CHAPTER 3

The Impact of EU Law on Dispute Resolution in International Investment and Trade Agreements

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§3.01 INTRODUCTION

The resolution of international investment disputes between investors and States through arbitration has been an established feature of public international law (PIL) for many decades. As is well known, Bilateral Investment Treaties (BITs) between States provide, in essence, that investors in one State party are granted certain rights, such as fair and equitable treatment and protection against unlawful expropriation, in the other State party.[1] BITs generally provide a mechanism for investor to state dispute settlement (ISDS) which is by means of an arbitration tribunal. However, this method of dispute resolution has come into conflict with another legal system, namely the European Union (EU) legal system. In this chapter the general relationship between the EU and PIL is analysed first before looking at the case law of the Court of Justice of the European Union (CJEU) on BITs between EU Member States ('intra-EU BITs') and on the Energy Charter Treaty (ECT) and subsequent developments arising from that case law.

§3.02 THE RELATIONSHIP BETWEEN PIL AND EU LAW

PIL lays down a number of rules that apply to Treaties concluded by States and international bodies that are largely now codified in the Vienna Convention on the law

* All views expressed are in a personal capacity.

1. I refer to BITs but the same is broadly true of Multilateral Investment Treaties like the Energy Charter Treaty (ECT) which entered into force on 1 April 1998.

of treaties (VCLT). Additionally, BITs and multilateral investment Treaties (MITs) contain specific provisions relating to their termination.

[A] Public International Law

The VCLT places a high value on the binding nature of treaties and their termination in accordance with prescribed procedures. Article 26 provides under the heading '*PACTA SUNT SERVANDA*' that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' The ability of a party to rely on its own internal law to bring an agreement to an end is very limited. Article 27 provides: 'INTERNAL LAW AND OBSERVANCE OF TREATIES A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.' Article 46(1) precludes a State from relying on a violation of its own internal law regarding its competence to conclude treaties to be bound by a Treaty 'unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. A manifest violation is one which 'would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.[2] Article 54 permits the termination of a Treaty in conformity with its provisions or by consent of all the parties.[3] Article 65 lays down the procedure to be followed in respect of the invalidity, termination, or suspension of the operation of a Treaty. In the case of a Treaty whose invalidity has been established under the VCLT and is therefore void, Article 69(2) provides what might be termed some form of protection for legitimate expectations: 'If acts have nevertheless been performed in reliance on such a treaty: …; (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.'[4] The same rules apply *mutatis mutandis* to multilateral Treaties.[5]

In the case of BITs and MITs, there are specific provisions to protect existing investments made prior to the termination of those agreements. Thus in the case of the ECT Article 47(3) provides that, in the event of a withdrawal by a Contracting Party: 'The provisions of this Treaty shall continue to apply to investments made in the area of a Contracting Party by investors of other Contracting Parties or in the area of other Contracting Parties by investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years

2. Article 46(2).
3. Article 59 also provides for a deemed termination as a result of the conclusion of a later treaty.
4. The principle of good faith also applies to a State prior to the entry into force of a Treaty which it has signed or consented to be bound by, *see* Art. 18 VCLT. In Case T-115/94 *Opel Austria v. Council* EU:T:1997:3 the General Court described 'the principal of good faith …[as] the corollary in public international law of the principle of protection of legitimate expectations which, according to the case law, forms part of the … [EU] legal order', para. 93.
5. *See* Arts 41 and 69(4).

from such date.'[6] Likewise, denunciation by a State of the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) has prospective effect only.[7] Nor can consent to arbitrate between an investor and a State be withdrawn unilaterally.[8]

[B] The EU Treaty Provisions: The Strict Observance of PIL

Article 3(5) of the Treaty on the European Union (TEU) provides that the EU 'shall contribute … to the strict observance and development of international law, including respect for the principles of the United Nations Charter'. A good illustration of the importance of Article 3(5) TEU arose in *Western Sahara*.[9] The issue in that case was whether the waters adjacent to the Western Sahara fell under the sovereignty or jurisdiction of Morocco and hence within the territorial scope of international fisheries agreements made between the EU and Morocco ('EU-Morocco Agreements').[10] The CJEU rejected the argument that it had no jurisdiction to examine the validity of an international agreement but merely the EU acts approving the conclusion of those agreements. It made three points.[11] First, that such agreements are, from the moment of their entry into force, an integral part of the EU legal order and thus must be compatible with EU law. Second:

> the EU is bound, in accordance with settled case-law, when exercising its powers, to observe international law in its entirety, including not only the rules and principles of general and customary international law, but also the provisions of international conventions that are binding on it (see, to that effect, judgments of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 9; of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph

6. For a similar provision in a BIT, *see* Art. 13(3) of the Netherlands – Slovakia BIT (1991) which provides: 'In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.'
7. *See* Arts 71–72 of the ICSID Convention which provide:

> 71. Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.
> 72. Notice by Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

8. Article 25(1) of the ICSID Convention provides: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.'
9. Case C-266/16 *The Queen, on the application of: Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs* EU:C:2018:118.
10. Those agreements were then approved by the EU and then entered into force, *see* para. 14.
11. *See* paras 43–51.

> 291; and of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 101 and 123).[12]

Third, the court nevertheless treated the question of the validity of an international agreement concluded by the EU as relating not to that agreement but to the EU act approving the conclusion of that international agreement. Thus, while the CJEU interpreted the EU-Morocco Agreements as a matter of PIL, it confined its response to the question of the validity of the EU's act of ratification.[13]

In the case of international agreements concluded by the EU, Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) provides that such agreements are binding on the EU and its Member States. This reflects the position under PIL as stated in Article 26 VCLT.[14] The effect of Article 216(2) TFEU is that the EU can incur liability at the international level for non-performance of an agreement that it has entered into even if it is in breach of its own internal constitutional rules.[15]

[C] The EU Law Principle of Autonomy: An Exception to the Strict Observance of PIL

Despite the wording of those TEU and TFEU provisions, the CJEU has held that the EU is not always bound by PIL. Perhaps the most famous example of this approach is *Kadi* where the CJEU held that the importance of fundamental rights in the EU legal order precluded Member States from complying with their own international obligations to impose sanctions on Mr Kadi pursuant to a UN Security Council Resolution. This was because those international obligations did not provide Mr Kadi with his rights of defence, his right to be heard and his right to effective judicial review of such measures, all rights under EU law. The core of the reasoning of the CJEU was as follows:

> In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23).
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> It is also to be recalled that *an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system*, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraphs 35 and 71, and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 123 and case-law cited).

12. Paragraph 47.
13. Paragraph 85.
14. *See* section §3.02[A] above.
15. Case C-327/91 *France v. Commission* EU:C:1994:305 at para. 25. That was a case where France successfully challenged the conclusion of an agreement by the Commission rather than the Council.

> In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29 and case-law cited).
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> It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73 and case-law cited).[16] (emphasis added)

Thus the principle of the autonomy meant that EU law did not need to comply with PIL where PIL did not respect the 'basic constitutional charter' of the EU. The CJEU's reliance on the principle of autonomy in *Kadi* as a reason to depart from PIL did not take away any rights that Mr Kadi had under PIL but rather granted him rights under EU law that did not exist in, or indeed were precluded by, PIL. *Kadi* illustrates that there is tension between the Member States' obligation to comply with PIL and the EU principle of autonomy. Nevertheless, as in *Western Sahara*, the CJEU in *Kadi* made it clear that it was reviewing the EU act implementing the international law measure rather than the international measure itself.[17]

The tension between PIL and the principle of autonomy was explained by Szpunar AG in C-641/18 *Rina*:

> it has consistently been held that international conventions which are an integral part of the legal order of the European Union and are binding on the Union have primacy over secondary legislation, which must be interpreted as far as possible in accordance with those conventions. (93) Leaving aside any differences between international conventions and the rules of customary international law, (94) since the latter form part of the legal order of the European Union and are binding upon it, (95) then they must also have primacy over acts of secondary legislation. …
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> The co-existence of two obligations, namely that of contributing to the observance of international law and that of ensuring respect for the autonomy of the European Union legal order, can create tensions which the Union must resolve. …
>
> In that context, in the second place, in order for an obligation imposed by international law, convention or custom to form a part of the legal order of the European Union, that obligation must not call into question the constitutional structure or the values on which the European Union is founded. (98)
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> Two judgments illustrate that point. …
>
> The second is the judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, (100) in which the Court held, in substance, that obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principle of the European Union that all EU acts must respect fundamental rights.

16. EU:C:2008:461 at paras 281–284.
17. Paragraph 286. That is also clear from the *dispositif* in the judgment where the CJEU confines its order to the annulment of the relevant EU Regulation.

> Those two apparently contradictory interpretations of the relationship between EU law and international law illustrate the importance of maintaining a balance between safeguarding the European Union's constitutional identity and making sure that EU law does not become hostile to the international community, but is an active part of it. (101).[18]

In summary, the position is that, consistently with Article 3(5) TEU, the EU will comply its obligation to observe PIL but where that obligation calls into question what Szpunar AG called 'the constitutional structure or the values on which the European Union is founded' PIL yields to EU law.

[D] The Procedure under the TFEU for Eliminating, in the Case of Agreements, any Incompatibility Between PIL and EU Law

It is necessary to look at two provisions of the TFEU: the first relating to agreements with third countries entered into by the Member States prior to their accession to the EU (*ex post* control) and the second relating to proposed agreements to be entered into by the EU (*ex ante* control).

Dealing first with *ex post* control, the first paragraph of Article 351 TFEU provides that 'the rights and obligations arising from agreements concluded before 1st 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'. The second paragraph lays down a procedure for eliminating any incompatibility between EU law and the rights and obligations arising from such an agreement. It requires the relevant Member State(s) to 'take all appropriate steps to eliminate the incompatibilities established'. This provision does not, however, apply between the Member States[19] but only between the Member States and third countries. The CJEU has held that such appropriate steps would include denunciation of the agreement in question in a manner that is provided for in the agreement itself.[20] In other words, the obligation in the second paragraph of Article 351, 'to take all appropriate steps to eliminate the incompatibilities' is intended

18. EU:C:2020:349 at paragraphs 136–141, footnotes omitted.
19. In a very early case on the standstill provision on custom duties between Member States, the CJEU held that a Member State could not rely, as a defence to the application of the EU Treaty, on what is now Art. 351 TFEU in respect of a multilateral agreement (GATT) to which the Member States were party prior to their accession, *see* Case 10/61 *Commission v. Italy* EU:C:1962:2. 'In matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT.'
20. Case C-203/03 *Commission v. Austria* EU:C:2005:76 at paras 62–64. Although, in that case, it was found that Austria's obligation under an ILO Convention was incompatible with EU law, Austria had not breached EU law since at the only previous occasion that Austria had the right to denounce that Convention pursuant to the procedure laid down in the Convention was 'when the incompatibility of the prohibition laid down by that convention with [EU Law] had not been sufficiently clearly established for that Member State to be bound to denounce the convention' at para. 62. This suggests a more nuanced approach than in Case 10/61 *Commission v. Italy* where the CJEU considered that a Member State was no longer bound by a multilateral Treaty once the matter was governed by EU law (which was the case in *Commission v. Austria*).

to avoid the abrupt termination of international agreements in breach of the provisions for termination in those very agreements. As the UK Supreme Court observed in *Micula*, Article 351 'is intended to establish, in accordance with principles of international law, that the application of the EU Treaties does not affect the duty of a member state to respect the rights of non-member states under a prior agreement and to perform its obligations thereunder'.[21] This also minimises any damage to legal certainty.

However, in *Kadi,* the CJEU held that the procedure in Article 351 TFEU was inapplicable in a case where a derogation is sought 'from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union'.[22] Thus Article 351 did not 'permit any challenge to principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights'.[23] The non-applicability of Article 351 did not adversely affect Mr Kadi as he lost no rights under PIL but rather gained additional rights under EU law, namely the right to rely on fundamental rights, that he did not possess under PIL. Article 351 did not, therefore, stand in the way of the CJEU annulling the EU Regulation implementing the UN Security Council Resolution as being incompatible with fundamental rights.[24] It is not, however, clear whether the procedure in Article 351 is inapplicable solely where a derogation is sought 'from the principles of liberty, democracy and respect for human rights and fundamental freedoms' as the CJEU stated in *Kadi* or any case where PIL yields to the principle of autonomy. When EU law overrides PIL law, it does not necessarily follow there should be no period of adjustment to protect the position of those who have relied on PIL and may be adversely affected by such a determination.

Turning to *ex ante* control, Article 218(11) TFEU provides that a procedure whereby an EU Institution or Member State is entitled to seek an Opinion[25] from the CJEU as to whether an agreement that the EU envisages concluding is compatible with the EU Treaties. Such a procedure is extremely useful as it enables any such potential incompatibility to be the subject of a definitive ruling before the EU concludes an agreement. As the CJEU observed in *Opinion 1/75*:

> It is the purpose of the … of Article [218(11)] to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community. In fact, a possible decision

21. *Micula and others v. Romania* [2020] UKSC 5 at para. 97. Thus Art. 351 TFEU reflects what is now Art. 26 of the VCLT as well as Art. 30(4)(b) which provides 'When the parties to the later Treaty do not include all the parties to the earlier one: … as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.'
22. Paragraph 303.
23. Paragraph 304.
24. Although the CJEU permitted the Regulation to be kept in force for a period of not exceeding three months so as enable the Council to rectify the procedural defects and to prevent Mr Kadi seeking to move his assets so as to avoid any new measure.
25. The consequence of an adverse Opinion is that the proposed agreement 'may not enter into force unless it is amended or the Treaties are revised', *see* the last sentence of Art. 218(11).

> of the Court to the effect that such an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty *could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries*.[26] (emphasis added)

§3.03 THE TREATMENT OF INVESTMENT TREATIES UNDER EU LAW

[A] The Background

It is estimated that the EU Member States are party to around 1,400 BITs with third countries.[27] The importance of BITs is illustrated by the encouragement given by the European Commission in the early 1990s to the conclusion of BITs between, on the one hand, the States of central and eastern Europe, who wished to accede in due course to the EU, and, and on the other hand, existing members of the EU. The aim was to attract investment in those mainly formerly communist countries by investors from the EU. Indeed the wide acceptance of the BIT model was underscored by its replication on a multilateral basis of the ECT. The ECT was signed in 1994 and now includes fifty-three Contracting Parties, including the EU and Euratom.[28] Unlike many BITs, the dispute resolution procedure contained in Article 26 ECT provides an investor with the option of bringing proceedings against a Contracting Party either before a court of the Contracting State or before an arbitration panel. A Tribunal shall decide issues under the ECT in accordance with the ECT and principles of PIL.[29] If a breach is established, damages are awarded to the investor according to the normal principles of PIL.[30]

[B] Intra-EU BITs

In *Achmea*[31] the CJEU had its first opportunity to consider the compatibility with EU law of an arbitral award made under an intra-EU BIT. The BIT had been concluded between the Netherlands and Slovakia in 1991 before Slovakia's accession to the EU in 2004. Since that date, it has become an intra-EU BIT. Pursuant to Article 8 of the BIT, the arbitral tribunal was to resolve the dispute by reference, in particular, to the law in

26. [1975] ECR 1355, 1360-1, EU:C:1975:145.
27. *See* https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/investment-disputes/ last accessed 3 May 2022.
28. *See* https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en/ last accessed 3 May 2022. The EU signed the ECT on 17 December 1994 and it was approved by Decision 98/181, OJ 1998 L69/1. Italy notified its withdrawal from the ECT on 31 December 2014 and by virtue of Art. 47(2) ECT that withdrawal took effect on 1 January 2016.
29. Article 26(6) which provides that: 'A tribunal established pursuant to paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'
30. Article 26(8).
31. Case C-284/16 *Slowakische Republik v. Achmea.* EU:C:2018:158.

force of the Contracting Party concerned, the provisions of the BIT, and the general principles of international law. *Achmea* commenced arbitration proceedings in 2008. The Tribunal, sitting in Germany, rejected Slovakia's objection, based both on the VCLT and EU law, that the Tribunal had no jurisdiction in respect of an intra-EU BIT. By a final award made in December 2012, the Tribunal awarded *Achmea* just over EUR 22 million in damages for breach by Slovakia of the BIT.

Slovakia then sought to set aside the award before the German courts on the basis it was contrary to EU law. On a reference under Article 267 TFEU, the CJEU held that EU law was to be interpreted as 'precluding a provision such as Article 8 of the [BIT] … under which an investor from [An EU Member State] may, in the event of a dispute concerning investments in [another EU Member State], bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept'.[32]

In brief, its reasoning was that the EU has its own autonomous legal order and that an international agreement could not affect the allocation of powers laid down in the EU Treaties. Article 8 of the BIT enabled the tribunal to interpret and apply EU law. However, the principle of autonomy precluded Member States removing from the jurisdiction of their own courts disputes 'which may concern the application or interpretation of EU law'.[33] Further, to allow the Member States to remove such disputes from the jurisdiction of national courts was contrary to the principle of mutual trust between the Member States.[34]

The CJEU's approach was based on a matter of high constitutional principle. It was not necessary to consider whether the tribunal had actually applied or interpreted EU law. In reaching this conclusion, the CJEU distinguished the position under a BIT both from commercial arbitration[35] where it had previously accepted that an arbitration could apply or interpret EU competition law, albeit subject to a broad public policy review by a national court in an EU Member State and also from an adjudication under an international agreement to which the EU itself is party.[36] The CJEU's reasoning in *Achmea* was based exclusively on EU law. There was no discussion as to whether such

32. Paragraph 60.
33. Paragraph 55.
34. Paragraph 58. That is to say that the national courts within the EU should trust each other.
35. §54 citing Case C-126/97 *Eco Swiss* EU:C:1999:269. The distinction drawn with commercial arbitration was that such an arbitration agreement originates from 'the freely expressed wishes of the parties' and not from a State Treaty. This does not extend to agreements to arbitrate under investment Treaties, *see* Case C-109/20 *PL Holdings* EU:C:2021:875 at paras 46–55.
36. §57 'The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected (see, to that effect, Opinion 1/91 (EEA Agreement – I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183).'

a result would create any 'tensions'[37] between the EU principle of autonomy and PIL, including the specific provisions in the Netherlands and Slovakia BIT on the termination of the BIT.[38] Unlike in *Kadi,* where the effect of the EU law principle of autonomy was to grant additional rights to an individual which he did not possess in PIL, the application of the principle of autonomy in *Achmea* was to remove, as a matter of EU law, rights that an individual has under PIL, namely to settle disputes with a State through arbitration.[39]

In January 2019, twenty-two EU Member States issued a Declaration on the legal consequences of the judgment of the CJEU in *Achmea* and on investment protection in the EU ('the BIT Declaration').[40] This was followed in May 2020 by an agreement between twenty-three EU Member States for the Termination of Bilateral Investment Treaties Between the Member States of the EU ('the BIT Termination Agreement').[41]

Section 2 of the BIT Termination Agreement provides not only for the termination of intra-EU BITs but also the sunset clauses in such BITs.[42] Section 3 deals with awards and claims made under such BITs. Article 6(1) provides that proceedings in 'Concluded Arbitration Proceedings' shall not be reopened. However, the definition of 'Concluded Arbitration Proceedings' is limited to 'any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where: (a) the award was duly executed prior to 6 March 2018, …, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018 [the date of the judgment in *Achmea*]'.[43] Given the narrow definition of Concluded Arbitration Proceedings, awards made before the entry into force of the BIT Termination Agreement and, indeed, awards made before the *Achmea* judgment are not preserved where there is an outstanding challenge.[44] This is in contrast to the sunset provisions in the BITs where termination of the BIT does not affect the right of an investor who made an investment before the date of termination for a further period of years in the future. Thus if the Netherlands and Slovakia BIT had been terminated according to the terms of the BIT, *Achmea* would not have been deprived of its award.[45] For these reasons, the legality of

37. The expression used by Szpunar AG in *Rina, see* footnote 18 above. It would seem that the issue of PIL was not raised before the CJEU as neither the Judgment nor the Opinion of the Advocate General touch on it.
38. *See* Art. 13(3) of the Netherlands – Slovakia BIT (1991) at footnote 6 above.
39. This issue has been considered by arbitral Tribunals post *Achmea, see* section §3.03[D] below.
40. https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.
41. OJ 2020 L 169/1.
42. *See* Art. 2. A 'Sunset Clause' is defined in Art. 1(7) as 'any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time'. Thus, in the case of the Netherlands-Slovakia BIT in issue in *Achmea* the sunset clause is to be found in Art. 13(3), *see* footnote 6 above, which provides a further fifteen years of investment protection post-termination.
43. *See* Art. 1(4).
44. For example, the award in *Achmea*, although made on 7 December 2012, would appear to fall outside the definition of Concluded Arbitration Proceedings since it had not been duly executed before 6 March 2018 and there was a pending challenge at that date.
45. Thus, in the case of the Netherlands-Slovakia BIT it is fifteen years. *See* Art. 13(3) at footnote 6 above.

the BIT Termination Agreement has been questioned.[46] In respect of arbitration proceedings that are not Concluded Arbitration Proceedings,[47] Article 7 imposes a duty on the contracting Member States to inform arbitral tribunals about the legal consequences of *Achmea* and where they are party to judicial proceedings concerning an arbitral award issued on the basis of a BIT to ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it.[48] There are transitional measures in respect of Pending Arbitration Proceedings which permit the extension of national time limits for a claim to be brought on condition that the claimant renounces all rights under the BIT.[49]

Subsequent to *Achmea* the CJEU was asked in *PL Holdings,*[50] *inter alia*, whether *Achmea* was to be interpreted as depriving investors of an award made prior to the delivery of the *Achmea* judgment where the arbitration proceedings had been initiated in good faith. The CJEU declined to impose any such temporal limitation so as to preserve pre-existing awards.[51] Rather it held that an investor's rights which derive from EU law 'must be protected within the framework of the judicial system of the member states'.[52] There are two problems with this approach. First, the investor's rights under EU law are likely to be different from that under a BIT both in terms of substantive rights and remedies.[53] Put shortly, in terms of substantive rights, the rights under EU law are less than under a BIT.[54] Even if an investor seeks to rely on rights under BIT before a national court, a national court is unlikely to have jurisdiction since

46. *See*, for example, Nardell and Rees-Evans, *The Agreement Terminating Intra-EU BITs: Are Its Provisions on 'New' and 'Pending' Arbitration Proceedings Compatible with Investors' Fundamental Rights?* Arbitration International Volume 37, 2021, 37, 197.
47. Defined as 'Pending Arbitration Proceedings' and 'New Arbitration Proceedings' in Arts 1(5) and (6) respectively.
48. The CJEU relied, *inter alia,* on this provision in *PL Holdings* at para. 53 (footnote 35 above) for its conclusion that EU law requires Member States to ask a national court to set aside, annul or refrain from recognising or enforcing an intra-EU arbitral award.
49. *See* Arts 8–10. Pending Arbitration Proceedings are defined in Art. 1(5) as any arbitration proceedings initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings. In the case of such proceedings an investor is entitled to have access to 'the judicial remedies under national law' and national time limits can be extended but only on condition that the investor withdraws his arbitration proceedings and 'waives all rights and claims pursuant to the relevant [BIT] or renounces execution of an award already issued, but not yet definitively enforced or executed', *see* Art. 10(1)(a).
50. *See* footnote 35 above.
51. *Ibid.*, at paras 57–67.
52. *Ibid.*, at para. 68.
53. *See*, in this context, Paparinskis, *Substantive Standards of Investment Protection under EU Law and International Investment Law* in *EU Law and International Investment Arbitration*, editors Hélène Ruiz-Fabri and Emmanuel Gaillard (Max Planck Institute Luxembourg for Procedural Law (Juris, 2018)).
54. *See* the Opinion of Wathelet AG in *Achmea* at paras 179–228. Since the delivery of that Opinion the CJEU held in Case C-235/17 *Commission v. Hungary* EU:C:2019:432 that a measure which restricts the free movement of capital can only be justified under EU law if it is compatible with the Charter on Fundamental Rights ('the Charter'). The Hungarian measure in issue in that case was a restriction relating to the right of usufruct over agricultural land which infringed Art. 63 TFEU on the free movement of capital and could not be justified under Art. 17 of the Charter on rights to property.

a BIT generally only gives jurisdiction to an arbitral tribunal.[55] In terms of remedies, the threshold for obtaining an award of damages is significantly higher in EU law than under a BIT.[56] There is also the question of whether a claim under EU law can be brought within national limitation periods.[57] Second, there is no consideration in the judgment of whether such an approach, by depriving an investor of an existing award,[58] is compatible with the sunset provisions in BITs and PIL more generally.

[C] The Energy Charter Treaty

In *Komstroy*,[59] the CJEU applied the principle of the autonomy of EU Law and mutual trust between the Member States to an MIT, namely the ECT, in the same way as it had done in *Achmea*. The dispute in *Komstroy* was not an intra-EU dispute as in *Achmea* but rather one between a non-EU person and Moldova. The non-EU person had obtained an award from an arbitral tribunal sitting in Paris pursuant to Article 26 ECT on the basis that Moldova had breached the ECT. Moldova then brought a challenge to that award on the basis that the tribunal should have declined jurisdiction as there had not been an 'investment' within the meaning of Article 1(6) of the ECT. The Court of Appeal in Paris then made a reference to this question to the CJEU.

The first issue was whether the CJEU had any jurisdiction to answer this question since the dispute was between non-EU parties in respect of events outside the EU which turned on the interpretation of the ECT, an international agreement. The CJEU held it did have jurisdiction. Its reasoning can be distilled into three steps. *First*, it held that agreements, such as the ECT, which are approved by an EU decision constitute acts of the EU and that provisions of those agreements form an integral part of the EU legal order.[60] *Second,* it was in the interests of the EU that, in the case of a provision of an international agreement that can apply both within and without the scope of EU Law, such a provision 'should be interpreted uniformly, whatever the circumstances in which it is to apply'.[61] This was the case here since the referring court 'could find it necessary, in a case falling directly within the scope of EU law, …, to rule on the interpretation of those same provisions of the ECT'.[62] *Third*, the parties chose to

55. The position is different under the ECT, *see* Art. 26 referred to in section §3.03[A] above.
56. The remedy for breach of a BIT is damages. However, consistently with most European national legal systems, damages are only available in EU law where the breach of EU law is a sufficiently serious breach of a superior rule of law for the protection of individuals, *see* Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL v. Council and Commission* EU:C:1978:113, para. 5. The high hurdle for damages is, however, counterbalanced by the available of remedies such as quashing and annulment which are not available under a BIT.
57. The award in *PL Holdings* would appear, like the award in *Achmea*, to fall within the definition of Pending Arbitration Proceedings and so national time limits could only be extended pursuant to the BIT Termination Agreement if the existing awards are definitively renounced, *see* footnote 49 above.
58. In *PL Holdings* the award was EUR 150 million, *see* para. 17 of the Opinion of Kokott AG.
59. Case C-741/19 *Republic of Moldova v. Komstroy* EU:C:2021:655.
60. Paragraphs 22–27. It added since the entry into force of the TFEU the EU has exclusive competence as regards foreign direct investment and shared competence in indirect investment.
61. Paragraph 29.
62. Paragraph 31.

arbitrate their dispute in Paris which made French law the *lex fori* and French law had to comply with EU law.[63]

Prior to answering the specific question on the definition of an investment under the ECT that was asked by the referring court, the CJEU decided that it was necessary 'to specify which disputes between one Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former may be brought before an arbitral tribunal pursuant to Article 26 ECT'.[64] The CJEU had in mind disputes between an EU Member State and an investor from another EU Member State, that is to say, an intra-EU dispute. Those observations were, however, *obiter* as the dispute was between a third country and a non-EU investor.[65]

The CJEU's observations on whether an intra-EU dispute fell within the scope of Article 26 ECT broadly followed its approach in *Achmea.* The steps in the analysis can be summarised as follows. *First*, Article 26(6) ECT requires a tribunal to apply the ECT and since the ECT is an act of EU law, the tribunal would be interpreting and applying EU law.[66]

Second, an arbitral tribunal set up under the ECT is not a court or tribunal for the purposes of Article 267 TFEU and so cannot make a reference to the CJEU and any award is not capable of a full review by a court of a Member State so as to guarantee full compliance with EU law. In this respect, the CJEU maintained the distinction that it had drawn in *Achmea* between commercial arbitration, freely entered into by the parties, and arbitration, deriving from a Treaty whereby the Member States remove disputes from the jurisdiction of their own courts.

Third, it confirmed that the EU's capacity to conclude international agreements necessarily entailed the power to accept the jurisdiction of a court to interpret an international agreement that does not extend 'to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed'.[67] That would call into question the preservation of autonomy, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU.

Fourth and finally, the CJEU considered that the multilateral nature of the ECT did not preclude such a result since Article 26 ECT 'is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the BIT at issue in [*Achmea*].[68] The conclusion was that "Article 26(2)I ECT must be interpreted as not being applicable to disputes between a Member State

63. Paragraphs 32–38. In so doing the CJEU distinguished earlier case law where it had held that it had no jurisdiction to interpret the EEA Agreement on a reference from a national court.
64. Paragraph 40.
65. The CJEU appears to justify this *obiter* by referring to the submissions of Member States who wished to have an answer to this question, *see* para. 40. As to whether the CJEU was right to proceed in this way, *see Republic of Moldova v. Komstroy LCC*: arbitration under Art. 26 ECT outlawed in intra-EU disputes by obiter dictum, Alan Dashwood E.L.Rev 2022, 47(1), 127.
66. Paragraphs 47–50.
67. Paragraph 62.
68. Paragraph 64.

and an investor of another Member State concerning an investment made by the latter in the first Member State."'[69] In other words, one could legally disconnect intra-EU disputes from other disputes falling within the scope of the ECT.

I will confine my observations on *Komstroy* to the conclusion that the ECT was part of EU law and that Article 26 ECT was inapplicable to intra-EU disputes.

It is to be recalled that the first step in the reasoning as to why the CJEU had jurisdiction was that the ECT was concluded by the EU and so became part of EU law from the moment that it entered into force. While this conclusion is amply supported by the case law of the CJEU,[70] it does not follow that the ECT is not also part of PIL. Indeed Article 26(6) ECT expressly states that a tribunal is to decide a dispute under the ECT in accordance with the law of the ECT and PIL. The conclusion that the ECT is part of EU law is based solely on the position that it is brought into the EU legal order by signature and ratification of the Member States and the EU. The ECT becomes part of the legal system of all the States that have signed and ratified the ECT. But the ECT still remains an instrument of PIL to be interpreted in the manner set out in Article 26(6) ECT. Thus, in the case of the EU legal order, the ECT has a hybrid character: it is both part of PIL and EU law. But when the CJEU was interpreting Articles of the ECT, it was bound to do so by reference to principles of PIL.[71]

When, however, the CJEU stated that Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties as opposed to being part of a multilateral obligation, in an analogous way to the provision of a BIT, it is not clear whether that conclusion was based on EU law or PIL.

If the CJEU was interpreting that Article as a matter of PIL, then it is striking that there was no analysis of the rules of interpretation under the VCLT, including the *travaux préparatoires* of the ECT.[72] By contrast, when faced with a similar argument as to whether, in the context of an enforcement of an award made under a BIT, the ICSID Convention involved multilateral or simply bilateral obligations between States, the UK Supreme Court in *Micula* analysed the Convention, including the *travaux préparatoires,* before concluding that it contained multilateral obligations.[73] On its face, there is nothing in the ECT that suggests that Article 26 is not to apply to intra-EU disputes. Although the Commission did submit a statement to the ECT Secretariat in respect of Article 26 which is appended to the ECT, there was no suggestion in that statement that Article 26 could not apply to intra-EU disputes.[74] Thus the better view must be that the CJEU in *Komstroy* was not interpreting Article 26 as a matter of PIL but rather as a

69. Paragraph 66.
70. *See*, e.g., *Western Sahara* discussed in section §3.02[B] above.
71. This was made clear by AG Szpunar who referred explicitly to the need to interpret those provisions in the light of Art. 31 VCLT, *see* para. 109 of his Opinion.
72. One might add that if the CJEU had intended to rule on this as a matter of PIL, it would have sought submissions from the parties on PIL but there is no indication that this occurred.
73. *See* footnote 21 above at paras 103–108. The Commission has announced that it has brought proceedings against the UK in respect of this judgment but it is unclear if those proceedings extend to the UKSC's interpretation of the ICSID Convention, *see* https://ec.europa.eu/commission/presscorner/detail/en/ip_22_802 (last accessed 3 May 2022).
74. *See* the Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art. 26(3)(b)(ii) of the ECT:

matter of EU law. This is also consistent with the whole *obiter* passage which refers solely to EU law and indeed what the CJEU subsequently stated in Opinion 1/20.[75] Viewed in this light, what the CJEU appears to have been saying is that EU law precludes Article 26 from being applied to an intra-EU dispute. Expressed in those terms, there is a tension between the interpretation of the ECT, as an instrument of EU law, and as an instrument of PIL. This tension could have been avoided if either the Commission or a Member State had sought an Opinion from the CJEU, via the procedure laid down in Article 218(11) TFEU, as to whether the EU could accede to the ECT in a manner that was compatible with the EU law. If the CJEU had given the answer that it gave in *Komstroy* the EU and the Member States could not have entered into the ECT without resolving the issue as to whether Article 26 ECT could apply to intra-EU disputes and considerable legal uncertainty could have been avoided.

[D] The Reaction of Tribunals and Courts to the CJEU's *Achmea* Case Law

The approach taken by the CJEU in *Achmea* and *Komstroy* has had a mixed response. Although *Achmea* has been applied by EU national courts as a matter of EU law, it has largely not been followed by Tribunals who have considered that the CJEU's approach omits any consideration of PIL.

Looking first at Tribunals, by way of example, in *Magyar Farming v. Hungary*[76] an ICSID Tribunal rejected Hungary's argument that, in the light of *Achmea,*[77] the Tribunal had no jurisdiction to adjudicate in a dispute between a UK investor and Hungary. It observed:

> The Parties agree that the question whether the EU Treaties override the dispute resolution clause of the BIT must be assessed under international law, and rightly so. Indeed, the BIT's offer to arbitrate is contained in an international treaty, and its validity and interpretation is governed by the VCLT of which Hungary and the

> 'The European Communities, as Contracting Parties to the Energy Charter Treaty, make the following statement concerning their policies, practices and conditions with regard to disputes between an investor and a Contracting Parties and their submission to international arbitration or conciliation:
>
> 'The European Communities are a regional economic integration organisation within the meaning of the Energy Charter Treaty. The Communities exercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions.'

75. Opinion of 16 June 2022 EU:C:2022:485 at para. 47. 'It is clear from the judgment of 2 September 2021, Republic of Moldova (C-741/19, EU:C:2021:655), and in particular from paragraphs 40 to 66 thereof, that compliance with the principle of autonomy of EU law, enshrined in Article 344 TFEU, requires Article 26(2)(c) of the ECT to be interpreted as meaning that it is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.'
76. ICSID Case No. ARB/17/27, award of 13 November 2019. *See* to the same effect *Eskosol v. Italy*, ICSID Case No. ARB/15/50, award of 7 May 2019. This was a case on the ECT not a BIT but the Tribunal's analysis of *Achmea* is equally relevant, *see*, in particular, paras 115–119, 152–186.
77. Case C-284/16 *Slowakische Republik v. Achmea.* EU:C:2018:158.

> UK are both contracting parties. In addition, this arbitration is conducted under the ICSID Convention and, thus, is not subject to a national legal system.
>
> …
>
> The Tribunal is not convinced that it is bound by the CJEU's decision [in *Achmea*] over the conflict between the BIT and the EU Treaties. Under Article 41 of the ICSID Convention, the UK, Hungary and the other 155 contracting States, including non-EU States, agreed that an arbitral tribunal constituted under the ICSID Convention 'shall be the judge of its own competence', and that:
>
> > Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, *shall be considered* by the Tribunal …
>
> …
>
> In any event, the CJEU's interpretative authority extends to the interpretation and application of the EU Treaties. The CJEU has no such (arguably) exclusive or ultimate mandate in respect of the interpretation of the BIT or the VCLT rules on treaty conflicts. Yet, in order to determine whether Article 8 of the BIT [the relevant dispute resolution provision] is precluded by the EU Treaties, it does not suffice to interpret the EU Treaties. This determination requires the interpretation of both the EU Treaties and the BIT, in order to answer crucial questions such as (i) whether the BIT and the EU Treaties govern the same subject matter as provided in Article 30 of the VCLT and, if so, (ii) whether there is a normative conflict between these treaties as understood under the VCLT.
>
> Not only does the CJEU have no exclusive authority to answer these questions, but it did not even purport to address them in the Achmea Decision. Even a cursory review of that decision reveals that the CJEU did not undertake a conflicts analysis under the VCLT. Thus, even if the Tribunal were willing to pay deference to the CJEU's reasoning, the Achmea Decision would give no guidance on the issues which must be resolved to determine whether the EU Treaties preclude the application of Article 8 of the BIT as a matter of international law.[78]

The Tribunal then held that the BIT Declaration[79] could not validly retroactively invalidate the valid acceptance under the ICSID Convention by Magyar Farms of Hungary's offer to arbitrate.[80] It concluded:

> The Tribunal's finding that the 2019 Declarations were not the proper procedure to terminate or amend the BIT is not based on mere formalism. The BIT is an international treaty that confers rights on private parties. While the Contracting States remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*. This is evident for instance from Article 13(3) of the BIT, which grants a guarantee of stability to investors who have made investments in reliance on the BIT:
>
> > In respect of investment made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.
>
> This provision shows that, even where the Contracting Parties terminate the treaty on mutual consent, they acknowledge that long-term interests of investors

78. Paragraphs 203, 207, 209–210, original emphasis but footnotes omitted.
79. At the time of the award the BIT Termination Agreement had not been signed.
80. Paragraphs 212–221.

> who have invested in the host State in reliance on the treaty guarantees must be respected. This is the purpose served by the 20-year sunset provision. If the protection of existing investments outlives an unambiguous termination of the Treaty, then the protection must continue a fortiori in respect of a decision of an adjudicatory body constituted under a different treaty or of declarations that purport to clarify the legal consequences of that decision.[81]

The Tribunals that have considered Article 26 ECT in the light of *Komstroy* have not all reached the same conclusion as the CJEU did in *Komstroy*. Thus, for example, in *Eskosol* an ICSID Tribunal cited the ILC which has stated that the very function of a 'disconnection clause'[82] is that it 'seek[s] to replace a treaty in whole or in part with a different regime that should be [] applicable between certain parties only', with such clause 'agreed to by all the parties of the treaty'.[83]

Subsequently, an ICSID Tribunal in *Infracapital* stated:

> The Tribunal agrees with Claimants that in interpreting Article 26 ECT the CJEU [in *Komstroy*] made no effort to conduct an interpretive exercise under the VCLT – as would be required under public international law – but rather relied on an alleged need to 'preserv[e] the autonomy and […] the particular nature of EU law' in order to justify its decision. This is clearly inappropriate.

The last premise essentially proposes that there be a separate treatment for intra-EU disputes (i.e., where investors and the host State are part of the EU) and non-intra-EU disputes. This would imply that investors of an EU Member State could not access arbitration against a Member State for claims relating to a breach of the ECT and international law. But such interpretation is not supported by the provisions of the ECT, nor in the objectives of the ECT.

In the Tribunal's view, nothing in the ECT gives an ECT tribunal the authority to disregard or modify the explicit provisions of the ECT and decline jurisdiction on the basis of a Contracting Party's status or its obligations under a different legal order.

As regards disconnection from the provisions relating to arbitration in Article 26(2)(c) of the ECT, this Tribunal found in the Decision that there is no evidence that the EU and the Member States are disconnected from the ECT for the purpose of intra-EU investment arbitrations, and again rejects the claim by Respondent that the EU and its Member States disconnected from Article 26 ECT subsequent to the ratification of the ECT ' as a necessary effect of the ratification of the Lisbon Treaty by the member states'.[84]

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81. Paragraphs 222–223, original italics but footnotes omitted.
82. That is to say a clause that disconnects intra-EU disputes from Art. 26.
83. Paragraph 91, footnotes omitted.
84. ICSID Case No. ARB/16/18 at paras 111–114 footnotes omitted. *See* to the same effect *Vattenfall v. Germany* ICSID Case No. ARB/12/12 https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf at paras 169–208 where the Tribunal concludes 'Having carried out an interpretation under Article 31 VCLT of the ordinary meaning to be attributed to Article 26 ECT, in its context, and in the light of the object and purpose of the ECT, the Tribunal finds that a Contracting Party to the ECT in Article 26 ECT includes EU Member States and non-EU Member States without distinction. There is no carve-out from the ECT's dispute settlement provisions concerning their applicability to EU Member States inter se, in particular regarding the

By contrast in *Green Power v. SCE Sola Don Benito*,[85] in an arbitration conducted under rules of the Stockholm Chamber of Commerce where the seat of arbitration was Stockholm the Tribunal concluded, applying *Komstroy*, that it had no jurisdiction to determine an intra-EU dispute under the ECT. The Tribunal considered that previous ICSID cases to the opposite effect were to be distinguished on the basis that they did not take into account the applicable law of the seat, which in this case was Swedish law which included EU law.[86]

What one sees from the above is that there is still uncertainty about the inter-relationship between EU law post *Achmea* and *Komstroy* and PIL. While plainly the CJEU has the ultimate arbiter of EU law, it would be helpful if the CJEU were, in a future case, to address not only issues of EU law but also PIL in the way that it has done in the past in such cases as *Kadi* and *Western Sahara.* While the CJEU is not able to provide a definitive ruling on PIL,[87] consideration by the CJEU of the position under PIL would be helpful as that would open a dialogue between, on the one hand, the CJEU interpreting both EU law and PIL and, on the other hand, Tribunals interpreting PIL and, it is hoped, reduce the scope for conflicting rulings. It may be that the position of the CJEU is that the principle of autonomy trumps any consideration of PIL. If that is the position, it would nonetheless be helpful to explain why such a result can be reconciled with rights investors consider that they have acquired as a matter of PIL.

Turning to the courts of EU Member States, the German Federal Court of Justice (the *Bundesgerichtshof)* applied the judgment of the CJEU in *Achmea* by setting aside the arbitral award in *Achmea*.[88] More recently, the Court of Appeal in Paris has annulled two awards made by arbitral tribunals, also sitting in Paris, under two intra-EU BITs.[89] It did so on the basis that the Tribunal had no jurisdiction pursuant to *Achmea* and *PL Holdings* to determine an arbitration under such BITs. It held that it was unnecessary to consider the position under PIL and the VCLT.

[E] Extra-EU Treaties

In contrast to the absence of the request for an Opinion prior to the EU acceding to the ECT, an Opinion was sought on the compatibility with EU law of the ISDS mechanism in the Comprehensive Economic and Trade Agreement between EU and Canada (CETA).[90] The ISDS mechanism in the CETA has its origins in the ISDS provisions found in BITs and the ECT but differs in a number of important respects. It has

opportunity for an EU Investor to pursue arbitration against an EU Member State. Indeed, the terms of Article 26 ECT give not the slightest hint that any such exclusion is possible.' at para. 207.

85. Arbitration Institute of the Stockholm Chamber of Commerce, SCC Arbitration V (2016/135) of 16 June 2022.
86. Paras. 413–478.
87. *See* Case C-66/18 *Commission v. Hungary* EU:C:2020:792.
88. Decision of 31 October 2018, Case I ZB 2/15.
89. *Poland v. Strabag and others*, Judgment of 19 April 2022 48/2022 and *Poland v. CEC Praha,* Judgment of 19 April 2022 49/2022.
90. *Opinion 1/17* EU:C:2019:341.

renounced ad hoc arbitration in favour of a permanent Tribunal and an Appellate Tribunal to adjudicate on disputes between investors and the parties to the CETA. In the words of Point 6(f) of the Joint Interpretative Instrument, the 'CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems'. The Tribunals are to apply the Agreement in accordance with the VCLT and other rules and principles of PIL.[91] They have, however, no jurisdiction to determine the legality of a measure alleged to constitute a breach of the CETA, under the domestic law of a Party but are confined to considering the domestic law of a Party as a matter of fact.[92] They have the jurisdiction to award compensatory damages for breach of a provision in the CETA.[93]

The CJEU held that the adjudication of disputes in the CETA by the CETA Tribunals was, in principle, compatible with EU Law as it was inherent in the ability of the EU to enter international agreements that it would also accept the jurisdiction of an international tribunal set up under that agreement. It distinguished *Achmea* on two grounds. First, the CETA Tribunals do not have jurisdiction to interpret EU law.[94] While they might have to consider EU law, they can only do so as a matter of fact which 'cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law'. Second, the CETA Tribunals were not an intra-EU arrangement between the Member States but one between the EU and a third country. By contrast, the tribunal in *Achmea* was set up under an agreement between the Member States and did not involve third States.[95] However, the CJEU's approval of the ISDS mechanism in the CETA was not unconditional. It laid down two main conditions.

First, although the establishment of the CETA Tribunals was not precluded by the principle of autonomy, that principle did preclude such Tribunals from 'call[ing] into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market'.[96] The reason for this was the remedy of damages for a breach of the CETA would lead the EU to amend or withdraw legislation because of a different evaluation of the level of protection made by a body outside the EU judicial system. This is what has been called 'the chilling effect'.[97] The question of whether the level of protection is unlawful is in effect reserved for the

91. Article 8.31.1.
92. Article 8.31.2.
93. Article 8.39.1(a), 3 and 4. The CJEU contrasted the remedy of damages with the remedies available under the World Trade Organization, *see* para. 146.
94. Paragraphs 126 and 130–135. As the CJEU acknowledged, the CETA is part of EU law whose interpretation the CETA Tribunals are entrusted with. However the CETA, like the ECT, is a hybrid of both PIL and EU law as explained in section §3.03[C] above. It is to be interpreted according to its own provisions and PIL and not in accordance with EU law.
95. Paragraphs 127–129. The CJEU added that the principle of mutual trust obliges Member States to consider that all other Member States comply with EU law, including the right to an effective remedy but that this principle does not apply between the EU and third States.
96. Paragraph 148.
97. The CJEU was responding to the argument by Belgium and other Member States that the CETA Tribunals should not be able to undermine the policy choices made by domestic legislators through the chilling effect of damages awards.

courts within the EU.[98] The CJEU then analysed the relevant provisions of the CETA and found that the jurisdiction of the CETA Tribunals did not permit them to review the level of protection but was 'concentrated on, inter alia, situations where there is abusive treatment, manifest arbitrariness and targeted discrimination …'.[99] The CJEU, therefore, used the principle of autonomy to impose a *limit* on the scope of the substantive review of EU legislation by an outside Tribunal pursuant to an international agreement. This is different from the scope of the principle of autonomy in *Achmea* and previous cases which *precluded* an outside Tribunal from having *any* jurisdiction to engage in any review at all. As has been observed, 'it appears to elevate … EU measures that may have been adopted via EU secondary legislation to the rank of a constituent element of the 'autonomy of the EU legal order'.[100]

The practical effect of this is that an investor will have to overcome a high hurdle to show a breach of the CETA and obtain damages. In this respect, the hurdle under the CETA is now closer to that under EU law. To obtain damages under EU Law requires one to establish that the breach of EU law is a sufficiently serious breach of a superior rule of law, that is to say, that there has been a manifest and grave disregard by a public body of the limits on its discretion.[101]

The second main condition laid down by the CJEU was that the ISDS provisions in the CETA had to comply with Article 47 of the Charter of Fundamental Rights ('the Charter') which provides for access to an 'independent and impartial tribunal'.[102] As mentioned above, while the CETA ISDS mechanisms had their origins in ISDS mechanisms found in BITs and ECTs, there were a number of innovations which were crucial in the CJEU finding that the ISDS mechanisms complied with Article 47. In essence, the ISDS mechanism in CETA is hybrid in nature, combining characteristics based on traditional arbitration mechanisms as well as those of permanent judicial bodies. It provides for the establishment of a permanent tribunal of fifteen Members and that a division of three Members will '[hear] the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable'.[103] The CJEU held that the requirements of independence and impartiality 'require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.[104] The CJEU

98. Paragraphs 149–151.
99. Paragraphs 152–160. The quoted passage comes from para. 159.
100. *See* Boelaert in Opinion 1/17 of the Court of Justice on the legality, under EU law, of the investor to state dispute settlement mechanism included in the CETA agreement. A case of legal pragmatism or the dawn of a new era? in Biondi and Sangiuolo eds, *The EU and the Rule of Law in International Economic Relations, an Agenda for an Enhanced Dialogue*, Edward Elgar 2021 p. 37 at p. 61.
101. *See* footnote 56 above.
102. Since CETA would be an agreement to which the EU would bind itself, it was subject to the Charter. It did not matter that the Charter does not apply to the third country with whom the EU had concluded the agreement, *see* paras 190–191.
103. Article 8.27.7.
104. §204.

imposed a high standard since the case law on which the CJEU relied was its case law on the requirement of independence of a court or tribunal of a Member State for the purposes of Article 267 TFEU. The tribunals set up under the CETA met this standard. Article 47 of the Charter applies to agreements, such as CETA, concluded or to be concluded after the entry into force of the Charter[105] but it has also been held to apply to measures that predate it.[106] Thus, in principle, it applies also to dispute resolution bodies in pre-existing agreements to which the EU is a party.

It remains to be seen how the EU will seek to ensure this standard is met in international agreements to which it is party which provides for a dispute resolution mechanism.[107]

§3.04 CONCLUSIONS

The EU principle of autonomy is a constitutional principle of the highest importance in the EU legal order. It needs, however, to be applied in a manner that does least damage to obligations undertaken by the Member States and the EU to comply with PIL. If the Member States had decided to terminate all their intra-EU BITs by means of agreements that were prospective in nature and respected sunset clauses in those BITs this would have been uncontroversial as a matter of PIL. However, the retrospective application of the principle of autonomy in *Achmea,* as then applied by the BIT Termination Agreement, has created, to use the expression of Szpunar AG in *Rina,*[108] 'tensions [between EU law and PIL] which the Union must resolve' as illustrated by a number of arbitral rulings post *Achmea*, which have not been willing to follow the *Achmea* approach as a matter of PIL. Such tensions are particularly unfortunate where the effect of EU law is to deprive investors of awards made under PIL for reasons unconnected to the merits.[109] It is, therefore, to be hoped that the CJEU will use a future occasion to resolve these tensions between EU law and PIL or explain more fully why the principle of autonomy trumps any consideration of PIL. In the case of agreements to which the EU itself wishes to adhere, it is important that the procedure under Article 218(11) TFEU is used as it provides a specific mechanism for avoiding any such future tensions. Given the developing nature of the principle of autonomy, the importance of this procedure cannot be overstated. If the CJEU concludes that there is an incompatibility

105. The Charter came into force on 1 December 2009 pursuant to Art. 6(1) of the Treaty on European Union.
106. *See*, for example, Case C-362/14, *Schrems v. Data Protection Commissioner,* EU:C:2015:650 at paras 91–98 where the CJEU annulled Commission Decision 2000/520 on data transfers between the EU and the US on the basis, *inter alia*, that it did not comply with the Charter.
107. *See* Vajda, *The Applicability of Article 47 of the Charter of Fundamental Rights to International Agreements to which the Union is a Contracting Party* in *Evolution des rapports entre les orders juridiques de l'Union européénne, international et nationaux, Liber Amicorum Jiří Malenovský*, Bruylant 2020, pp. 551–572.
108. *See* section §3.02[C] above.
109. There is no suggestion in any of these cases that the Tribunal has misapplied substantive provisions of PIL or indeed has misinterpreted of misapplied any substantive provision of EU law, other than the principle of autonomy which is a principle relating to jurisdiction that does not go to the merits of a dispute.

between an intended agreement and EU law, everyone knows what the legal position is. In the absence of an Opinion under Article 218(11) TFEU, one might ask whether any subsequent court ruling concluding that such an agreement, or part of it, is incompatible with EU law should not be prospective in nature or at least not re-open past transactions entered into in good faith under the agreement. What one can say is that if an Opinion had been sought in respect of the ECT, as it was in the case of the CETA, a great deal of legal uncertainty could have been avoided.