³ *Tarakhel v Switzerland*, ECHR App No 29217/12, para 104.

⁷⁴ See Article 3(2) Dublin Regulation which sets out the sovereignty clause: CJEU, Case C-411/10. *NS* [2011] ECR I-13905 para 65.

⁷⁵ See *MS, NA, SG v The Secretary of State for the Home Department* [2015] EWHC 1095 (Admin) paras 137-8, and *R (Yosief Weldegaber) v Secretary of State for the Home Department* [2015] UKUT 70(IAC) para 15. See also the Supreme Court’s judgment in *EM (Eritrea)* [2014] UKSC 12, where the CJEU’s judgment in *Abdullahi* is not taken into account even though it had been rendered two months earlier.

⁷⁶ See Jürgen Basedow, ‘EU Law in International Arbitration: Referrals to the European Court of Justice’ (2015) 32 *Journal of International Arbitration* 367.

This adjustment of the preliminary reference procedure found favour with Advocate General Wathelet who, in his Opinion of in Case C-567/14 noted in a footnote that such a solution ‘could help to ensure the correct and effective implementation of EU law’.⁷⁷ In its judgment, the Court did not refer to this issue.⁷⁸ The questions that it may raise notwithstanding,⁷⁹ such a solution illustrates an effort to introduce legal techniques aiming to the efficient management of the interactions between EU and international investment law.

6 Conclusion

The relevance of EU law to disputes before arbitration tribunals have raised questions about the coexistence of interacting legal orders and the parallel exercise of competing jurisdiction of international judicial bodies. Whilst not without tensions, these interactions have been managed so far on the ground, without causing a crisis, and with no direct involvement from the European Court of Justice. A combination of cases, however, raised in different procedural settings have rendered the Court at the centre of the interactions between the EU legal order and the sets of rules and procedures laid down in intra-EU BITs.

As far as the EU is concerned, navigating these waters on the basis of pragmatic and flexible arrangements would be by no means unprecedented. After all, the European Union legal order has developed pursuant to compromises which the principal institutional actors have acknowledged tacitly whilst avoiding to test their limits in practice. The genesis and development of the protection of human rights in the EU legal order, for instance, owe their success to this deeply pragmatic and inherently flexible process of mutual understanding between national, EU and international actors.

It remains to be seen whether the relationship between EU and international investment law would develop in the context of intra-EU BITs along similar lines. At this juncture, suffice it to point out that, should the answer be affirmative, the success of such de-

⁷⁷ CJEU, Case C-567/14, *Genentech* ECLI:EU:C:2016:177, footnote 34.

⁷⁸ CJEU, Case C-567/14, *Genentech* ECLI:EU:C:2016:526.

⁷⁹ See the skepticism in Juliane Kokott and Christoph Sobotta, ‘Investment Arbitration and EU Law’ (2016) *Cambridge Ybk Eur Legal Studies* 1, 9.

velopment would depend on the cooperation of the interacting judicial actors (CJEU, arbitral tribunals, national courts) – their understanding that their jurisdiction is not exercised in isolation from other transnational legal regimes, their confidence to acknowledge their interactions with each other, and their willingness to accommodate these interactions would be vital. Similarly, there is a price to pay for avoiding open conflicts, that is an inherent uncertainty. The cooperation of different judicial actors along the lines suggested above would require a leap of faith from each one of them which would render the quest for complete certainty elusive. It takes confidence for a legal system to tolerate this state of affairs. The alternative, however, would lead to open conflicts which both the EU legal order and international investment law can ill afford.