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# Navigating EU Law and the Law of International Arbitration

by GEORGE A. BERMANN \*

## ABSTRACT

*The European Union and international arbitration are two robust legal regimes that have managed to develop largely in accordance with their own respective 'first principles', and they have accordingly thrived. This article initially explains why that has been the case.*

*But the era of parallelism between the regimes has ended, and rather suddenly. This article identifies the two principal fronts on which tensions between EU law and international arbitration law have emerged. Interestingly, both commercial and investment arbitration are implicated.*

*A first front entails a conflict between the European Court of Justice's (ECJ's) expansive notions of EU public policy and two well-established axioms of international commercial arbitration law: first, that public policy must be construed narrowly when invoked as a ground for annulling an award or denying it recognition and enforcement; and second, that parties in arbitration are expected to raise all substantive arguments pertinent to their claims or defences in the course of the arbitral proceedings and not reserve them for post-award relief from a disappointing award. A second front finds EU Member States invoking their obligations under EU law as a defence – sometimes jurisdictional, sometimes substantive – in investor-State tribunals. The paradigm argument is that EU law mandates withdrawal of an illegal state aid in reliance on which an investor entered that market.*

*This article examines two prevailing methodologies for addressing these tensions, in arbitral tribunals themselves as well as in reviewing courts. It concludes that many such tensions – particularly those along the first front – may be resolved through accommodation techniques well-established in other areas of the law. Others, particularly those arising in the investor-State context, resist resolution in that way and are requiring decision-makers to face the uncomfortable prospect of making one of these legal regimes cede ground to the other. The ECJ and investor-State tribunals are understandably inclined to prioritise the regimes differently, with the ultimate outcome falling to member state courts which owe allegiance to both regimes.*

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## INTRODUCTION

Up to now, European Union law and the law of international arbitration have largely occupied separate worlds.<sup>1</sup> To describe their relationship as one of mutual indifference would scarcely be an overstatement. The past, in which these two bodies of law coexisted, each following its separate and distinctive logic, looks today like something of an age of innocence.

This pattern is changing, however, as European Union law and international arbitration law find themselves in greater contact and increasingly in conflict. So far, the conflict between these two legal regimes has taken two distinct shapes..

First, the European Court of Justice (ECJ) has lately advanced a particularly far-reaching notion of EU public policy that, while not in itself problematic, challenges a central premise of international arbitration law, namely that public policy must be narrowly construed when invoked as a ground for annulling arbitral awards or denying them recognition or enforcement. This particular conflict typically arises when EU Member State courts are asked to deny effect to an otherwise valid award on the ground that it offends an EU public policy norm.

Second, Member States may be required under EU law to take action that places them at risk of violating their obligations under international investment treaties, thus exposing them to liability at the hands of investor-State arbitral tribunals. In this scenario, it is not only Member State courts that face competing EU law and investment law claims; investment arbitration tribunals face them as well.

These two developments – each in its own way – have heightened EU law’s stakes in international arbitration and, reciprocally, international arbitration’s stakes in EU law. The stakes are not only more apparent, but now also more conflictual, than ever. This article explores the nature of these two sets of conflicts. It observes that both require careful and considered navigation between the demands of competing legal orders. It further concludes that though these conflicts present real challenges, neither of them defies resolution. On the other hand, while the two sets of conflict emanate from the same pair of legal orders, they are distinctive and cannot satisfactorily be approached in entirely the same fashion.

I conclude that conflicts stemming from the unusually robust notion of EU public policy lend themselves to what might be called a traditional ‘accommodation’ strategy, whereby one or both of two competing legal orders relaxes its demands sufficiently to accommodate the demands of the other. But accommodation strategies go only so far in addressing the second set of conflicts I have identified, namely those resulting from clashes between EU law and the law of investor protection. At least in some circumstances, conflicts of this sort require arbitral tribunals and courts to confront, more or less head-on, the relative authority of the two contending legal orders.

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<sup>1</sup> See generally, Natalya Shelkopyas, ‘The Application of EC Law in Arbitration Proceedings’, (2004); Theodore C. Theofrastous, ‘International Commercial Arbitration in Europe: Subsidiarity and Supremacy in Light of the De-Localization Debate’, 31 *Case W. Res. J. Int’l L.* 455 (1999).

This Article proceeds as follows. Part One serves as background, describing the circumstances that for over a half century have permitted EU law and international arbitration law to follow their separate logics largely without interference from the other. Parts Two and Three then examine the two species of conflicts between EU law and international arbitration law that have recently emerged. Part Two in particular traces the development of an expansive notion of EU public policy and its consequences for international arbitration. Part Three then demonstrates that the Member States, under pressure from EU law, are taking measures of dubious legality under international investment law, as enforced by investment arbitration tribunals. The developments identified in these two parts have increasingly disturbed the pattern of peaceful coexistence between EU law and international arbitration law that has so long prevailed; in some regards, these developments place the two regimes on a veritable collision course.

Part Four explores whether and, if so, how the demands flowing from these two previously disengaged legal orders may be accommodated without undue sacrifice to their respective value systems. I conclude that courts have gone a great distance in defusing the tensions by deploying time-honoured accommodation strategies. Such strategies have proven especially effective in coping with the pressures that the notion of EU public policy has placed on the international arbitration system. This operation has been remarkably smooth, considering that it has required altering the way in which public policy has commonly been conceived. Rather than attach the label of public policy to a particular norm and proceed to treat every breach of that norm as *ipso facto* a violation of public policy, courts now increasingly make offence to public policy turn instead on the magnitude and seriousness of the breach. In other words, courts are becoming ever more comfortable with the notion that a norm may enjoy public policy status within EU law without its every breach constituting a violation of EU public policy.

Accommodation strategies also have utility in resolving conflicts between the demands of EU law and the international investor protection system. Investment tribunals in particular have proven to be quite deft at interpreting the mandates of these competing international legal regimes in ways that render them compatible. But while accommodation strategies provide an exit path from some normative dilemmas in the investment arena, they do not do so in all cases. Due to the way in which tensions between EU law and investment arbitration law have recently been framed, arbitral tribunals and courts can scarcely avoid addressing more frontally the relationship between the competing legal orders. Indications thus far suggest that, in that confrontation, the European Union may be required to make concessions to competing legal orders that it is not accustomed to making.

## I. THE DISTANT WORLDS OF EU AND INTERNATIONAL ARBITRATION LAW

The year 1958 saw the entry into force of the Treaty Establishing the European Economic Community,<sup>2</sup> forerunner of today's Treaty on European Union,<sup>3</sup> a treaty pursuant to which the EU has made its presence felt ever more conspicuously on Europe's political, economic and legal landscape. That same year also marked the signature of a quite different international treaty – the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (better known simply as the New York Convention)<sup>4</sup> – that has become the cornerstone of an increasingly robust international arbitration regime. Each of these treaty arrangements pursues its own distinct policy objectives supported by a distinctive set of 'first principles' calculated to ensure its effectiveness.

Notwithstanding the contemporaneity of these two treaties, the fields of EU law and international arbitration law have largely failed to intersect. This failure is probably due more to EU law's assumptions about international arbitration than vice versa, which is not to say that EU law harbours any particular distrust of arbitration, much less views arbitration itself as in contradiction with EU law and policy.<sup>5</sup> In theory, arbitration merely offers another forum for giving effect to EU law in private legal relations,<sup>6</sup> and to that extent serves EU law's purposes. But if EU law is not inhospitable to international arbitration, it has nevertheless kept it at arm's distance, due primarily to three distinct factors: first, the gulf that has long separated EU law and private international law; second, the exclusion of arbitration cases from the Brussels Regulation, which is the EU's principal legal instrument for regulating judicial jurisdiction in civil and commercial matters; and third, the ineligibility of arbitral tribunals to make preliminary references to the

<sup>2</sup> Treaty Establishing the European Economic Community, 298 U.N.T.S. 3, art. 220(4).

<sup>3</sup> Treaty on European Union (TEU), 1992 O.J. C 191/1 (July 29, 1992). In fact, most matters traditionally covered in the Community treaties are now dealt with, not in the Treaty on European Union, but in the Treaty on the Functioning of the European Union (TFEU), 2010 O.J. C 83 (Mar. 30, 2010).

<sup>4</sup> 330 U.N.T.S. 38 (1959).

<sup>5</sup> However, the European Commission has been said to show some suspicion of arbitration, regarding it, at least in the antitrust arena, 'as an instrument for evasion of competition law and Commission enforcement policy.' Shelkopyas, *supra* n. 1 at 422.

<sup>6</sup> 'The need for the recognition of an independent and alternative system to litigation, such as arbitration, is important both for the direct implementation of Article 81 of the EC Treaty [now TFEU Article 101] in accordance with the scope of the Commission White Paper and to share the load of cases concerning competition disputes.' Georgios I. Zekos, 'Antitrust/Competition Arbitration in EU versus U.S. Law', 25 *J. of Int'l Arb.* 1, 29 (2008). As Zekos has written elsewhere, '[i]t is questionable if arbitral tribunals can serve as a means to evade the application of certain EU laws such as competition rules. For example, the parties to an arbitration agreement would agree to exclude issues of EU law from their dispute so that arbitrators would not rule on these matters. The enforcement of arbitral awards would be contrary to public policy since there is a breach of a directly applicable rule.' Georgios I. Zekos, 'The Treatment of Arbitration Under EU Law', 54 *Disp. Res. J.* 9 (1999).

For its part, the European Court of Human Rights has given arbitration a generalised blessing, remarking that 'a waiver of [access to national courts] is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts . . .', and adding that such a waiver, 'which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.' *Deweer v. Belgium*, Case 6903/75, [1980] ECHR 1 (Feb. 27, 1980), para. 49.

ECJ on the meaning or validity of EU law measures. I discuss each of these three considerations in turn.

(a) *EU Law and Private International Law*

Widely viewed as a branch of private international law, international arbitration did not historically resonate with the EU's core concerns. Though European Union law has come with time to range over a remarkably wide variety of fields, private international law was for a long period distinctly not among them. From the start, constitutional and administrative law occupied a conspicuous place in the landscape of EU law, alongside a host of substantive law domains that the architects of the EU specifically targeted: agriculture, fisheries and transport law; a common commercial policy; competition law; and of course the establishment of a common market (later the internal market) more generally. Treaty amendments later brought whole new subject matters within the purview of EU law; environmental<sup>7</sup> and consumer protection<sup>8</sup> and occupational safety and health are only the most conspicuous examples. In fact, over time, pursuit of internal market objectives potentially brought EU law into virtually any field – even a core private law field – in which harmonization of Member State law plausibly stood to render the EU market more fully integrated.<sup>9</sup> Product liability was an early, and remains the paradigmatic, example of private law harmonization in aid of market integration.<sup>10</sup>

From other fields, such as private international law, however, EU law traditionally maintained a distance. This distance reflected the fact that the Community was not originally conceived of as governing purely private legal relations. Disputes under Community law were accordingly not expected to give rise to very much arbitral adjudication. The original EEC Treaty expressly contemplated that any harmonization in the field of private international law would proceed outside the framework of EU law and, more particularly, through a wholly separate convention to be entered into by the Member States. It anticipated in this connection separate agreements on international jurisdiction and the enforcement of foreign country judgments among the Member States, for example,<sup>11</sup> and it was on this basis that the Member States eventually entered into the critically important 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters.<sup>12</sup>

Even when the 1992 Treaty of Maastricht finally brought private international law within the ambit of EU law, it relegated the field to the EU's then so-called 'third pillar' on justice and home affairs, which operated purely inter-governmentally, rather than according to the so-called Community method that

<sup>7</sup> TFEU, *supra* n. 3, art. 191,

<sup>8</sup> *Id.*, art. 169.

<sup>9</sup> *Id.*, art. 114.

<sup>10</sup> Council Directive 85/374/EEC, 1985 O.J. L 210 (Aug. 7, 1985), as amended by Council and Parliament Directive 1999/34/EC, 1999 O.J. L 141/20 (June 4, 1999).

<sup>11</sup> Treaty Establishing the European Economic Community, *supra* n. 2, art. 220.

<sup>12</sup> 1998 O.J. 1998 C27/1 (Jan. 26, 1998).

governed action in the more mainstream ‘first pillar,’<sup>13</sup> which entailed qualified majority voting among the Member States in the Council, executive authority in the European Commission, and judicial review by the European Court of Justice. Only with the 1999 Treaty of Amsterdam<sup>14</sup> was private international law finally integrated into the first pillar, with the result that the 1968 Brussels Convention was transformed into Community legislation, in the form of Council Regulation 44/2001,<sup>15</sup> a directly applicable EU law instrument.

(b) *The Brussels Convention and the Brussels I Regulation*

The 1968 Brussels Convention was not only entered into outside the Community law framework,<sup>16</sup> but also contained an express exclusion for jurisdiction and judgments in arbitration cases.<sup>17</sup> This exclusion did a good deal more than place the exercise of adjudicatory authority by *arbitral* tribunals beyond the Convention’s reach; it also excluded matters of *judicial* jurisdiction and the *judicial* recognition or enforcement of prior judgments, when the underlying claim or judgment pertained to arbitration – whether arbitration agreements, arbitral proceedings or arbitral awards. As a result, none of the typical judicial actions relating to arbitration – such as suits to enforce arbitration agreements, applications for interim relief in aid of arbitration, actions for the annulment of local awards, and suits to enforce foreign arbitral awards – fell within the scope of the Brussels Convention, even though, but for the arbitration connection, such litigation qualified in every other respect for Convention treatment.<sup>18</sup>

The arbitration exception was a rational one. By the time the Brussels Convention was concluded in 1968, the New York Convention was already a decade old.<sup>19</sup> Although the New York Convention did not, and still does not, comprehensively govern the role of courts in relation to arbitration agreements and arbitral awards, it addressed core issues, such as the obligation of national courts to refer parties to arbitration<sup>20</sup> and to grant recognition and enforcement of foreign arbitral awards.<sup>21</sup> The drafters of the Brussels Convention understandably assumed that the New York Convention adequately addressed these problems, and so they created a categorical carve-out for arbitration cases in the courts. When, in

<sup>13</sup> TEU, *supra* n. 3, Title VI (Provisions on Cooperation in the Fields of Justice and Home Affairs), 1992 O.J. C 191/1 (July 29, 1992).

<sup>14</sup> Treaty of Amsterdam, 1997 O.J. C 340/1 (Nov. 10, 1997), amending the Treaty Establishing the European Community, art. 65.

<sup>15</sup> Council Regulation 44/2001, 2001 O.J. L 12/1 (Jan. 16, 2001), art. 1(2).

<sup>16</sup> See *supra* n. 11, and accompanying text.

<sup>17</sup> Brussels Convention, *supra* n. 12, art. 1 (“The Convention shall not apply to: . . . 4. arbitration”). A comparable provision is found in the Lugano Convention.

<sup>18</sup> See *Marc Rich & Co. AG v. Società Italiana Impianti PA*, Case C-190/89, [1991] ECR I-3855 (para. 18) (holding that the Brussels Convention does not apply to proceedings before national courts for the appointment of an arbitrator).

<sup>19</sup> See *supra* n. 4.

<sup>20</sup> *Id.*, art. II.

<sup>21</sup> *Id.*, art. III.

2000, the Convention was transformed into secondary EU legislation in the form of the Brussels I Regulation, the carve-out remained.<sup>22</sup>

The Brussels I Regulation is currently the subject of proposed revisions. This is due largely to the ECJ's controversial 2009 judgment in *Allianz SpA v. West Tankers Inc.*<sup>23</sup> In *West Tankers*, the Court ruled that while actions in national court to enforce arbitration agreements and arbitral awards fall within the Regulation's arbitration exception, that exception does not apply to a case merely because the jurisdiction of the rendering court is challenged on the basis of a prior arbitral agreement between the parties, provided the case is otherwise subject to the Regulation (as was the contract damages suit in *West Tankers*). Having brought this important category of cases within the scope of the Brussels Regulation, notwithstanding the Regulation's arbitration exception, the Court went on to subject it to the same prohibition on use by Member State courts of anti-suit injunctions targeting judicial proceedings in the courts of other Member States that the Court had previously imposed as a general matter in cases falling under the Regulation.<sup>24</sup>

Viewed through the logic of the Brussels Regulation, the Court's position in *West Tankers* made good sense. An action for contract damages is no less subject to the Brussels Regulation's rules on the exercise of judicial jurisdiction in civil or commercial cases merely because jurisdiction is contested on the basis of an agreement to arbitrate rather than on some other ground. But, though logical from a Brussels Regulation perspective, and from an EU law perspective more generally, the result was pernicious from the viewpoint of international arbitration. Anti-suit injunctions in aid of agreements to arbitrate, like judicial orders compelling arbitration, had become a widely used and highly effective weapon against attempts by parties to avoid an agreement to arbitrate – attempts that had themselves become commonplace among parties resisting arbitration. It is small wonder that *West Tankers* elicited loud protests from the international arbitration community.

On this particular conflict, the EU now appears poised to give ground. The European Commission has proposed introducing into the Brussels Regulation a mechanism whereby a Member State court would be required to stay any action arguably falling within the scope of an agreement that designates as arbitral situs another Member State, if and when the jurisdiction of either an arbitral tribunal

<sup>22</sup> Council Regulation 44/2001, *supra* n. 15, art. 1(2)(d).

<sup>23</sup> Case C-185/07, [2009] ECR I-663. In *West Tankers*, the Court was asked to decide whether a UK court's issuance of an anti-suit injunction in support of an arbitration agreement was consistent with the Brussels Regulation. The Court held that 'even though the proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness.' The Court thus affirmed the breadth of the arbitration exception, even while relying on the policies underlying the Regulation to bar the use of the anti-suit injunction as an instrument for strengthening the enforcement of agreements to arbitrate. *Id.*, para. 24.

<sup>24</sup> In *Turner v. Grovit*, Case C-159/02, [2004] ECR I-3565, the ECJ had held that for a Member State court to seek to restrain the exercise of jurisdiction by the courts of another Member State through anti-suit injunctions, even if the latter's assertion of jurisdiction was improper under the Brussels Regulation, would be contrary to the spirit of mutual respect that underlay the Regulation and EU law more generally.

or a court situated within that other State is invoked in relation to the dispute.<sup>25</sup> Though the proposal eschews the anti-suit injunction – an instrument upon which the continental legal culture generally frowns – it features a mechanism that achieves very much the same result. While maintaining the Regulation’s arbitration exclusion, the proposal would require Member State courts to support arbitration by deferring to the arbitral tribunal or to a court of the arbitral situs as soon as the jurisdiction of either is invoked over the dispute. This represents a significant enlistment of EU law in support of arbitration.<sup>26</sup>

(c) *Authority to Make Preliminary References*

Further indicative of the traditional distance between EU law and the law of international arbitration is the apparently settled position of the ECJ that arbitral

<sup>25</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, 2010/0383 (COD) (Dec. 14, 2010), art. 29(4). The mechanism represents a variation on *lis pendens* in that a court must refrain from entertaining a case once there has been instituted in the arbitral seat either an arbitration itself or court proceedings relating to it. A stay would become mandatory ‘once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal has been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.’ Moreover, should the arbitral tribunal or court of the arbitral seat determine that the arbitration agreement exists and is valid, the Member State court where the initial action is pending must decline jurisdiction. *Id.* According to the proposal, this modification ‘will enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics.’ *Id.*, p. 9, para. 3.1.4.

In fact, the provision is even more favourable to arbitration than may at first appear. Traditional *lis pendens* operates chronologically; the court first seized keeps the case to the exclusion of those that come later. Article 29(4) is drafted in such a way (notably through the word ‘once’) to require deference to the arbitration even if the arbitration is instituted after litigation has been begun. See Martin Illmer, ‘Brussels I and Arbitration Revisited: The European Commission’s Proposal COM(2010) 748 final’ (Max Planck Private Law Research Paper No. 11/6)17-18 (2011).

<sup>26</sup> The Commission proposal includes a second change that would further enhance the effectiveness of arbitration as a dispute resolution mechanism. Under the proposal, Member State courts would also be required to entertain applications for provisional relief in aid of arbitration. This would have the effect of placing the grant of provisional relief in aid of arbitration on the same footing as the grant of provisional relief in aid of litigation in the courts of other Member States. Indeed it would go further, since the obligation to support international arbitration through the grant of provisional measures as appropriate would obtain whether or not the arbitration is sited within the EU.

In its earlier Green Paper, the Commission had proposed a full or partial deletion of the arbitration exclusion so as to bring all court proceedings in support of arbitration within the scope of the Regulation, possibly coupled with a grant of exclusive jurisdiction over such proceedings to the courts of the Member State of the place of arbitration. Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final (Apr. 21, 2009), pp. 8-9. This proposal was roundly rejected by the international arbitration community, which took the position that the arbitration exclusion had not been problematic in practice; that bringing arbitration within the scope of the Brussels Regulation would be inconsistent with the Member States’ obligations under the New York Convention; and that the deletion of the arbitration exclusion would give rise to difficulties and uncertainties. See, e.g., IBA Submission to the European Commission on Regulation (EC) No 44/2001 (June 15, 2009); Comments to the European Commission of the Comité français de l’arbitrage (June 16, 2009); Submission of the Association for International Arbitration in relation to the Green Paper released in connection with the review of Regulation 44/2001 (June 25, 2009). Consequently, the European Commission abandoned its proposal to delete the arbitration exclusion in the Brussels Regulation, making the more moderate proposals discussed above in its December 2010 proposals for a reform of the Brussels Regulation. See *supra*, notes 25-26, and accompanying text.

tribunals lack standing to make preliminary references to that Court. The preliminary reference mechanism, by which Member State courts may, and under some circumstances must, refer questions to the ECJ on the interpretation or validity of EU law, if necessary for disposing of particular cases before them, enables EU law to effectively penetrate the Member State legal orders.<sup>27</sup> As part of the procedural landscape from the European Community's very beginnings,<sup>28</sup> preliminary references have given the ECJ vast opportunities to expound authoritatively on EU law, in the expectation that Member State courts, having suspended proceedings to make the very reference in question, will upon resuming the case follow the Court's ruling.<sup>29</sup> Moreover, the Court's preliminary rulings – though issued in the context of a particular referral – have carried as much precedential weight as any other judgment of the Court for future cases arising in Member State courts.

The ECJ has consistently maintained the view that arbitral tribunals, though sitting on the territory of a Member State and even governed by that State's law of arbitration, do not constitute 'courts or tribunals of the Member States,' for purposes of the Treaty's preliminary reference mechanism.<sup>30</sup> Accordingly, arbitral tribunals may not seek preliminary rulings from the Court on the meaning or validity of EU law, despite the fact that the dispute before them raises such issues, even centrally. This perfectly reasonable reading of the treaty means that an arbitral tribunal confronting an issue, and even an entire case, governed by EU law cannot seek the kind of guidance on the meaning or validity of the relevant EU law norms that would ordinarily be available to a national court hearing the identical dispute.

Precluding arbitral tribunals from referring questions to the ECJ arguably lessens the effectiveness of EU law. An arbitral tribunal entertaining an EU competition law claim, for example, cannot make a preliminary reference to the

<sup>27</sup> TFEU, *supra* n. 3, art. 267. See generally Zekos, Antitrust-Competition, *supra* n. 6.

<sup>28</sup> For the current provision, see TFEU, *supra* n. 3, art. 267.

<sup>29</sup> George A. Bermann et al., *Cases and Materials on European Union Law* 324 (3d. ed. 2011).

<sup>30</sup> *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG*, Case 102/81, [1982] ECR 1095. See also *Denuit and Cordenier v. Transorient Mosaique Voyages and Culture, S.A.*, Case C-125/04, [2005] ECR I-923 (para. 13). More recently, the Court ruled in the *European Schools* case that a complaint board set up by international agreement is not a 'court or tribunal' for preliminary reference purposes, primarily because it was an organ of an international organization having a distinct identity from the Member States. *Miles and Others v. Ecoles européennes*, Case C-196/09, [2011].

The Court has clarified that, in order to qualify as a court or tribunal for these purposes, a body 'must be established by law, have permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure and apply the rules of law.' *Municipality of Almelo v. NV Energiebedrijf IJsselmij*, Case C-393/92, [1994] ECR I-1477 (para. 21). What distinguishes arbitral tribunals from courts is their status and not the legal principles they apply. Arbitral bodies are not courts or tribunals because parties are not bound to arbitrate and public authorities are not involved in arbitration. *Nordsee*, paras 11-13. Thus, a national court, hearing a challenge to an arbitral award, remains a court for preliminary reference purposes, even if the legal principles that it (like the tribunal) must apply in the case are the norms of fairness and reasonableness. *Almelo*, paras 21-24.

In the same vein, the French Cour de Cassation has held that an arbitral tribunal is not an emanation of the State and does not constitute a French court or tribunal within the meaning of the requirement of a fair hearing under Article 6(1) of the European Convention of Human Rights. Decision of February 20, 2001, 2001 *Rev. Arb.* 511.

Court, no matter how compelling its need for clarification of EU law on that subject. On the other hand, the cost in EU law efficacy should not be exaggerated. Even without the benefit of preliminary rulings from the Court, arbitral tribunals seldom find themselves in the dark with respect to EU law. Advocates can be counted on to educate arbitral tribunals reasonably well about the contours of EU law, as needed. Moreover, as the Court specifically observed in the leading case,<sup>31</sup> arbitration agreements and arbitral measures and awards commonly end up in litigation before Member State courts at one stage or another in the arbitral life-cycle. Those courts, being ‘courts or tribunals of member states,’ may then of course make any preliminary references to the Court that are otherwise appropriate. Such proceedings – national court actions relating to arbitration – may have fallen into a carve-out from the Brussels Convention and Regulation,<sup>32</sup> but they were not excluded from the EU’s preliminary reference mechanism.

The European treaties, which have been fundamentally revised on several occasions over the years, could readily have been amended to enable arbitral tribunals to make preliminary references to the Court. That step, however, has never been taken. Whether driven by an assumption that EU law issues will seldom arise in arbitration, by a desire not to overburden the Court, by a textual interpretation of the treaty language ‘courts or tribunals of member states,’ or by some other purpose, the exclusion of arbitral tribunals from the preliminary reference mechanism has endured. Even as the Commission has been vigorously urging private parties to bring claims in Member State courts for damages against enterprises for their violations of EU competition law,<sup>33</sup> knowing that at least some of those claims were found to fall within the ambit of a broadly drafted arbitration clause, the EU has left arbitral tribunals without authority to seek direct guidance from the Court.

The EU has in this way contributed to the distance separating EU law and international arbitration practice. But neither the arbitration exclusion from the Brussels Convention and Regulation nor arbitrators’ lack of standing to make preliminary references to the Court of Justice has in any way slowed the development of international arbitration in Europe or kept it from entering into what has been called its ‘golden age.’<sup>34</sup> While at times awkward and even unnatural, the peaceful coexistence of EU law and arbitration has largely prevailed.

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<sup>31</sup> *Nordsee*, *supra* n. 30, paras 14-15.

<sup>32</sup> See *supra*, notes 16-22, and accompanying text.

<sup>33</sup> Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 (Apr. 2, 2008). For an argument that the ECJ should treat investment arbitration tribunals, as distinct from commercial arbitration tribunals, as ‘courts or tribunals of a Member State,’ see Stephan Schill, ‘Arbitration Procedure: the Role of the European Union and the Member States in Investor-State Arbitration,’ in Catherine Kessedjian (ed.), ‘Le droit européen et l’arbitrage d’investissement: European Law and Investment Arbitration’ 129, 144 (2011).

<sup>34</sup> Amr Shalakany, Book Review, ‘International Arbitration in the 21st Century: Towards ‘Judicialisation’ and Uniformity?’ (Richard B. Lillich & Charles N. Brower, eds.), 9 *Eur. J. Int’l L.* 576 (1998); ‘Arbitration: the End of the Golden Age,’ 5 *Glob. Arb. Rev.* (issue 2) (2010).

The landscape I have sketched is, however, changing in potentially important ways. One source of change, and of the emergence of a dangerous intersection between EU law and the law of international arbitration, is the evolution of the notion of public policy in EU law. For this development, sketched in Part II below, the ECJ itself is largely responsible. A second source of change is the growth of a robust international investor protection regime that places substantial constraints on States' freedom to act in ways detrimental to the interests of foreign investors, coupled with a potent investment arbitration mechanism for resolution of the disputes that result. When actions by Member States generating investor protection claims stem from EU law mandates, tensions between the EU and the international investment regimes necessarily follow. Those tensions are the subject of Part III below.

## II. THE TWO WORLDS OF PUBLIC POLICY

The notion of public policy surfaces across broad swaths of the law in virtually all legal systems. But regardless of the area of law or the particular legal system in which it operates, public policy performs the same basic functions. It limits the enforceability of otherwise permissible exercises of party autonomy, within the law of contract, succession, or any other private law field. More important, for present purposes, is its limitation on the enforceability of otherwise applicable choice of forum clauses, choice of law clauses, rules of foreign law, or foreign judgments. Public policy limitations of the latter sort are predicated on a court's interest in safeguarding the most fundamental values of the legal system of which it is a part. Even under the Brussels I Regulation as it stands, an EU Member State court may withhold recognition or enforcement from a judgment of another Member State's courts on public policy grounds, although the Court of Justice has done its level best to keep national courts from applying the public policy defence too broadly.<sup>35</sup>

Public policy is a notoriously vague concept, whatever the context in which it arises.<sup>36</sup> Courts<sup>37</sup> and scholars<sup>38</sup> alike regularly lament its pervasive indeterminacy.

<sup>35</sup> Council Regulation 44/2001, *supra* n. 15, art. 34(1).

<sup>36</sup> '[T]he concrete components of public policy as a ground of the control over arbitral awards . . . are hardly identifiable beyond what is commonly referred to as the most fundamental principles of justice and morality. . . . [A]s a German court put it, a violation of essential principles of German law (*ordre public*) exists only if the arbitral award contravenes a rule which is basic to public or commercial life, or if it contradicts the German idea of justice in a fundamental way.' Shelkopyas, *supra* n. 1, at 364.

According to Swiss Federal Tribunal, '[t]he substantive appraisal of a claim in dispute only violates public policy when it contravenes fundamental principles of law and is therefore incompatible per se with the system of law and values.' Judgment of Nov. 14, 1991, XVII *Ybk Comm. Arb.* 279, 284 (1992). See also Decision of the Swiss Federal Tribunal of 7 March 2003 (RP.250/2002), section 2.1 (an award can be set aside only if its outcome is contrary to public policy; it is insufficient that the reasoning conflicts with public policy).

More recently, the Swiss Federal Tribunal rendered a decision that evidently for the first time under the current Swiss Private International Law (PILA) annulled an arbitral award due to a violation of substantive public policy. Decision of March 27, 2012, no. 4A\_558/2011 March 2012, finding that '[t]he substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognised values, which according to dominant opinions in Switzerland should be the basis of any legal order' (para. 4.1)

By any account, courts have substantial latitude in determining whether a given norm rises to the level of public policy within their respective legal orders, and whether that norm is sufficiently offended to bring a public policy injunction into play.<sup>39</sup> Determining the scope of public policy within any given legal order is ultimately the prerogative of that legal order's highest courts – a prerogative that public policy's nebulous character only strengthens. Precisely for that reason, and regardless of the area of law in which it is invoked, public policy ordinarily receives a narrow interpretation. Across jurisdictions, relatively few legal norms rise to the level of public policy, and denomination of a norm as public policy remains exceptional. That is decidedly the case in the specific context of international arbitration, a matter to which I now turn.

(a) *The Public Policy Defence in International Arbitration*

Public policy plays a highly distinctive role in the international arbitration world. It is one of the few grounds on which courts of the arbitral situs may annul an otherwise proper arbitral award or on which courts elsewhere in the world may deny the award recognition or enforcement. The possibility that an arbitral award may be denied effect by national courts on public policy grounds is inscribed in the New York Convention,<sup>40</sup> in the UNCITRAL Model Law on International Commercial Arbitration,<sup>41</sup> and in the positive law of just about every jurisdiction in the world that seriously seeks to attract international arbitration, whether it has codified its arbitration law or not.<sup>42</sup> Indeed, under the Convention<sup>43</sup> and the Model Law<sup>44</sup> alike, courts appear to have authority to raise a public policy objection *sua sponte*.

<sup>37</sup> See *Richardson v. Mellish*, 2 Bing. 229, 252 (1824) (Borrough, J.) ('[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you.') See also *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) ('The meaning of the phrase "public policy" is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it').

<sup>38</sup> See Friedrich K. Juenger, 'General Course on Private International Law', 193 *RCADI* 1985-IV, p. 201 (describing public policy as 'spell[ing] uncertainty, unpredictability, and lack of uniformity'). For a comprehensive overview of the different types of public policy that courts apply in international arbitration cases, see James D. Fry, 'Désordre Public International under the New York Convention: Whither Truly International Public Policy', 8 *Chin. J. Int'l L.* 81 (2009).

<sup>39</sup> On the meaning of public policy in the EU law context, see generally Sacha Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel', 35 *Common Mkt. L. Rev.* 681, 702-05 (1998); Georges Karydis, 'Ordre public dans l'ordre juridique communautaire', 38 *Revue Trimestrielle de Droit Européen* 1 (2002); Christoph Liebscher, 'European Public Policy—A Black Box?', 17 *J. Int'l Arb.* 73 (2000).

<sup>40</sup> New York Convention, *supra* n. 4, art. V(2)(b).

<sup>41</sup> United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 34(2)(b)(ii). See generally Jean-Baptiste Racine, 'La contribution de l'ordre public européen à l'élaboration d'un ordre public transnational en droit de l'arbitrage', *R.A.E. – L.E.A.* 2005/2, p. 227, citing corruption as a public policy basis for challenging an award.

<sup>42</sup> Gary B. Born, '2 International Commercial Arbitration' 2620-2621 (Kluwer 2009).

<sup>43</sup> New York Convention, *supra* n. 4, art. V(2)(b). ('Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country').

<sup>44</sup> UNCITRAL Model Law of International Commercial Arbitration, *supra* n. 41, art. 34(2)(b)(ii) ('An arbitral award may be set aside . . . only if: . . . (b) the court finds that . . . (ii) the award is in conflict with the public

Despite its near-universality as a ground for challenging international arbitral awards, public policy is subject to a decidedly narrow interpretation. In this respect, it operates no differently in this context than elsewhere in private international law. But the narrowness of public policy in international arbitration is particularly emphatic, fueled by a concern that national courts can all too readily invoke public policy as a ground for rejecting international arbitral awards of which they disapprove on the merits – a move that would drastically undermine international arbitration’s effectiveness and viability as an alternative to national courts as a forum for the resolution of international disputes. Nothing short of the finality of arbitral awards is assumed to be at stake.<sup>45</sup>

In the interest of finality, courts hearing actions for post-award relief are regularly enjoined to refrain from correcting errors of fact or of law,<sup>46</sup> and to construe narrowly the few grounds that are available for annulling awards or denying them recognition or enforcement, public policy included.<sup>47</sup> Courts seem never to tire, even in the rare instance in which they do sustain a public policy challenge to an award, but also in the far more numerous instances when they do not, of reminding challengers of the narrowness of public policy in the arbitration setting.<sup>48</sup> In order for an award to merit either annulment by a court of the place of arbitration or denial of recognition or enforcement by a court elsewhere on public policy grounds,<sup>49</sup> it must offend a norm that is well-defined, deeply held, and rooted in the most fundamental notions of morality and justice.<sup>50</sup>

In some legal systems, though not the United States, the narrowness of the public policy defence in the arbitration context is strengthened by the further proposition that the public policy that is relevant in this context is *international*, as opposed to *national*, public policy. Under this view, it is not enough to justify

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policy of this State’ (emphasis added). Most of the grounds for denying recognition or enforcement of an award under the Model Law are preceded by the language ‘An arbitral award may be set aside . . . only if (a) the party making the application furnishes proof that . . .’ *Id.*, art. 34(2)(a) (emphasis added).

<sup>45</sup> Restatement of the Law Third of the U.S. Law of International Commercial Arbitration, sec. 4-11 (Tentative Draft No. 2, Apr. 16, 2012) (approved May 22, 2012); Born, *supra* n. 42, at 2560-2567, 2711-2729.

<sup>46</sup> *Id.*, sec. 4-11, comment c; Born, *supra* n. 42, at 2599.

<sup>47</sup> Restatement, *supra* n. 45, sec. 4-18, comment b; Born, *supra* n. 42, at 2625-2628.

<sup>48</sup> A.J. van den Berg, ‘The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation’ 265, 360 (1981).

<sup>49</sup> Public policy performs another function in the international arbitration context, but that function is unrelated to the present inquiry. I refer to the use by arbitral tribunals themselves of ‘public policy’ as an instrument for rejecting application of otherwise applicable substantive rules of law where giving effect to them would offend the most fundamental values and principles. See Shelkopyas, *supra* n. 1, at 179. ‘[A]ccording to the prevailing view, . . . public policy is a safety mechanism protecting the forum’s legal and ethical principles which constitute its most fundamental pillars.’ *Id.*, at 197. For this purpose as well, the notion of public policy is strictly and narrowly interpreted. See *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, Case C-38/98, [2000] ECR I-2973, para. 26 (stating that the public policy provision in Article 27(1) of the Brussels Convention must be interpreted strictly).

<sup>50</sup> Even within Europe, national judiciaries disagree over the proper outlook of courts in wielding a public policy defence and, more particularly, over whether to adopt a primarily national or a primarily international attitude in giving content to public policy. See Fry, *supra* n. 38, at 94-100 (reviewing the interpretations of public policy in national arbitration laws around the world and categorising them as public policy of the state, international public policy, incorporation by reference of the New York Convention, and public policy generally).

non-recognition or non-enforcement on public policy grounds that an award offends a fundamental principle of the legal system whose court is asked to give it effect; rather, the award must offend fundamental values that are viewed as more or less universal.

(b) *European Union Public Policy*

Within many areas of EU law, public policy enjoys a similarly narrow understanding. The setting in which public policy most commonly arises is that in which an EU Member State seeks to justify an apparent violation of an EU law norm – notably a cardinal principle such as the free movement of goods, persons, services and capital – by invoking a consideration of national public policy. The ECJ generally subjects any such claim on the part of a Member State to the strictest of scrutiny, lest the effectiveness of EU law be impaired by anything short of the most compelling of policy considerations.<sup>51</sup> To this extent, public policy in EU law is subject to much the same restrictive interpretation as it has received in the international arbitration context and in private international law more generally.

However, the ECJ is proving far less restrictive when it comes to imbuing EU law norms with a public policy dimension. The emergence of EU public policy as a construct is in fact a relatively recent development.<sup>52</sup> For most of its history, the European Union did not distinguish between *EU law*, on the one hand, and *EU public policy*, on the other. Nor did the treaties establishing the European Community, and thereafter the European Union, offer textual support for such a notion. Nevertheless, the ECJ has come to embrace the idea that certain legal norms are so essential to attainment of the EU's most fundamental objectives that they must be treated as if mandatory, in the sense that private parties may not waive them, that choice of law clauses may not oust them, and that national courts are required to invoke and apply them regardless of the otherwise applicable law, even raising them *sua sponte* if need be.<sup>53</sup> To term a norm of EU law origin as having the status of public policy is to say that it cannot be compromised in any of these or similar ways.

The emergence of a notion of public policy within EU law is not in itself particularly remarkable. The EU is a polity based on the rule of law. Like most any other entity of that description, it asserts the right to ascribe to certain of its norms such fundamental importance as to warrant protection against both exercises of

<sup>51</sup> See, for example, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] ECR 649.

<sup>52</sup> On European public policy generally, see Peter F. Schlosser, 'Arbitration and the European Public Policy', in *Arbitration and European Law, reports of the International Colloquium of CEPANI*, April 25, 1997 81-96; M. Fallon, 'Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne', 255 *R.C.A.D.I.* 9, 140-149 (1995-III); Liebscher, *supra* n. 39; Yves Brulard & Yves Quintin, 'European Community Law and Arbitration—National Versus Community Public Policy', 18 *J. Int'l Arb.* 533 (2001). See also Shelkyoplas, *supra* n. 1, § 4.2.

<sup>53</sup> See, e.g., *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, Case C-381/98, [2000] ECR I -9305. See generally, Stéphanie Drancq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – or the Other Way Around', 8 *Ybk Priv. Int'l L.* 333 (2006).

party autonomy and the operation of ordinary conflict of law rules. But, within the EU, and especially for the ECJ, the notion of EU public policy stands to serve an additional and distinctive function, namely ensuring the primacy of EU law vis-à-vis the law of the Member States. The Court's early case law had already posited that much of EU law enjoys 'direct applicability,' in the sense of not requiring transposition at the national level in order to become part of the Member States' domestic legal orders.<sup>54</sup> The Court also ascribed to much of EU law the quality of having 'direct effect,' that is, giving rise to private rights that individuals may assert in national administrative and judicial proceedings and that all Member State authorities, including Member State courts, must protect.<sup>55</sup> In the Court's view, EU law also enjoys primacy over any national law norm – even a national norm of constitutional status – with which it comes into conflict.<sup>56</sup> With the passage of time, the Court further strengthened EU law's demands on Member States by requiring them to make available all procedures and forms of relief, whether administrative or judicial, necessary to ensure that rights derived from EU law are supported by adequate remedies at the Member State level – with the Court ultimately reserving to itself the right to decide whether a given State's machinery of administrative or judicial justice meets the adequacy standard.<sup>57</sup> Denominating a particular EU law norm as 'EU public policy' cannot help but enhance its status still further.

[i] *The Public Policy Imperative in EU Law: The Eco Swiss Case*

As much as any ECJ judgment, the judgment in *Eco Swiss China Time Ltd. v. Benetton International NV*<sup>58</sup> lent currency to the notion of EU public policy. The case is cited most often for the proposition that the norms underlying EU competition law enjoy public policy status. But *Eco Swiss* arose in both a competition law and an arbitration context, and public policy performs very different functions in those two settings.

*Eco Swiss* and *Bulova Watch* had entered into a licensing agreement with *Benetton* that permitted *Eco Swiss* and *Bulova* to manufacture and sell watches and clocks bearing the words 'Benetton by *Bulova*.' Under the agreement, *Eco Swiss* could not sell those products in Italy and *Bulova* could not sell them

<sup>54</sup> *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1.

<sup>55</sup> *Id.*; *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585.

<sup>56</sup> *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, Case 106/77, [1978] ECR 629.

<sup>57</sup> *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] ECR 1891.

<sup>58</sup> *Eco Swiss China Time Ltd. v. Benetton International NV*, Case 126/97, [1999] ECR I-3055. The Court's position in *Eco Swiss* was not entirely novel. Several years earlier, the Court said:

That interpretation by the Court is not affected by the fact that, by virtue of the arbitration agreement made between the parties, a court such as the *Gerechtshof* gives judgment according to what appears fair and reasonable. It follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law must, even where it gives judgment having regard to fairness, observe the rules of Community law, in particular those relating to competition.

*Almelo v. Energiebedrijf IJsselmij NV*, Case C-393/92, E.C.R. I-1477 (1994), para. 23.

On the *Eco Swiss* judgment generally, see Fallon, *supra* n. 52, at 140-149 (1995-III); Christoph Liebscher, 'Arbitral & Judicial Decision: European Public Policy After *Eco Swiss*', 10 *Am. Rev. Int'l Arb.* 81 (1999); Brulard & Quintin, *supra* n. 52.

anywhere in the EU but Italy. When Benetton terminated the agreement, Eco Swiss and Bulova initiated arbitration in the Netherlands pursuant to the agreement's arbitration clause, and won an award for breach of contract. Benetton then sought to have the award annulled in Dutch court under Dutch arbitration law.

Benetton encountered two problems, however. First, it had failed to launch annulment proceedings within the three-month limitations period prescribed by Dutch law. Second, its principal argument in support of the award's annulment – namely that the contract upon which the claim was based was itself illegal under EU competition law, and thus unenforceable – was one that Benetton had failed to raise during the arbitration, and therefore had arguably waived or forfeited.

The Dutch annulment proceeding prompted a preliminary reference to the ECJ. The Dutch court wanted to know whether it was required to annul awards for violation of EU public policy and, if so, whether the violation of EU competition law alleged by Benetton amounted to a public policy violation for these purposes. It also wanted to know whether EU law required it to entertain the annulment action, despite passage of the Dutch limitations period and despite Benetton's failure to advance its competition law argument in the arbitration.

The Dutch court should not have been surprised, upon receiving the preliminary ruling, to learn that the ECJ requires any Member State that treats offence to *domestic public policy* as a ground for annulling a local award (as they all in fact do) to treat offence to *EU public policy* as a ground for annulment as well. To reach that result, the Court had only to invoke the so-called 'principle of equivalence' that it had long since announced and applied in many other settings. Under that principle, Member States are barred from discriminating procedurally against legal claims derived from EU law as compared to analogous claims based on domestic law.<sup>59</sup> Thus, while Member States enjoy basic 'procedural autonomy,' that is, the right to determine the ways in which their authorities – notably their courts – implement and enforce the law, including EU law,<sup>60</sup> they must not discriminate against EU-law-based claims by comparison with analogous domestic law claims. In other words, Member States must accord EU-law-based claims what

<sup>59</sup> *Rewe-Zentralfinanz EG v. Landwirtschaftskammer für Das Saarland*, Case 33/76, [1976] ECR 1989, para. 5; *van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430/93 and C-431/93, [1995] ECR I-4705, paras 13, 17.

For an interesting application of the principle, see *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, Case C-453/00, [2004] ECR I-837. The referring Dutch court asked the ECJ whether a Member State authority is required, upon request, to reopen a matter on which it had made a final decision, where the decision was based on an interpretation of EU law that the Court of Justice had later rejected. The Court observed that under Dutch law, subsequent case law may in certain circumstances be given effect in cases in which a final decision was made and all ordinary remedies exhausted. The Court ruled, implicitly, on the basis of the equivalency principle, that under broadly similar circumstances Dutch bodies must review otherwise final decisions in order to take account of subsequent interpretations of the relevant provision of EU law by ECJ. *Id.*, paras 27-28.

<sup>60</sup> See Theofrastous, *supra* n. 1, at 485 ('As with national laws, the primary questions here are whether there are E.U. objectives to be honored in terms of Public Policy and Arbitrability, and whether those objectives will trump the desire by Member States to grant complete autonomy to the parties to international commercial arbitrations').

might simply be called ‘national treatment.’ Accordingly, if Dutch courts subject arbitral awards to annulment for violation of Dutch public policy, they must be equally prepared to do so for violation of EU public policy. On the premise that it and it alone determines the scope and content of EU public policy,<sup>61</sup> the Court then went on in *Eco Swiss* to rule that EU competition policy does indeed constitute EU public policy.<sup>62</sup>

Over the years, the Court of Justice had applied the principle of equivalence to a myriad of more or less narrow procedural rules of the Member States, including rules on standing to sue, remedy limitations, and the obligation of courts to raise legal issues *sua sponte*. In fact, the Court also applied the principle of equivalence in *Eco Swiss* to an issue of just that sort, namely the statute of limitations, satisfying itself that the Dutch three-month statute of limitations would be applied evenhandedly to annulment actions alleging violation of both Dutch and EU public policy. Unfortunately, Benetton, as noted, had let the limitations period elapse before bringing its annulment action, and it was unable to avoid the time bar by invoking the other main limitation that the ECJ has placed on the procedural autonomy of the Member States, namely the ‘principle of effectiveness.’ (Stated in very general terms, the ‘principle of effectiveness’ requires Member States, in addition to giving EU law claims national treatment, to make available to persons invoking an EU law right in national court such procedures and remedies as are necessary to adequately ensure their enjoyment of the benefits to which the right in question entitles them.<sup>63</sup>) Applying the effectiveness principle to the statute of limitations, the Court ruled that three months was a reasonable time limit on bringing actions to annul arbitral awards; it was not so short as to render such actions unduly difficult to bring, even in a case like *Eco Swiss* in which a party was seeking annulment on public policy grounds. Thus, even though competition law constituted EU public policy, for purposes of the annulment of arbitral awards, Benetton forfeited the right to prove that the award rendered against it in disregard of EU competition law should be annulled on public policy grounds.<sup>64</sup>

<sup>61</sup> It was on that very assumption that the Dutch court in *Eco Swiss* referred to the Court the question whether the competition law claim asserted in the Dutch annulment proceeding was of an EU public policy nature.

<sup>62</sup> For reaffirmation of competition law’s ‘public policy’ status, see *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, Joined Cases C-295-98/04, [2006] ECR I-6619, para. 31; *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, [2009] ECR I-4529 (para. 49).

To the extent that *Eco Swiss* designated EU competition law as having public policy status, it echoed the U.S. Supreme Court’s decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Impliedly, the *Eco Swiss* judgment treated EU competition law claims as arbitrable, much as the U.S. Supreme Court declared antitrust law claims arbitrable in *Mitsubishi*.

<sup>63</sup> *Eco Swiss*, *supra* n. 58, para. 45. See also *Comet BV v. Produktschap voor Siergewassen*, Case 45/76, [1976] ECR 2043, paras 12-16. On the Court’s jurisprudence developing the principles of equivalence and effectiveness, see generally Prechal, *supra* n. 39.

<sup>64</sup> However, the Court in *Eco Swiss* nevertheless hinted that it would not be quick to treat the competition law claim as waived, where the forum in which the waiver allegedly occurred was one not authorised to make preliminary references to the Court of Justice on the meaning of EU law:

[A]rbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be

Returning to the equivalency principle, it is true that the ECJ has occasionally applied it to non-procedural questions. In one case, a Greek court asked the Court whether it could freely apply the traditional Greek ‘abuse of rights’ doctrine, rooted in the Greek Civil Code, to bar a party from abusively invoking a right under EU law.<sup>65</sup> However, public policy is an especially amorphous and sweeping notion with potentially far-reaching substantive implications.<sup>66</sup> Its reach in the arbitration context is no less than its reach elsewhere in private international law, where it can operate to bar the enforcement of otherwise applicable laws, judgments, or contracts, across the board.

Applying the equivalency principle to public policy in the international arbitration context in particular entails especially high stakes. First, annulment of an arbitral award on grounds of public policy (or indeed on any ground) renders the award a legal nullity within the jurisdiction rendering that judgment. Annulment also greatly reduces, without altogether eliminating, the award’s prospects of winning recognition or enforcement elsewhere; an award’s annulment by a competent court is sufficient under the New York Convention to justify the courts of other States in denying the award recognition or enforcement.<sup>67</sup> Even if an award is not challenged in a court of the arbitral situs (or is challenged, but survives), its recognition or enforcement by a foreign court can still be defeated if that court finds that the award’s recognition or enforcement would offend that jurisdiction’s own public policy.<sup>68</sup> An award annulled by a competent court or denied recognition or enforcement by foreign courts accordingly has rather little value.

Second, treating violation of EU public policy in particular as a basis for annulling an arbitral award effectively makes the public policy defence mandatory rather than discretionary. It is widely assumed that, despite their importance, none of the grounds for annulment of awards or for denial of their recognition or enforcement – not even violation of public policy – is strictly-speaking mandatory, in the sense that a national court is obligated to annul the award or deny it recognition or enforcement once the ground is established. The operative term in the New York Convention and the Model Law is the permissive ‘may.’ Improbable though it is, courts theoretically may in their discretion decline to annul an award (or proceed to recognise or enforce it), even though they find the award or its

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applied. It follows that, in the circumstances of the present case . . . Community law requires that questions concerning the interpretation of the prohibition laid down in [EU competition law] should be open to examination by national courts when asked to determine the validity of an arbitral award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

*Eco Swiss*, *supra* n. 58, para. 40.

<sup>65</sup> *Panagis Pafitis v. Trapeza Kentrikis Ellados AE*, Case C-441/93, [1996] ECR I-1347. The Court held, unsurprisingly, that the Greek rule ‘must not detract from the full effect and uniform application of Community law in the Member States.’ *Id.*, paras 68-70.

<sup>66</sup> Monrad G. Paulsen & Michael I. Sovern, “‘Public Policy’ in the Conflict of Laws”, 56 *Colum. L. Rev.* 969 (1956).

<sup>67</sup> New York Convention, *supra* n. 4, art. V(1)(e).

<sup>68</sup> *Id.*, art V(2)(b).

enforcement repugnant to public policy.<sup>69</sup> But, under the Court of Justice's hierarchy of norms, the courts of the Member States almost certainly have no discretion to uphold an award if in fact doing so would offend EU public policy.

[ii] *Beyond Eco Swiss*

*Eco Swiss* was the first ruling in which the ECJ employed the principle of equivalence in connection with the annulment of an arbitral award, or indeed in connection with arbitration altogether. The Court returned to the notion of EU public policy in arbitration in the case of *Mostaza Claro v. Centro Móvil Milenium*.<sup>70</sup> A Spanish telecom company had instituted arbitration against one of its customers, Mostaza Claro, for failure to comply with the minimum contractual period of her telephone service subscription. Although the subscription agreement contained an arbitration clause, it also gave customers the right to have a covered dispute heard in a judicial rather than an arbitral forum. Mostaza Claro did not, however, invoke that right. Instead, she appeared in the arbitration and interposed a defence on the merits, without raising any jurisdictional objection. Having lost in the arbitration, she then sought annulment of the award in a Spanish court, arguing that the underlying arbitration agreement was invalid under EU law as an 'unfair contract term,' within the meaning of the EU directive on unfair clauses in consumer contracts.<sup>71</sup> The national court referred to the ECJ the question whether a Member State court that is hearing an action to annul an arbitral award is required to determine whether the underlying agreement to arbitrate is unfair and therefore unenforceable under the unfair consumer contract terms directive, even if the consumer failed to raise that issue before the arbitrators. The national court was essentially inviting the ECJ to revisit one of the questions that the Dutch court had raised in *Eco Swiss* but that the Court of Justice had not squarely answered.<sup>72</sup>

In *Mostaza Claro*, the Court of Justice ruled that the consumer's failure to invoke the directive during the arbitral proceedings did not relieve the national court of the obligation to entertain that challenge once raised in an annulment action.<sup>73</sup> It described the rights conferred by the directive as being, to that extent, non-waivable.<sup>74</sup> Relying on the principle of effectiveness,<sup>75</sup> the Court in *Mostaza Claro* held that a consumer's failure to question the fairness of a consumer contract term

<sup>69</sup> Restatement, *supra* n. 45, sec. 4-11(d).

<sup>70</sup> *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, Case C-168/05, [2006] ECR I-10421.

<sup>71</sup> Council Directive 93/13/EEC, 1993 OJ. L 95 (Apr. 21, 1993).

<sup>72</sup> Since the annulment action in *Eco Swiss* was time-barred under Dutch law, and since application of the Dutch limitations period was found to offend neither the principle of equivalence nor the principle of effectiveness, the annulment action could not in any event proceed.

<sup>73</sup> *Mostaza Claro*, *supra* n. 70, paras 30-31.

<sup>74</sup> On consumer arbitration generally in the US and EU, see Christopher R. Drahozal & Raymond J. Friel, 'Consumer Arbitration in the European Union and the United States', 28 *N.C. J. Int'l L. & Com. Reg.* 357 (2002); Donna M. Bates, 'Note: A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?', 27 *Fordham Int'l L. J.* 823 (2004); Maud Piers, 'Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations', 2(1) *J. Int'l Disp. Settlement* 209 (2011); Jean R. Sternlight, 'Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World', 56 *U. Miami L. Rev.* 831 (2002).

during an arbitration does not excuse an annulment court from entertaining the challenge. We can infer from the case that a court (a) *may* address the fairness of a consumer contract term, even if the consumer never raised the issue, and (b) *must* address the term's fairness if the consumer raised the issue, even if only belatedly. Strictly speaking, the case did not require the Court to decide whether national courts *must* address the fairness of a consumer contract term even if the consumer *never* raises it.<sup>76</sup>

The Court in *Mostaza Claro* relied secondarily on the principle of equivalence, holding, as it had done in *Eco Swiss*, that the national court was obligated to effectuate EU public policy norms as fully as it effectuates domestic public policy norms.

Where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award, and where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type.<sup>77</sup>

A fair reading of the case thus suggests that if any right under national law is deemed so fundamental as to be unwaivable, then a right that is equally fundamental under EU law must, as a matter of EU public policy, likewise be treated as unwaivable.

Just as in *Eco Swiss*, the Court in *Mostaza Claro* did not suggest that all EU law norms constitute public policy for purposes of the annulment of arbitral awards.

<sup>75</sup> The Court in *Mostaza Claro* built upon its prior decision in *Océano Grupo Editorial SA v Roció Murciano Quintero*, Joined Cases C-240-44/98, [2000] ECR I-4941, a case not involving arbitration. *Océano Grupo* arose out of a sale of encyclopedias on deferred payment terms. The contract of sale provided that in case of a dispute, the courts of Barcelona – which was the seller's place of business but not the purchaser's domicile – would have exclusive jurisdiction. In the seller's action for the purchase price, the buyer did not challenge the jurisdiction of the Barcelona court or the forum selection clause on which its jurisdiction was based. However, it occurred to the court that the forum selection clause might well be unfair within the meaning of the unfair consumer contract terms directive (and that, absent a valid forum selection clause designating that court as forum, it would have no basis on which to exercise jurisdiction). The Barcelona court thus referred to the Court of Justice the question whether the directive authorised national courts to determine, entirely on their own motion, whether such a consumer contract term is unfair within the meaning of the directive.

The Court of Justice in *Océano Grupo* answered in the affirmative, invoking the principle of effectiveness. It described Article 6(1) of the directive, which prohibited Member State courts from treating an unfair term as binding on the consumer, as 'a mandatory provision' and as 'essential to the accomplishment of the tasks entrusted to the consumer and, in particular, to raising the standard of living and the quality of life in the territory.' On several occasions thereafter, the Court reaffirmed *Océano Grupo*, and its use of the effectiveness principle in connection with the unfair consumer contract terms directive (see, e.g., *Cofidis SA v Jean-Louis Fredout*, Case C-473/00, [2002] ECR I-10875; *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi*, Case C-243/08, [2009] ECR I-4713), as well as with other consumer protection instruments (*Max Rampion and Marie-Jeanne Rampion (née Godard) v. Franfinance SA and K par K SAS*, Case C-429/05, [2007] ECR I-8017).

Analogizing the importance of the unfair terms directive to the importance it had ascribed to competition law in *Eco Swiss*, the Court in *Mostaza Claro* concluded that Article 6(1)'s effectiveness would be undermined if national courts required the consumer himself or herself to challenge the fairness of a consumer contract term.

<sup>76</sup> The Court did not expressly find that Spanish law required a court to address a public policy ground under national law in an annulment action even though the consumer failed to raise the issue during the arbitral proceedings.

<sup>77</sup> *Mostaza Claro*, *supra* n. 70, para. 35.

But neither did it go very far in indicating what features of the unfair consumer contract terms directive lent it public policy status. The ECJ characterised Article 6(1) of the directive as ‘mandatory,’ even though Article 6(1) did not by its own terms so state. It simply inferred the directive’s mandatory status from ‘the nature and importance of the public interest underlying the protection which the Directive confers on consumers.’<sup>78</sup> In drawing that inference, the Court confined itself to observing that the directive advanced an interest – namely, raising the standard of living and quality of life – that figures among those listed in Article 3 of the then European Community Treaty as objectives of the Community. Yet the same could be said of virtually any EU law measure. Indeed, the EU law principles of proportionality and subsidiarity suggest that there is no warrant for an EU legislative norm unless it is an important one from the point of view of achieving the EU’s objectives, as well as one that the Member States are incapable of effectively addressing themselves at the national level.<sup>79</sup>

The more recent case of *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*<sup>80</sup> introduces an important qualification to the Court’s position in *Mostaza Claro*. The facts of *Asturcom* were similar to those in *Mostaza Claro*, except that (a) the consumer had not participated at all in the arbitral proceedings, (b) the tribunal issued its award by default, and (c) the consumer took no steps whatsoever to have the award annulled. The consumer had ignored the award altogether, prompting the claimant telecom company to seek enforcement of the award in a Spanish court.<sup>81</sup> That was the context in which the national court made a preliminary reference to the ECJ, asking whether it was obligated under these circumstances to invoke the directive on the consumer’s behalf.

Again, the ECJ analysed the case in terms of both the principle of effectiveness and the principle of equivalence. As to the former, the Court found that Spanish law gave the consumer an opportunity to seek the award’s annulment that was adequate in all respects. It concluded in effect that to require the Spanish court to go further – namely to raise and entertain the consumer protection argument *sua sponte*, when the award was not only final, but the period for challenging it had passed without any action by the consumer – would impermissibly impair the fundamental principle of *res judicata*, while making EU law only marginally more effective. That, the ECJ concluded, would impose an unjustifiably high price on the Member State.<sup>82</sup> It thus recognised that the principle of effectiveness has limits

<sup>78</sup> *Id.*, para. 38.

<sup>79</sup> George A. Bermann, ‘Taking Subsidiarity Seriously’, 94 *Colum. L. Rev.* 331 (1994).

<sup>80</sup> *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, Case C-40/08, [2009] ECR I-9579.

<sup>81</sup> It does not appear from the judgment of the Court of Justice that the consumer even mounted a defence to the enforcement action in national court.

<sup>82</sup> *Asturcom*, *supra* n. 87, paras 39-46. Put differently, *Asturcom* holds that, while a consumer who fails to raise the unfairness of an arbitration agreement in an arbitration does not forfeit the objection in a later annulment proceeding, it may forfeit the objection if it raises it for the first time when the prevailing party seeks to enforce the award, since by then the award was no longer subject to direct challenge and had thus become *res judicata*.

The analysis in *Asturcom* under the principle of equivalence proved more difficult. Under that principle, if a Spanish court would determine on its own motion whether an arbitration clause in a consumer contract

and must at some point yield to considerations of national procedural autonomy. But the decision does not signal any retreat on the Court's part from the proposition that the unfair consumer contract terms directive represents EU public policy and that national courts must organise the machinery of justice so as to ensure that the directive's purposes are achieved both effectively and in a fashion equivalent to comparable provisions of national law.

[iv] *The Boundaries of EU Public Policy*

Taken together, *Eco Swiss*, *Mostaza Claro*, and *Asturcom* clearly place certain norms of EU competition and consumer protection law within the category of EU public policy. But they also raise more far-reaching questions.

First, do whole fields of EU law (such as competition and consumer protection law) fall *en bloc* within the domain of public policy, or do only certain norms within them – whether treaty provisions or legislative instruments – do so?<sup>83</sup> The ECJ in fact has refrained from declaring whole fields of EU law to have a public policy character. This is unsurprising, considering that, for purposes of any given case before the Court, it is sufficient to decide whether the particular norm invoked has that status.

Second, what other fields of EU law – or particular norms within those fields – enjoy public policy status? If EU competition and consumer protection law have attained that status, has EU environmental protection law, labour law or occupational health and safety law also done so? That prospect can hardly be excluded.<sup>84</sup> For labour law, the likelihood is especially great, given the ECJ's repeated assertion that certain employee protections are mandatory and cannot be waived, either directly or indirectly.<sup>85</sup> Whether environmental protection or occupational health and safety falls within this category is less certain, but surely cannot be excluded *a priori*. We may assume that fundamental human rights norms, including the prohibition on nationality and gender discrimination,<sup>86</sup> must be

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conflicts with national public policy, despite the arbitral outcome having become *res judicata* without the question ever having been raised, then it must do likewise in regard to EU public policy. The Court reiterated in this connection that Article 6(1) of the consumer contract terms directive was a 'mandatory provision' and 'essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community' *Id.*, para. 51. Therefore, Article 6(1) enjoyed the status of EU public policy. *Id.*, para. 52 ('Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy'). It remained only for the national court on remand to ascertain whether Spanish courts would decline to enforce an arbitral award on national public policy grounds under the circumstances presented in *Asturcom*. If they would, the principle of equivalence would require them to do likewise in the case at hand.

<sup>83</sup> On the debate whether EU competition law as a whole constitutes EU public policy, see Karydis, *supra* n. 39.

<sup>84</sup> The suggestion has been made that all norms of EU law that are directly applicable and directly effective are necessarily EU public policy norms. See, e.g. Brulard & Quintin, *supra* n. 52.

<sup>85</sup> *Mirja Juuri v. Fazer Amica Oy*, Case C-396/07, [2008] ECR I-08883, Opinion of Advocate-General Colomer of Sept. 4, 2008, para. 25; *Föreningen AF Arbejdsledere I Danmark v. Daddy's Dance Hall A/S*, Case 324/86, [1988] ECR 739, para. 15. See generally Schlosser, *supra* n. 52, at 86.

<sup>86</sup> Schlosser, *supra* n. 52, at 86. It has been suggested that an EU law norm must 'contain an element of "fundamentality" to pertain to European public policy.' Liebscher, *supra* n. 39.

protected as a matter of public policy in whatever field they arise.<sup>87</sup> Public policy may also be ascribed to those liberal economic values deemed essential to the functioning of the integrated market that is the EU's very cornerstone. Thus, one leading academic considers that all norms establishing the free movement of the factors of production – goods, persons, services and capital – collectively constitute public policy.<sup>88</sup> The contours of EU public policy will become known only progressively, as Member State courts consider, and occasionally ask the ECJ, whether a given field of EU law, or norm within that field, enjoys public policy status.<sup>89</sup> The Court has already held that some EU harmonization measures do not constitute EU public policy, but has not clearly indicated why.<sup>90</sup>

That the notion of public policy in private international law is nebulous has long been acknowledged, but that reality has been offset by a consensus that public policy represents a highly restricted normative category. That is appropriate, as its function throughout private international law – and international arbitration is no exception – is typically to override party autonomy or defeat enforcement of an otherwise applicable law or judgment. But, as developments at the EU level show, the notion of public policy may enjoy much greater amplitude when it is put to a different set of purposes. In the EU context, it performs a distinctive function indeed, namely, to emphasise the paramountcy of EU law vis-à-vis the law of the Member States. The ECJ has reason to entertain a highly robust conception of EU public policy for these purposes, since doing so serves to strengthen EU law's

<sup>87</sup> Racine, *supra* n. 41, at 227-228. Racine takes the position, however, that not every provision of the European Human Rights Convention enjoys public policy status. *Id.* at 231. According to Racine, public policy probably also does not tolerate corruption.

<sup>88</sup> Schlosser, *supra* n. 52, writes:

The very essence of the European Communities has always been to create and to develop the five big freedoms of the citizens of the community: the freedom of transnational trade, the freedom to provide services, the freedom of movement of capital, the freedom of movement of workers and the freedom of establishment; if anything, these five freedoms are the culmination of European public policy.

Schlosser singles out for public policy treatment the directive guaranteeing protection of commercial agents. *Id.* at 87.

<sup>89</sup> See generally, Hanna Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom', 4 *Eur. Rev. Priv. L.* 847 (2010).

In *Eco Swiss*, *supra* n. 58, the Court relied on the inclusion of competition law in EC Treaty Article 3 as one of the competences of the EU, but this is a dangerous line of reasoning. '[A]lmost any piece of Community law can claim, as an instrument providing a legal framework for EC tasks and actions, to be within the scope of Article 3 EC.' Shelkypas, *supra* n. 1, at 126.

<sup>90</sup> In *van der Weerd v. Minister van Landbouw, Natuur en Voedselkwaliteit*, Joined Cases C-222-25/05, [2007] ECR I-4233, the Court determined that a national court is not required to raise on its own motion arguments based on an alleged violation of Directive 85/511 governing measures to control foot-and-mouth disease. According to the Court:

[T]he principle of effectiveness does not, in circumstances such as those which arise in the main proceedings, impose a duty on national courts to raise a plea based on a Community provision of their own motion, *irrespective of the importance of that provision to the Community legal order*, where the parties are given a genuine opportunity to raise a plea based on Community law before a national court.

[2007] ECR I-4233 (para. 41) (emphasis added). For the Court, clearly, not all provisions of EU law provisions have the same 'importance . . . to the Community legal order.' But see Racine, *supra* n. 41, at 232, who would place in the category of EU public policy competition policy, consumer protection, company law, intellectual property law and bankruptcy, adding that 'this comes close to saying that all of Community law is public policy.'

effectiveness within the national legal orders. But in that context, public policy cannot then be assumed to have the highly exceptional character ordinarily ascribed to it in private international law.

[c] *The Dilemma of Member State Courts*

In the abstract, there is no reason why two international regimes, such as EU law and international arbitration, cannot entertain very different notions of public policy. Sometimes, however, the demands of public policy as articulated in the two regimes cannot readily be reconciled. As the *Eco Swiss*, *Mostaza Claro* and *Asturcom* cases reveal, public policy claims can arise in judicial settings that implicate *both* EU law *and* the law of international arbitration, often within the borders of a single case before a single national court.

In a case like *Eco Swiss*, first principles of international arbitration law required the Dutch court to give public policy, as a ground for annulment, a narrow and restrictive interpretation, reserving it for the truly exceptional case. At the same time, EU law, at least as articulated by the ECJ, required the same Dutch court to entertain an expansive definition of public policy and to annul any arbitral award within its jurisdiction that offends it. Put simply, the logic of EU law favours an expansive notion of public policy, while the logic of international arbitration law favours one that is markedly more restrictive. It is fair to ask whether, in such a case, the Dutch court can possibly do right by both imperatives.

But the challenge that EU public policy presents to international arbitration runs still deeper. Arbitration's claims to efficiency are largely predicated on the notion that parties must bring all their legal claims – procedural and substantive alike – before arbitral tribunals rather than reserve them for ex post judicial challenges to unfavourable awards.<sup>91</sup> Thus, in arbitration practice, well-developed principles of waiver and estoppel serve the generally salutary purpose of compelling parties to raise their claims on a timely basis in the arbitral forum, on pain of forfeiting them. However, according to cases like *Eco Swiss* and *Mostaza Claro*, parties may not in fact be required to lay their EU public policy arguments before the arbitrators in the first instance, but rather may reserve them for eventual judicial challenges to awards. To this extent, EU public policy – particularly one of wide proportions – risks disturbing the specific equilibrium on which the international arbitration regime's proper functioning relies. Discrepancies in the scope of public policy between the EU and international arbitral regimes thus cannot be dismissed as of academic interest only.

### III. IN THE INVESTOR PROTECTION/EU LAW CROSS-FIRE

The rise of investor-state arbitration has more recently opened up a second front in the contest between the EU and international arbitration legal orders. In this Part,

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<sup>91</sup> See generally Piers, *supra* n. 74, at 227-228.

I explore the tensions this confrontation is generating – tensions that differ markedly from those described in the previous part. As will be seen, analysis of these conflicts is complicated by two factors: first, the distinction between bilateral investment treaties (BITs) between two EU Member States ('intra-EU BITs') and BITs between a Member State and a third country ('extra-EU BITs');<sup>92</sup> and second, the fact that the EU's winning of exclusive competence over foreign direct investment under the 2009 Treaty of Lisbon<sup>93</sup> raises more questions than it answers.<sup>94</sup>

The tensions observable on the investor protection front derive from a simple reality, namely that EU law occasionally mandates that Member States take measures that arguably run afoul of those States' obligations to foreign investors under BITs, thus subjecting them to claims, and potentially very considerable liabilities, before investment arbitration tribunals.<sup>95</sup>

The EU's prohibition on state aids illustrates the point. From the start, European Community law barred Member States from granting state aids to industry except when, in exceptional circumstances, the Commission authorised them to do so.<sup>96</sup> The Court of Justice has pronounced such recovery of any illegal state aid from the recipient to be a Member State "obligation,"<sup>97</sup> and the Commission enforces it energetically.<sup>98</sup> The Commission and Court count on

<sup>92</sup> Intra-EU BITs are typically agreements entered into by a Member State with a third country prior to the latter's accession to the EU. Such agreements were technically extra-EU BITs, but became what are now known as intra-EU BITs upon the third country's accession. As discussed below, *infra*, notes 186-187, and accompanying text, the European Commission has taken the position that, upon a State's accession to the EU, its BITs with existing Member States are no longer valid and enforceable, unless the Commission specifically authorises them. This view has not commanded the support of the Member States, and may therefore not win the support of the Council when it comes to legislating on the matter. See *infra*, n. 189, and accompanying text. Extra-EU BITs are agreements between a Member State and a State that is not a member of the EU.

<sup>93</sup> Treaty of Lisbon, amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 O.J. C 306 (Dec. 17, 2007). See more specifically TFEU, *supra* n. 3, arts 3(1)(e) (making the common commercial policy an exclusive Union competence), 207 (making foreign direct investment a component of the common commercial policy). TFEU Article 207(1) reads, in pertinent part, '[t]he common commercial policy shall be based on uniform principles, particularly with regard to . . . commercial aspects of . . . foreign direct investment . . .' Article 2(1) of the TFEU defines 'exclusive competence' as meaning that 'only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.' See generally Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *Comm. Mkt L. Rev.* 383, 387 (2009).

<sup>94</sup> See *infra*, notes 196-203, and accompanying text. On the subject, see generally Catherine Kessedjian, 'Le droit européen et l'arbitrage d'investissement: European Law and Investment Arbitration' (2011); Jacqueline Dutheil de la Rochère, 'Quel rôle pour la Cour de Justice', in Kessedjian, *id.*, at 37; Stephan Schill, 'Arbitration Procedure: the Role of the European Union and the Member States in Investor-State Arbitration', in Kessedjian, *id.*, at 129.

<sup>95</sup> Jan Kleinheisterkamp has identified, as among the leading BIT provisions that might well contravene EU law: unqualified capital transfer guarantees, prohibition of performance requirements, national or most-favoured treatment, and respect for existing state aids. Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty', 15 *J. Int'l Econ. L.* 85 (2012).

<sup>96</sup> George A. Bermann et al., 'Cases and Materials on European Union Law' 1043 (3d. ed. 2011).

<sup>97</sup> An order to recoup state aid is the standard remedy imposed by the Commission for the issuance of an illegal state aid. See, e.g., *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*, Case C-24/95, [1997] ECR I-1591.

<sup>98</sup> Commission Notice on the Enforcement of State Aid Law by National Courts, O.J. C 85/1 (April 9, 2009), pp. 6-7, 9-11. The Notice describes in detail national courts' 'essential' role in the enforcement of EU state aid

Member State courts not only to perform this obligation, but also to entertain private damage actions by competitors and other third parties allegedly injured as a result of the grant of an illegal state aid.<sup>99</sup>

On the other hand, the international investor protection regime does not always look kindly on the revocation of state aids, particularly when they were granted as an inducement to investors. State aid withdrawals can readily be challenged before an investor-State tribunal as in violation of a Member State's standard BIT obligations, including the requirement of 'fair and equitable treatment' of investors, guarantees of most-favoured nation (MFN) and national treatment, and protection from expropriation. A Member State's dilemma is manifest. At the same time that it is responsible under EU law for ensuring the recovery of an unauthorised state aid (and is subject to Commission prosecution, fines and private damages actions if it fails to do so), a Member State is enjoined from doing so under international investor protection law principles. A State that proceeds with such a revocation will likely face an investment arbitration, and possibly an award in damages that the courts of that State, like other countries' courts, have an international obligation to enforce.<sup>100</sup> While some categories of investor-State awards – notably those rendered under the aegis of the International Centre for Settlement of Investment Disputes (ICSID) – are immune to challenge in national courts,<sup>101</sup> others will come in for judicial scrutiny.<sup>102</sup> In the latter circumstance,

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law. *Id.*, p. 5. When difficult issues of EU state aid law arise in national court proceedings, the court may seek an opinion from the Commission. *SFEI and Others*, Case C-39/94, [1996] ECR I-3547 (para. 50).

<sup>99</sup> Commission Notice, *supra* n. 98, pp. 6, 11-13. Such actions may be supported by provisional remedies pending judgment. *Id.*, p. 13.

<sup>100</sup> See generally, Michele Potestà, 'Bilateral Investment Treaties and the European Union: Recent Developments in Arbitration and Before the ECJ', 8 *Law & Pract. Int'l Courts and Tribunals* 225, 230 (2009); Eilmansberger, *supra* n. 93, at 387; Christer Soderlund, 'Intra-EU Investment Protection and the EC Treaty', 24 *J. Int'l Arb.* 455 (2007).

State aid cases are not unique in this regard. See *Mercuria Energy Group, Ltd. (Cyprus) v. Republic of Poland*, Arbitration Institute of the SCC, final award rendered in December 2011, in which a Cypriot investor challenged as arbitrary and discriminatory under Article 10(1) of the Energy Charter Treaty the manner in which Poland had implemented an EU directive increasing mandatory fuel reserve requirements for firms. Poland had imposed a fine on Mercuria's Polish subsidiary, J&S Energy S.A., for its failure to maintain mandatory stocks of fuel oil. The tribunal rejected all of Mercuria's claims, stating that Poland did not breach the obligation to accord fair and equitable treatment to Mercuria's investment in Poland, nor did Poland discriminate against Mercuria's investments in Poland. See 'Poland Wins Investment Treaty Arbitration with EU Investor; Government Sits On Growing Cache of Unpublished Rulings', *Investment Arbitration Reporter*, Feb. 7, 2012, available at [http://www.iareporter.com/articles/20120207\\_1](http://www.iareporter.com/articles/20120207_1).

<sup>101</sup> The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) does not contemplate judicial annulment actions or judicial review of awards upon their enforcement, and even within the internal ICSID annulment process, public policy is not an available defence. ICSID Convention, arts. 53-54. Presumably an EU Member state is required under ICSID to enforce an ICSID award even if, in substance, it is incompatible with EU law. Eugenia Levine, 'Amicus Curiae in International Investment Arbitration', 29 *Berkeley J. Int'l L.* 101 (2011). But see n. 145, *infra*.

<sup>102</sup> Outside the ICSID Convention, investor-State awards are as susceptible to annulment or denials of recognition and enforcement as any other species of international arbitral awards.

shall the Member State court sustain the award in accordance with the country's investment treaty obligations or reject it as offensive to EU law?<sup>103</sup>

In fact, prior to any national court facing the challenge of squaring a State's EU law obligations with its investor protection obligations, an investment arbitration tribunal will ordinarily have been presented with that very same challenge. Recent years offer us several examples.<sup>104</sup> By way of illustration, in the *AES Summit Generation* case,<sup>105</sup> involving an intra-EU BIT, the Hungarian government had terminated long-term power purchase agreements (PPAs) with foreign investors that had set prices for electricity guaranteeing those investors a return on investment without commercial risk. Hungary took that action pursuant to a decision in 2007 to reintroduce an administrative pricing scheme that it had abolished several years earlier, ostensibly as an inducement to foreign investors. Hungary reintroduced the scheme following a three-year infringement proceeding by the Commission, which ultimately ruled that the PPAs not only restricted competition in the energy sector in violation of EU law (by sheltering incumbent operators from competition), but effectively constituted a state aid incompatible with the common market.<sup>106</sup> Under compulsion by the Commission, Hungary recovered from the investors the amount of revenue they earned that they would not have earned in a competitive market without the benefit of the PPAs. The *AES Summit* arbitration, along with others, ensued. Invoking the Energy Charter Treaty (ECT),<sup>107</sup> AES, a U.K. company, charged that Hungary had violated various of its host state obligations (including the obligation to accord fair and equitable

<sup>103</sup> It has been suggested that the tension is more imagined than real because the Commission is only operating within an EU law framework and BIT tribunals only under international law. Wenhua Shan & Sheng Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy', 21 *Eur. J. Int'l L.* 1049, 1057 (2011). But that is precisely the problem, inasmuch as Member State courts are answerable to both.

<sup>104</sup> For a full discussion, see Matthew T. Parish & Charles B. Rosenberg, 'Investment Treaty Law and International Law', 23 *Am. Rev. Int'l Arb.* 138, 147-152 (2012). See also Meg Kinnear, 'Transparency and Third Party Participation in Investor-State Dispute Settlement, Making the Most of International Investment Agreements', paper delivered at ICSID, OECD and UNCTAD joint symposium (Sept. 12, 2005).

<sup>105</sup> *AES Summit Generation Ltd. & AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22 (award of Sept. 23, 2010).

The tribunal considered that the measure was taken for the legitimate purpose of reducing the excessive profits earned by the generators and reduce the burden on consumers, that any reasonably prudent investor would have contemplated the possibility of the reintroduction of administrative pricing, and that the measure was neither discriminatory nor a violation of Hungary's most-favoured-nation and national treatment obligations. *Id.*, paras 9.3.34, 9.3. The claimants brought an annulment action that was dismissed on the merits on June 29, 2012.

<sup>106</sup> Commission Decision C 41/05, (2008) 2223 final, 2009 O.J. L. 225/53 (June 4, 2008). AES Summit also challenged the Commission decision in the General Court (formerly the Court of First Instance). *AES-Tisza v. Commission*, Case T-468/08. The case is apparently still pending. But in a related case, *Budapesti Erömü Zrt v. Commission*, Case T-182/09, [2012] ECR (Feb. 13, 2012), the General Court upheld the Commission's conclusion that the PPAs enabled power generators to enjoy economic advantages that they would not have obtained in a competitive market.

<sup>107</sup> 2080 UNTS 95; 34 ILM 360 (1995). Article 26 of the ECT gives investors several options for submitting their claims against host governments to international arbitration, including the ICSID Convention, ICSID Additional Facility Rules, *ad hoc* arbitration operating under the UNCITRAL Arbitration Rules, or Stockholm Chamber of Commerce arbitration. See generally Thomas Wälde, 'Investment Arbitration under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation', 12 *Arb. Int'l* 429

treatment, to avoid unreasonable and discriminatory measures, to provide just compensation for expropriation and to comply with requirements of both national and most-favoured-nation treatment). Predictably, Hungary defended itself on the ground, among others, that revocation of the aid was mandated by EU law. Seeking to support Hungary's contention, the European Commission requested and was granted *amicus curiae* status in the arbitration.<sup>108</sup> The Commission had understandable concerns, among them that investors would bring their claims to a BIT tribunal rather than a host State court (i.e. forum-shop), in hopes of a more hospitable forum.<sup>109</sup>

In its award, the *AES Summit Generation* tribunal ultimately rejected the investor's claim on the merits, on the ground that Hungary had not in fact created in the investor legitimate expectations that precluded Hungary from terminating the PPA.<sup>110</sup> Though plainly conscious of the dissonance between the EU law and investor protection law, the tribunal thus avoided having to favour one legal order over the other.

#### IV. RESOLVING THE TENSIONS

Having identified the two major lines of conflict between EU law and international arbitration law that have emerged in recent years, I turn now to the means that are

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(1996); Richard Happ, 'The Legal Status of the Investor vis-à-vis the European Communities: Some Salient Thoughts', 10 *Int'l Arb. L. Rev.* 74 (2007); Markus Burgstaller, 'European Law and Investment Treaties', 26 *J. Int'l Arb.* 181 (2009).

<sup>108</sup> See generally, Eugenia Levine, *supra* n. 101.

The Commission has similarly sought and obtained *amicus curiae* status in investor-State arbitrations brought against other Member States. See *Ioan Micula, Viorel Micula and Others v. Romania*, ICSID case no. ARB/05/20. In *Micula*, two Swedish investors claimed that Romania's partial withdrawal of incentives (in the form of tax exemption, customs refunds and subsidies) originally granted to the investors' drinks companies with a view to developing economically disfavoured regions of the country constituted a violation of the Swedish-Romanian BIT. Romania argued in its defence that, as a matter of EU state aid law, the benefits had to be withdrawn. On September 24, 2008, the tribunal issued an award affirming its jurisdiction and the dispute's admissibility, but thus far has issued no award on the merits.

<sup>109</sup> Christoph G. Benedict, 'The Multilateralization of Investment Protection under the Lisbon Treaty: Fears and Hopes of Investors', 24 *ICSID Rev. – Foreign Investment L.J.* 446, 450-451 (2009). The Commission probably worries not only about the inability of BIT tribunals to make preliminary references to the ECJ, but also about the likelihood that they will be less solicitous of EU law than a national judge would be, particularly when a State invokes EU law as a justification for what would otherwise amount to an investment treaty violation. More generally, a decentralised investor-State dispute resolution system is not conducive to the uniform application of EU law and policy across the Union.

<sup>110</sup> The tribunal considered that the measure was taken for the legitimate purpose of reducing the excessive profits earned by the generators and reduce the burden on consumers, that any reasonably prudent investor would have contemplated the possibility of the reintroduction of administrative pricing, and that the measure was neither discriminatory nor a violation of Hungary's most-favoured-nation and national treatment obligations. *AES Summit*, *supra* n. 105, paras 9.3.34, 9.3. The claimants brought an annulment action that was dismissed on the merits on June 29, 2012.

In a related arbitration, a Belgian energy firm initiated arbitration proceedings against Hungary for breach of the Energy Charter Treaty, arising out of Hungary's restructuring of its electricity power sector. *Electrabel S.A. v. Republic of Hungary*, ICSID case no. ARB/07/19. The arbitral proceedings are still ongoing. For still another related case, still pending, see *EDF International, S.A. v. Hungary*, an ad hoc arbitration conducted under the UNCITRAL Rules.

available to decision-makers for addressing them. A traditional means of resolving conflicts of this sort entails reasonably straightforward exercises in accommodation. In this Part, I demonstrate that accommodation techniques have succeeded remarkably well in defusing the tensions between the ECJ's expansive understanding of EU public policy and the needs of international arbitration. Those techniques also work, but considerably less well, in reconciling the conflicts between EU law and the law of investor protection. In this second arena, arbitral tribunals on occasion have had no choice but to confront more or less directly the authority relationship between the competing legal regimes.

(a) *Accommodation Strategies*

Normative conflicts between international legal regimes, like conflicts between domestic and international legal regimes, are of course nothing new. Perhaps the most common way of addressing them is through one form or another of accommodation. In fact, there is no single accommodation strategy. Even in the limited interface between EU law and international arbitration law, multiple accommodation strategies are demonstrably at work.<sup>111</sup>

[i] *Accommodation in the Public Policy Arena*

The task of accommodating the demands of EU law with the needs of international arbitration has, as already noted, fallen principally to the courts of the Member States – notably when those courts confront claims that an otherwise valid arbitral award violates EU public policy and for that reason should be annulled or denied recognition or enforcement.<sup>112</sup> The *Eco Swiss* and *Mostaza Claro* cases served to bring this challenge suddenly to the fore.<sup>113</sup>

Member State courts have been relatively quick to devise an accommodation strategy suited to this situation. The French Supreme Court decision in the *Cytec* case is illustrative.<sup>114</sup> There, a French party that had prevailed in a contract action before a Belgian arbitral tribunal sought enforcement of the resulting award in France. The defendant resisted enforcement on the ground that the underlying contract stemmed from an abuse of dominant position under EU competition law. Conceding that the prohibition on abuse of dominant position constituted public policy at the EU level, the French court nevertheless ruled that its violation did not necessarily constitute an offence to public policy for award enforcement purposes. To have that effect, the violation had to have been 'flagrant, effective and

<sup>111</sup> See generally, Piers, *supra* n. 74.

<sup>112</sup> Brulard & Quintin, *supra* n. 52. Even in its *Eco Swiss* judgment, the Court of Justice admitted that review under the rubric of public policy 'may be more or less extensive depending on the circumstances.' *Eco Swiss*, *supra* n. 58, para. 32.

<sup>113</sup> See generally Emmanuel Gaillard, 'Extent of Court Review of Public Policy', 237 *N.Y.L.J.* (Apr. 5, 2007); Pierre Mayer, 'The Second Look Doctrine: The European Perspective', 21 *Am. Rev. Int'l Arb.* 201 (2010).

<sup>114</sup> *Sté SNF SAS c/ Sté Cytec Industries BV*, Cass. civ. 1re, June 4, 2008, Bull. civ. I no. 162, Gaz. Pal. no. 52, p. 32, RTD Com. 2008, p. 518.

concrete,<sup>115</sup> which it evidently was not. Other courts have likewise refrained from annulling arbitral awards for violation of public policy where an arbitral tribunal issued an award that may have violated EU competition law, but did not reflect ‘manifest disregard’ of that body of law.<sup>116</sup> The accommodation technique employed in these cases consists essentially of reconciliation through interpretation.

But reconciliation of this sort requires something of a doctrinal shift in public policy analysis. At least in some contexts, it has been assumed that whether a measure constitutes an offence to public policy depends strictly on the character and content of the norm that has been violated, and more particularly on the importance of the values or interests that the norm embodies. It is tempting to view public policy, by its very nature and by the rhetoric that commonly accompanies it, as uncompromising, in the sense that a legal norm either has public policy status or it does not, and if it does, it must prevail over competing considerations in all circumstances.

Under the *Cytec* approach, however, less important than the content or character of the offended norm is the degree to which that norm is offended. Practically speaking, *Cytec* reflects what might be called a ‘norm-mitigation’ strategy, for it directs courts to overlook violations of public policy norms, provided those violations are not themselves egregious. To judge by the case law that has ensued, courts widely view this mitigation strategy as satisfactorily resolving the normative conflicts that EU public policy raises in the arbitration context.

The question that naturally arises is whether the ECJ will give its blessing to the relaxation of EU public policy inherent in the approach I have described. Such

<sup>115</sup> The academic commentary is generally approving. See Schlosser, *supra* n. 52, at 81-96; Liebscher, *supra* n. 39. One authority described the inquiry into the EU law violation as ‘minimalist.’ Zekos, ‘Antitrust/Competition’, *supra* n. 6, at 23. Another has described the approach as essentially a compromise between vindication of EU public policy and the finality of arbitral awards. Pascal de Vareilles-Sommières, ‘Lois de Police et Politiques Législatives’, 100 *Rev. Crit. Dr. Int’l Privé* 207, 276-277 (2011).

The New York Convention refers simply, in regard to the public policy exception to the enforcement of foreign awards, to an award being ‘contrary to the public policy of [the country where recognition or enforcement is sought.’ However, the Convention does not itself regulate the annulment or vacatur of awards made locally, even if international in character. That is a matter governed by the national law of arbitration. While virtually all such national laws recognise the violation of public policy as a ground for annulment, some specify that, to justify annulment, enforcement of an award must be ‘manifestly’ contrary to public policy. See, e.g., France’s New Code of Civil Procedure, art. 1498; Dutch Code of Civil Procedure, art. 1063; Organization for the Harmonization of Business Law in Africa, Uniform Arbitration Law 1999, art. 31.

<sup>116</sup> *Thales Air Defence BV v. GIE Euromissile*, case no. 02/19606, 2005 *Jurisclasser* 35 (Ct. App., Paris, Nov. 18, 2004); *Linde*, case 08/21022 (Ct. App Paris, Oct. 22, 2009); *Nuovo Pignone v. Schlumberger* (Ct. App. Florence, Mar. 21, 2006); *Terra Armata v. Tensacciai* (Ct. App. Milan, July 21, 2006); *Latvian Republic v. JSC Latvijas Gaze*, no. T 6730-03 (Ct. App. Svea, Sweden).

For a recent example, see the French Supreme Court’s decision of June 29, 2011, arrêt no. 702. There, a French grain seller refused to deliver goods to a Belgian buyer because the latter’s accreditation had been withdrawn by a decision of the EU’s grain authority (ONIC). The buyer claimed breach of contract and sought damages in arbitration. The arbitral tribunal issued an award declaring itself without jurisdiction, and the buyer sought that award’s annulment in French court as in violation of the principles of free movement of goods and freedom of establishment and services under EU law. The French Supreme Court found that even if the award violated EU law principles, it did not violate them in a sufficiently flagrant fashion to warrant relief from the award. *Id.*, para. 3.

willingness cannot simply be taken for granted, for the Court has not always manifested tolerance for error by Member State courts in the application of EU law.<sup>117</sup> Nor has the Court always shown deference toward the claims of competing international regimes in conflict situations.<sup>118</sup> However, there is reason to expect the Court to receive this strategy favourably, since it has shown in analogous settings a willingness to make comparable accommodations.

In the *Renault* case,<sup>119</sup> for example, the car manufacturer asked an Italian court to enforce a French court judgment in its favour against an Italian company, Maxicar, for losses resulting from the latter's marketing of auto parts in violation of Renault's industrial property rights. Maxicar argued before the Italian court that enforcement of the judgment would offend public policy because it was contrary to fundamental EU principles of free movement of goods and freedom of competition.<sup>120</sup> The ECJ disagreed, insisting that the Convention's public policy defence be applied only when a judgment's recognition or enforcement 'would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought' or 'constitute a manifest breach of a rule of law regarded as essential in the legal order of [that] State.'<sup>121</sup>

The U.S. Supreme Court made a move of much the same sort in its landmark arbitration ruling in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*<sup>122</sup> Though the Court granted certiorari in *Mitsubishi* to decide whether private claims under the Sherman Antitrust Act were arbitrable, i.e., legally capable of submission to arbitration rather than exclusively reserved for judicial determination, it ultimately found Sherman Act claims to be neither categorically arbitrable nor categorically non-arbitrable. Instead, it held that such claims could

<sup>117</sup> See Shelkypolas, *supra* n. 1, at 12, expressing concern that the European Court of Justice might not be willing to give EU public policy only the scope that public policy at the national level enjoys. 'European law is used to asserting its application as supranational law taking precedence over conflicting national provisions. . . . Thus, an egalitarian treatment [of EU law] in arbitration might appear inadequate from an EC law perspective.' *Id.*

<sup>118</sup> See *infra*, notes 168-169, and accompanying text.

<sup>119</sup> *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, Case C-38/98, [2000] ECR I-2973.

<sup>120</sup> Article 27 of the then-applicable 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, *supra* n. 12, recognises a 'public policy' exception to a Member State court's obligation to enforce the civil and commercial judgments by courts of other Member States.

<sup>121</sup> *Renault*, *supra* n. 119, para. 30. Although in its preliminary rulings the ECJ purports to interpret but not apply EU law, the Court ultimately found that enforcement of a judgment for civil damages under the circumstances of that case, even if erroneous, 'does not constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought.' *Id.*, para. 34. According to the Court, 'a judgment of a court or tribunal of a Contracting State recognizing the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.'

The *Renault* case does not of course offer perfect assurances. There, the Italian court had invoked the public policy exception to avoid an obligation not under *international arbitration law*, but under *EU law*, namely the obligation under the Brussels I Regulation to recognise and enforce a French judgment. Clearly, the Court has an interest of its own in curbing Member States' use of public policy to evade an EU law obligation. Even so, the case reveals an appreciation of the fact that mere errors of law or fact in the enforcement of an EU public policy norm need not always suffice to "activate" the public policy defence.

<sup>122</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

be entrusted to arbitration, but only on the assumption that the arbitral tribunal would not do extreme violence to the public policy norms underlying the antitrust laws. The arbitral tribunal must be willing to ‘vindicate’ the cause of action, but if it is, a U.S. court’s role at the enforcement stage will be limited to ‘ensur[ing] that the legitimate interest in the enforcement of the antitrust laws has been addressed.’<sup>123</sup> Thus, the Court in *Mitsubishi* implicitly distinguished between international arbitral awards that thwart the fundamental purposes of a norm that is mandatory under domestic law and those that do not, suggesting that the latter, but not the former, could be tolerated in the interest of arbitration. Analogous distinctions may be found in many jurisdictions and across other fields of law.<sup>124</sup>

In fact, the judgments in *Eco Swiss*, *Mostaza Clara* and *Asturcom* may all be read in this fashion. In both *Eco Swiss* and *Mostaza Clara*, the Court of Justice was asked whether national courts are required to entertain a claim alleging violation of competition and consumer protection law norms, respectively, even though the party advancing the claim in court had failed to raise it in the prior arbitral proceeding. In *Eco Swiss*, the Court managed largely to sidestep the question. But even in *Mostaza Clara*, the Court insisted merely that national courts be willing, even under those circumstances, to entertain the claim. The Court did not require that a national court reject an arbitral award on public policy grounds merely because a tribunal committed error – legal or factual – in adjudicating a claim of a public policy nature.<sup>125</sup> Even less did it address the degree of error that a national court is allowed to tolerate in enforcing those norms.

[ii] *Accommodation in the Investor Protection Arena*

As noted, a time-honoured accommodation technique is to interpret one or both of two potentially conflicting norms in such a way as to dispel an apparent contradiction between them.<sup>126</sup> The utility of this approach is also evident in

<sup>123</sup> ‘[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function.’ 473 U.S. at 637-638.

<sup>124</sup> By way of example, as respected a system of constitutional law as the German distinguishes between violations of fundamental rights that touch the ‘core’ of those rights and those that touch, for lack of a better term, their ‘periphery.’ See generally Matthias Mahlmann, ‘The Basic Law at 60: Human Dignity and the Culture of Republicanism’, 11 *Ger. L.J.* 9 (2010).

<sup>125</sup> See Shelkyoplas, *supra* n. 1, at 311: ‘The function of the public policy ground at this stage of the proceedings is not to give a judge another chance to review the merits of the case, thus correcting the award and achieving justice, but merely to prevent the final result of arbitral adjudication from having an effect which is fundamentally harmful to the forum’s values.’ For a similar formulation, see Christophe Seraglini, ‘Lois de police et justice arbitrale internationale’ 206 (2001).

<sup>126</sup> See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682, paras 37-43 (Apr. 13, 2006) (discussing issues of harmonization and systemic integration). See also Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31(3)(c), providing for consideration also to be given to ‘any relevant rules of international law applicable in the relations between the parties’ application.

For a discussion of the role this principle in the context of EU law and international investor protection, see Eilmansberger, *supra* n. 93, at 421; Hanno Wehland, ‘Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?’, 58 *Int’l & Comp. L.Q.* 209, 305-306 (2009); Ulrich Wölker, ‘The

arbitral rulings issued in the handful of disputes pitting EU law against the law of investor protection. There is no reason to suppose that it will be any less useful when such cases make their way, as at least some will, to Member State courts.

Consider the example of *Eastern Sugar B.V. v. Czech Republic*,<sup>127</sup> another intra-EU case. A Dutch investor claimed that the Czech authorities violated their obligations of 'fair and equitable treatment' under the 1991 Czech-Dutch BIT in enacting a series of three pricing decrees that allegedly discriminated against the investor. As will be seen,<sup>128</sup> the arbitral tribunal rejected the Czech Republic's argument that the tribunal lacked jurisdiction because the BIT itself automatically lapsed upon the Czech Republic's accession to the European Union in 2004. However, the Czech Republic argued in the alternative that mandatory EU law principles of non-discrimination required it to enact the decrees, and that those principles took priority over the State's investment treaty obligations.<sup>129</sup> The tribunal found that the Czech Republic's enactment of the first two decrees did not in any event deny Eastern Sugar fair and equitable treatment.<sup>130</sup> However, the tribunal found that the third decree violated that right, and awarded Eastern Sugar 25 million euros in damages on that basis.<sup>131</sup> Moreover, the violation could not be excused on the ground that the EU law principle of non-discrimination, embodied in Article 18 of the TFEU, justified enactment of the decree, since those principles did not in fact require its enactment.<sup>132</sup> The tribunal thus avoided any suggestion that the

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EU as a Player in the BIT Arena: Current and Future Legal Challenges', 24 *ICSID Rev.—For. Inv. L.J.* 434, 440 (2009); Marek Wierzbowski & Aleksander Gubrynowicz, 'Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations', in *International Investment Law for the 21<sup>st</sup> Century* 552-553 (2009).

<sup>127</sup> *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial award, SCC no. 088/2004 (Mar. 27, 2007). The arbitration was conducted pursuant to the 1991 Netherlands/Czech Republic BIT, before the Stockholm Chamber of Commerce, and under the UNCITRAL Rules.

<sup>128</sup> See n. 149, *infra*, and accompanying text.

<sup>129</sup> The Czech Republic relied for that proposition in part on two EU documents, a January 13, 2006 letter written by the Director-General of the Commission Directorate for the Internal Market and a November 2006 Note by the Commission, according to which:

[Submission of investor-State disputes between an EU national and another EU Member State to arbitration] could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome. In order to avoid such legal uncertainties and unnecessary risks for Member States, it is strongly recommended that Member States exchange notes to the effect that such BITs are no longer applicable, and also formally rescind such agreements.

*Eastern Sugar*, *supra* n. 127, para. 126.

<sup>130</sup> The tribunal ruled that, under Article 8(6) of the BIT, the law applicable to the dispute consisted of the substantive terms of the BIT, other applicable international agreements and general principles of international law. The tribunal found that the first two decrees were flawed in many respects, but not so much so as to deprive the investor of fair and equitable treatment. *Id.*, paras 259-270, 274. The tribunal underscored that it reached this result on the basis of the BIT, and not EU law. *Id.*

<sup>131</sup> The tribunal found that the Czech Republic had unfairly and inequitably targeted the investor in retaliation for its closure of a production facility, and thus acted in a discriminatory and unreasonable manner. *Id.*, paras 333-338.

<sup>132</sup> *Id.*, paras 155-180.

It is not surprising that the tribunal would reach that conclusion. The Court of Justice itself has held that non-discrimination principles of EU law do not preclude Member States from entering into a convention for the avoidance of double taxation even though the effect is to grant benefits to residents of those countries, but not to residents of third country Member States. The Court ruled that it is an inherent consequence of a bilateral double tax convention that reciprocal rights and obligations stemming from such a convention

demands of investor protection law and EU law were in conflict, much less that satisfying the demands of the former required disregard for the demands of the latter.<sup>133</sup>

The arbitral tribunal in the case of *ADC Affiliate Ltd & ADC-ADMC Management Ltd. v. Republic of Hungary*<sup>134</sup> made a similar move. Two Cypriot investors had contracted with Hungary to rebuild and operate the Budapest airport. Upon Hungary's issuance of a decree taking over the project, the investors instituted arbitration for expropriation of their property. By way of defence, Hungary invoked EU legislation requiring separation of traffic control from airport operations.<sup>135</sup> The tribunal determined that Hungary could in fact have complied with the EU law mandate without taking over airport operations, and so the apparent normative conflict disappeared.<sup>136</sup> Conflict can equally be avoided through restrictive interpretation of the demands of investor protection law. In the case of *Saluka Investments BV v. Czech Republic*, a Dutch bank claimed that its legitimate expectations were frustrated by the Czech Republic's reorganization and privatization of the banking sector, resulting in the bank's forced administration and, in turn, runs on the bank. The tribunal found that the claimant had no reasonable basis for assuming that there would be no change in banking regulation in the Czech Republic, especially since in 1998, at the time the investment was made, alignment of Czech banking law with EU banking law could have been anticipated.<sup>137</sup> Again, the conflict dissipated.

Accommodation strategies, by definition, are highly contextual. Before compromising a value or interest of the legal order to which a decision-maker owes primary allegiance, that decision-maker will ordinarily weigh the costs and benefits of compromise in the long as well as the short term. An important component of that exercise is the decision-maker's assessment of both its vulnerabilities and those of the legal order to which it primarily belongs. In fact, neither the international arbitration legal order nor the EU legal order lacks vulnerability. In commercial and non-ICSID<sup>138</sup> arbitration alike, national courts have the authority to annul or

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apply only to persons resident in one of the two Contracting Member States. *D. v. Inspecteur van di Belastingdienst*, Case C-376/03, [2005] ECR I-5821.

The Tribunal denied that the ECJ enjoys an 'interpretive monopoly' with regard to the meaning of EU law. *Eastern Sugar*, *supra* n. 127, para. 134.

<sup>133</sup> For another example, see *AES Summit Generation*, *supra* n. 105. The tribunal did not find itself paralysed by the apparent conflict between the requirements of EU and investor protection law. It managed to reach the conclusion that Hungary had not impaired the investor's interests to the point of committing a BIT violation. Significantly, the tribunal managed to reach this result without attaching any special weight or importance to the state aid policy of the EU.

<sup>134</sup> ICSID case no. ARB/03/16 (2006).

<sup>135</sup> Directive 96/97 on access to the ground-handling market at European Union airports, 1996 O.J. L 272/36.

<sup>136</sup> *ADC Affiliate, Ltd.*, *supra* n. 134, para. 272. Conflict-avoidance was thus achieved in *ADC Affiliate*, as in the *AES Summit* case, through a restrictive reading of EU law.

<sup>137</sup> Partial award, para. 351 (Mar. 17, 2006).

<sup>138</sup> ICSID awards are in principle immune from national judicial review, either by way of annulment or denial of recognition or enforcement. Article 53 makes an ICSID binding on the parties and 'not . . . subject to any appeal or to any other remedy except those provided for in [the ICSID] 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.' On the other hand, Article 54 only requires

deny recognition or enforcement to awards they find offensive. The legitimacy debates that currently surround international investment arbitration only heighten that risk. It is easy to imagine how challenges to the investment arbitration regime emanating from the EU and its Member States might spread to other parts of the world, especially those that from the very outset harbor doubts about its legitimacy.

The EU likewise has vulnerabilities in this arena. Disrespect for international arbitral awards not only exacts reputational costs, but also encourages disrespect for awards by other actors in other circumstances. To the extent that the EU is a net capital exporter, its nationals figure among the putative beneficiaries of the investment arbitration regime, who stand to suffer from its weakening. Moreover, inherent in international arbitration is the fact that one country's refusal to recognise or enforce an award, and even its annulment of an award, leaves other countries entirely free to give the award whatever recognition or enforcement they wish. At the same time, Member States may come to be viewed as less attractive arbitration venues, due to the annulment risks they present.

The mutual vulnerabilities I have described will likely operate as an incentive to pursuing accommodation strategies of various sorts. The complexities of the disputes that epitomise commercial and investment arbitration today can only favour the calculations and tradeoffs upon which accommodation strategies typically depend.

*(b) Confronting Authority Relationships*

The previous sections reveal the considerable distance that accommodation techniques such as mitigation and interpretation can go in reconciling the demands of EU and international arbitration law. This is particularly so in connection with the challenges to international arbitral awards mounted in the name of EU public policy. But an examination of the conflicts between EU law and investment protection law shows that accommodation techniques have their limits. In this section, I demonstrate the inability of those techniques to address some of the conflicts that have arisen in the investor protection arena. Unable to accommodate the demands of the competing regimes, arbitral tribunals have felt compelled to effectively establish a priority between them. I first examine the results of that exercise thus far, while venturing thoughts on how authority conflicts in this arena are best resolved when conventional accommodation techniques fail. I then consider the impact on these tensions of the EU's achieving exclusive competence vis-à-vis the Member States over foreign investment law under the 2009 Treaty of Lisbon.

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Contracting States to recognise and enforce an ICSID award 'as if it were a final judgment of a court in that State,' and Article 55 specifically preserves 'the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.' The latter provisions could provide an opening for a national court to exercise some measure of judicial review of an ICSID award if it is intent on doing so.

## [i] Positioning the EU and Investor Protection Regimes

Recent investor protection disputes reveal the limits of accommodation techniques in defusing conflicts between EU law and the law of international investor protection. Such techniques meet their limits when parties before investment tribunals, and eventually courts, in effect acknowledge the possibility of an irreconcilable conflict between international norms, and question the priority between the systems from which those norms emanate. That was the case in the *AES Summit Generation* dispute, discussed earlier.<sup>139</sup> The *AES Summit* tribunal concluded on the merits that Hungary's termination of the long-term power purchase agreements with the claimants did not amount to unfair or inequitable treatment under the relevant BIT. However, Hungary also argued in that case that the law applicable to the investment claim was not the Energy Charter Treaty (ECT), but rather the law of the European Union. The tribunal rejected that view, stating clearly that it was the ECT that supplied the legal standards for assessing Hungary's actions and that EU law operated in that case as at most a legal datum in the application of those standards.<sup>140</sup> The requirements of EU state aid law were thus certainly not irrelevant, but neither were they decisive. Faced with the question as framed by Hungary, the tribunal had no choice but to establish in effect a priority between EU law and the international law of investor protection, essentially in favour of the latter. For the tribunal, fundamental was the international law principle that 'a State may not invoke its domestic law as an excuse for alleged breaches of its international obligations.'<sup>141</sup> In rejecting Hungary's defence that it was compelled by EU law to act as it had done in that case, the tribunal basically took a page from the ECJ's own playbook, according to which Member States cannot justify their EU law infringements by invoking domestic – even domestic constitutional – legal constraints.<sup>142</sup>

Other investment tribunals that, like the *AES Summit* tribunal, were required to address the matter squarely have reached the same conclusion. In the *Eastern Sugar*

<sup>139</sup> See *supra* n. 105.

<sup>140</sup> The tribunal concluded that any obligation that Hungary may have had under EU law 'is only an element to be considered by this Tribunal when determining the "rationality," "reasonableness," "arbitrariness," and "transparency" of the reintroduction of administrative pricing . . . ' *Id.*, paras 10.2.3, 10.3.16.

Note that the ECT attempts itself to establish a distinctive priority between the norms. According to Article 16, in the event of conflict between the ECT and any other treaty dealing with the subject matter, the tribunal should prefer the provision that is more favourable to the investor.

<sup>141</sup> *AES Summit*, *supra* n. 105, para. 7.6.6. See Vienna Convention on the Law of Treaties, *supra* n. 126, art. 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' Due precisely to the incorporation of EU law within the Member State legal orders, the constraints on Member States emanating from EU law are in effect their 'internal' law.

In *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID ARB/04/15, Award (Sept. 13, 2006), a tribunal dismissed an investment claim brought by the Norwegian company, Telenor, against Hungary for expropriation and denial of fair and equitable treatment. Hungary, it was alleged, had excluded Telenor from a new universal service program mandated by EU law, but nevertheless imposed a levy on the company while excluding it from certain pricing benefits. The tribunal found that a Member state's breach of EU law, even if established, did not in itself establish a BIT violation.

<sup>142</sup> *Commission v. Italy*, Case 69/86, [1987] ECR 773.

case,<sup>143</sup> a Dutch investor objected to changes in the Czech Republic's regulation of the sugar market – changes that the Czech Republic argued were required of it by the EU as part of the country's EU accession process.<sup>144</sup> The Czech Republic, supported by the European Commission,<sup>145</sup> argued that the arbitral tribunal lacked jurisdiction to entertain the claim because the Republic's BIT obligations were superseded by its Treaty of Accession to the EU,<sup>146</sup> principally invoking Articles 42 and 59(1) of the Vienna Convention on Treaties.<sup>147</sup> According to Article 59(1):

A Treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

In order for Article 59 to apply, the successive treaties must relate to the same subject matter and be incompatible. The BITs have some commonality with the EU principle of free movement of capital, but it may be a stretch to read the duties of fair and equitable treatment, full protection and security, or even the guarantee against expropriation into the EU Treaty. In any event, the BITs provide for investor-State arbitration, widely regarded as an advantageous dispute settlement mechanism.<sup>148</sup> The tribunal, accordingly, was rightly unpersuaded by the Czech Republic's arguments.<sup>149</sup> Having upheld its jurisdiction, the tribunal in *Eastern*

<sup>143</sup> *Eastern Sugar*, *supra* n. 127.

<sup>144</sup> *Id.*, para. 97.

<sup>145</sup> The Czech Republic specifically cited two EU documents: (a) a January 2006 letter from the Commission stating that 'intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence' and (b) a note from the Commission to the Economic and Financial Committee – an EU advisory body – suggesting that the BIT provisions were superseded upon accession to the EU. *Eastern Sugar*, paras 119, 155.

<sup>146</sup> Like similarly situated Respondent States, the Czech Republic argued that BITs between Member States are definitionally incompatible with European Union law on nationality discrimination grounds. This is because the effect of a BIT is to guarantee nationals of a Member State benefits that nationals of third Member States do not enjoy. These benefits are not only substantive (e.g. guarantees of fair and equitable treatment), but also procedural (availability of mandatory arbitration in the event of a dispute). See Parish & Rosenberg, *supra* n. 104, at 149; Ahmad Ali Ghouri, 'Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options', 16 *Eur. L. J.* 806, 808 (2010).

<sup>147</sup> Vienna Convention, *supra* n. 126, art. 42. Article 42 provides that a treaty is terminated only according to its own terms or the terms of the Convention itself. Because the tribunal found that the BIT did not provide for its termination upon Czech accession to the EU (*Eastern Sugar*, paras 143-154), it turned to possible grounds for termination set out elsewhere in the Vienna Convention, notably Article 59.

The Czech Republic also invoked Article 30 of the Vienna Convention, discussed more fully, *infra*, at notes 152, and accompanying text, in connection with the *Eureko* case, *infra* n. 151. The tribunal summarily rejected the argument.

<sup>148</sup> *Eastern Sugar*, *supra* n. 127, para. 165 (finding that 'the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties . . . EU law does not provide such a guarantee'). See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction (Apr. 30, 2010), para. 77 ('the EC Treaty provides no equivalent to one of, if not the most important feature of the BIT regime, namely, the dispute settlement mechanism providing for investor-State arbitration').

<sup>149</sup> *Eastern Sugar*, *supra* n. 127, para. 160. The tribunal asserted the right to determine its own jurisdiction and, on the merits of that issue, upheld its jurisdiction. *Id.*, para. 225. It found that, contrary to the position of

*Sugar* then concluded on the merits that the State had breached its obligations of fair and equitable treatment, not only by disappointing the investor's expectations, but also by demonstrating favouritism toward Czech beet growers.<sup>150</sup>

Similarly, in *Eureko BV v. Slovak Republic*,<sup>151</sup> a Dutch health insurance company doing business in Slovakia complained that, following a change in government, Slovakia reversed the liberalization of the health insurance market upon which the investor had relied in entering that market. The company asserted numerous claims based on the relevant BIT, including indirect expropriation, denial of fair and equitable treatment, denial of full protection and security, and violation of the right of free transfer of profits and dividends. Slovakia raised a jurisdictional objection, arguing as other Respondent EU Member States have done, that the BIT was superseded by Slovakia's accession to the EU. As in *AES Summit* and *Eastern Sugar*, the tribunal disagreed, rejecting all of Slovakia's jurisdictional arguments, including ones based on Article 30 as well as Article 59 of the Vienna Convention on the Law of Treaties,<sup>152</sup> the exclusivity of ECJ jurisdiction over

both the Czech Republic and the EU Commission, neither the Accession Treaty nor the BIT provided for the latter's automatic termination once both State parties became EU Member States. *Id.*, paras 125, 138-145, 172.

For still another jurisdictional award along the lines of *Eastern Sugar* and *Eureko*, see *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, *supra* n. 148, paras 65-109 (holding that the applicable Dutch-Slovak BIT was not terminated upon Respondent's accession to the EU).

For an approving view of the decision, see August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations', 39 *Leg. Issues Econ. Integr.* 157 (2012). For a dissenting view, see Jan Kleinheisterkamp, *supra* n. 95.

Member States and the EU have also invoked Article 344 of the TFEU, according to which 'Member States undertake not to submit a dispute concerning the interpretation and application of this treaty to any method of settlement other than those provided for therein.' In the case of *Commission v. Ireland (Mox Plant case)*, Case C-459/03, [2006] ECR I-4635, paras 84-86, the ECJ ruled that Article 344 barred Ireland from bringing action against the United Kingdom under the United Nations Convention on the Law of the Sea (UNCLOS) in the tribunal established by that instrument. In the view of the Court, claims brought under international agreements concern the interpretation and application of the European Treaties insofar as they deal with matters that are the subject in large measure of EU law, and to that extent raises 'the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law.' *Id.*, para. 177. Most commentators correctly distinguish *Mox Plant* from the BITs cases on the ground that the former was a Member State-to-Member State dispute (thus covered by Article 344), while the latter represent dispute initiated by a private party against a Member State (hence not covered by Article 344). See, e.g., Markus Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States', 39 *Leg. Issues Econ. Integr.* 207, 217 (2012). For a contrary view, see Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law', 48 *Comm. Mkt L. Rev.* 63, 89 (2011).

<sup>150</sup> The tribunal in *Eastern Sugar*, *supra* n. 127 awarded the claimant 25 million euros in damages.

<sup>151</sup> *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (Oct. 26, 2010).

The European Commission filed an amicus submission in the case. European Commission Observation, July 7, 2010, quoted in *Eureko*, para. 180.

<sup>152</sup> *Eureko*, para. 265. On Article 59, see *supra*, notes 147-150, and accompanying text.

Article 30 of the Vienna Convention reads in pertinent part:

(2) When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

matters touching on EU law,<sup>153</sup> and the fundamental principle of non-discrimination under EU law.<sup>154</sup> More generally, the tribunal held in effect that the EU may represent a new legal order for the constituent States but that, from an international legal perspective, it is nevertheless a subject of international law, and bound along with its Member States by its international engagements.<sup>155</sup>

[ii] *The Role of Decision-maker Identity*

Resolution of the normative conflicts in cases like *Eastern Sugar* and *Eureko* are complicated by the multiplicity of players and perspectives in the investment arbitration arena. The international arbitral tribunals from which awards emanate are themselves the product of that regime and, in a very real sense, owe their existence to it. They are therefore likely to favour the mandates of the international arbitral regime when conflicts with EU law cannot be avoided. Every indication from the recent jurisdictional rulings of investment arbitration tribunals supports this prediction.

The ECJ finds itself in a very different position, accustomed as it is to making success of ‘the European project’ its chief preoccupation. No institution has a stronger and more permanent commitment than the ECJ to vindication of the programmatic values that underlie the EU, and a greater incentive to protect its

(3) When all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation . . . , the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Article 30 thus contemplates that States are excused from compliance with particular provisions of a treaty when a later treaty between the same parties contains provisions with which the earlier ones are incompatible. The *Eureko* tribunal rightly found that ‘there is no incompatibility in circumstances where an obligation under the BIT can be fulfilled by respondent without violating EU law,’ and that even if there were one, the incompatibility would be dealt with as part of the merits and not affect the tribunal’s jurisdiction. *Eureko*, paras 271-272, 277.

<sup>153</sup> *Id.*, para. 274. The *Eureko* tribunal handily dismissed the Respondent’s assertion that investor-State arbitration is itself inconsistent with EU law because Article 344 of the TFEU, *supra* n. 3, gives the EU courts exclusive competence over all claims which involve EU law, ‘even for claims where EU law would only be partially affected’. See *supra* n. 151.

<sup>154</sup> Slovakia argued that extending benefits to nationals of one Member State that nationals of other member states would not enjoy offended the fundamental EU law principle of non-discrimination on nationality grounds. (The ECJ had ruled in the case of *Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, Case 235/87, [1988] ECR 5589, that while Member States may enter into agreements with one another, the principle of non-discrimination under EU law requires equal treatment of nationals of third Member States, even if the agreement lies outside the scope of EU law and was concluded before the EC Treaty entered into force between the two Member States.) The *Eureko* tribunal rejected the argument on the ground that Member States are entirely free to extend to nationals of all Member States the benefits that a BIT requires them to give to nationals of the co-contracting Member State. In support of this view, see Nikos Lavranos, ‘Bilateral Investment Treaties (BITs) and EU Law’ (paper presented at ESIL Conference 2010).

<sup>155</sup> ‘In the view of the Tribunal, the proper framework for its analysis . . . is, in the first place, the framework applicable to the legal instrument from which the Tribunal derives its *prima facie* jurisdiction. Just as the Court of Justice of the European Communities has held that its own perspective is dictated by the treaties that established it, so the perspective of this Tribunal must begin with the instrument by which and the legal order within which consent originated . . . . That framework is the BIT and international law, including applicable EU law.’ *Eureko*, *supra* n. 151, para. 228. The Tribunal added: ‘Whatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules.’

autonomy in determining the relationship between the EU and other actors and regimes on both the national and international level. The ECJ's record in defending its autonomy vis-à-vis these other actors is an impressive one. The Court has managed to win an extraordinary measure of deference from Member State constitutional courts, such as the German, which have pledged not to review the conformity of EU law with fundamental constitutional values 'so long as' the European system – notably through the ECJ itself – polices itself adequately in this regard.<sup>156</sup> The European Court of Human Rights in Strasbourg has largely followed suit, announcing and acting upon the conviction that ECJ jurisprudence can be relied on to vindicate adequately the human rights values to which the Strasbourg court is committed, in effect immunising from its review Member State measures taken pursuant to EU law.<sup>157</sup> By contrast, the ECJ in the *Kadi* case asserted the right to review, and disapprove, Member State actions mandated by the United Nations Security Council, on the premise that the U.N. system *may not* be counted on to adequately safeguard fundamental rights as the Court conceives them.<sup>158</sup> There is no reason, a priori, to assume that the ECJ will prove more deferential in principle to the international arbitral system than it has been to these other national and international legal orders, but as I argue below,<sup>159</sup> the ECJ should seriously consider doing just that.

While international arbitral tribunals and the ECJ alike have firm and well-established allegiances, the Member States find themselves in a more delicate position. If a Member State is squarely confronted with a normative conflict that cannot be avoided, does it owe a higher obligation to EU law or to investment treaty law? Much will depend on how that State's judiciary integrates EU law and

<sup>156</sup> *In re Application of Wünsche Handelsgesellschaft (Solange II)*, Case 2 BvR 197/83. 73 BVerfGE 339, [1987] 3 CMLR 225 (Fed. Const. Ct, 2d senate, 1<sup>st</sup> chamber, Nov. 9, 1987). Thus, the ECJ insisted that Member State courts refrain from reviewing the legality of Member State measures mandated by EU law, even as against national constitutional standards or international human rights standards. If they have any doubts in that regard, their only recourse is to put the question of validity to the Court itself for decision exclusively on the basis of EU law principles. *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585. The supreme and constitutional courts of most of the Member States have conditionally acquiesced in the Court's position.

<sup>157</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, case no. 45036/98. [2005], Series A, no. 440, para. 304. The Strasbourg Court essentially announced what amounts to a presumption in favour of the consistency of EU law with the European Human Rights Convention.

See also the ECJ's Opinion 1/91, [1991] ECR 6079, barring the EU's joining the European Economic Area (EEA) because the exercise of jurisdiction by the EEA Court contemplated by that Agreement '[i]s likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect of which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that Treaty to any method of settlement other than those provided for in the Treaty' (para. 35).

<sup>158</sup> *Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05P & C-415/05P, [2008] ECR I-6351. Thus, acts that Member States are required to take under a U.N. Security Council resolution are subject to review in the courts of the EU when challenged on the ground that they violate fundamental rights standards or otherwise offend 'the principles that form part of the very foundations of the Community legal order.' *Id.*, para. 304.

<sup>159</sup> See *infra*, notes 166-171, and accompanying text.

international treaty law, respectively, into the national constitutional order. Under that State's constitutional design, EU law may well operate as a normative source to which the norms of all international legal regimes to which the State is party must yield.<sup>160</sup> Alternatively, enforcement of EU law measures on national soil might conceivably be contingent on their compatibility with certain international legal norms. A strong academic current suggests that, in situations of irreconcilable conflict, Member State courts have no choice but to privilege the demands of EU law over those of other international legal orders.<sup>161</sup> And yet, in May 2012, an intermediate appellate court in Frankfurt, Germany, denied Slovakia's application to set aside the partial award on jurisdiction in the *Eureka BV* arbitration.<sup>162</sup> Significantly, the court declined to make a preliminary reference to the Court of Justice on the effect of Slovakian accession to the EU on the country's existing BIT with the Netherlands.<sup>163</sup> The judgment is on appeal before the German Supreme

<sup>160</sup> This position is clearly espoused by Kleinheisterkamp, n. 95, *supra*, at 92-93:

For any court of an EU member state, however, the hierarchy of norms is different and it would be under the obligation to refuse recognition and enforcement of such an award to the degree that it contradicts European competition law. Faced with the dilemma of having to choose between respecting his or her country's obligations under international law or preserving the integrity of the legal order of the EU Treaties, a judge of an EU member state is, as a matter of principle, obliged to privilege the latter.

<sup>161</sup> See Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties: The Case of Intra EU Investment Arbitration', 39 *Leg. Issues of Econ. Integr.* 179, 205 (2012); Burgstaller, *supra* n. 107, at 195.

<sup>162</sup> Decision of May 10, 2012, case 26 SchH 11/10 (Ct. App., Frankfurt-am-Main).

<sup>163</sup> The ECJ may have created an inconvenient precedent for itself in this regard in the form of *Commission v. Republic of Slovakia*, Case C-264/09, [2011] ECR (Sept. 15, 2011), a case that, however, concerns an extra-EU rather than an intra-EU BIT. In that case, a Swiss company ('ATEL') in 1997 entered into a contract with a State-owned network operator in Slovakia ('SEPs') for the provision of electricity. Pursuant to that contract, ATEL paid over half of the construction costs of an electric transmission line from Poland to Slovakia, in return for priority access to the line for a 16-year period and a transmission fee. The European Commission brought an infringement action against Slovakia for having breached its obligations under Directive 2003/54, in particular its provisions guaranteeing third party access to transmission systems without discrimination among system users and requiring transmission system operators to ensure non-discrimination as between system users. Slovakia argued that since ATEL had made important contributions to the construction of the transmission line, it occupied a different position from other users and treating it differently did not constitute discrimination. Slovakia also maintained that the contract was an investment protected under the Energy Charter Treaty and the BIT between Switzerland and Slovakia, and that the directive should be interpreted in such a way as to conform to the obligations arising under those agreements.

The Advocate-General concluded that ATEL's preferential treatment amounted to discrimination under the directive, and considered whether such discrimination could nevertheless be justified by reference to Slovakia's obligations under either the ECT or the BIT. Having determined that the ECT offered investors no greater protection than the BIT, he focused on the latter. Admitting that the BIT could not be read as guaranteeing investors that the regulatory environment in which the investment was made would never be altered, the Advocate-General nevertheless read it as protecting them against arbitrary or unreasonable changes. He concluded that the change the Commission sought to impose would so completely destroy the consideration that ATEL had given in connection with the investment as to be arbitrary and unreasonable (A-G Op., para. 96), and even amount to an indirect expropriation (*id.*, paras. 106-107). Rather than interpret the directive in such a way as to require Slovakia to breach its BIT obligations, the Advocate-General invoked Article 307 of the then EC Treaty (now TFEU art. 351), according to which '[t]he rights and obligations arising from agreements concluded . . . , 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 this Treaty.' Article 307(2) went

Court, which may have a difficult time, as national court of last resort, declining to make a preliminary reference to the ECJ.

The fact is that while Member State courts may well feel bound under current law to give priority to the mandates of EU law, they can also, through an appropriately framed preliminary reference, invite the ECJ to revisit the matter. The ECJ might then well rule, along the lines of *Eco Swiss*,<sup>164</sup> that Member State courts must annul an international investment award, or deny it recognition and enforcement, if the award offends EU state aid or competition law, for example, and the Commission might well bring infringement proceedings against the State if the courts decline to do so.<sup>165</sup> But the Court could also take a fresh look at the matter.

One thing is certain. As the European Union increasingly constitutes itself a participant in binding international legal regimes – as if it were a nation-State, even though it most certainly is not – it will find itself correspondingly less comfortable asserting a privilege not to be bound by the authoritative rulings of the judicial bodies of those regimes.<sup>166</sup> Take the European Human Rights Convention system, for example. The Member States, as noted, currently benefit from a kind of dispensation insofar as the measure for which they are under attack in Strasbourg was taken pursuant to EU law.<sup>167</sup> The Strasbourg court's rationale was evidently that the ECJ could be counted on to function as a surrogate international actor. But, under the Lisbon Treaty, the EU is bound to become itself a full member of the European Human Rights Convention system and subject to its strictures. When the EU moves from being an international human rights ally of the ECHR system to being a subject, among others, of it, its claim to a special status within that system will be substantially weakened, if not entirely

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on to say '[to] the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.'

The Advocate-General also addressed the question of whether, if the contract with ATEL were in breach of EU law, Slovakia could be required to terminate the contract in order to correct its infringement. He concluded that outside the public procurement area, a Member State should not be required to annul such a contract. To do so would be contrary to the principle of legal certainty recognised in EU law (*id.*, para. 37).

In its judgment (paras 47-72), the ECJ described Article 307 as preserving the pre-accession international treaty obligations of accession States. That holding obviated any need on the Court's part to interpret the directive restrictively so as to avoid finding a conflict between it and the BIT.

Presumably, the ECJ would find that the ground rules governing the survival of pre-accession vary according to whether the BIT in question is an intra-EU or extra-EU BIT.

<sup>164</sup> See *supra* n. 58, and accompanying text.

<sup>165</sup> Arguably, the Commission could bring infringement proceedings against a Member State merely for paying such an award. See Burgstaller, *supra* n. 107, at 196. See also Jan Kleinheisterkamp, 'European Policy Space in International Investment Law', forthcoming in 27 *ICSID Rev. — For. Inv. L. J.* — (2012).

<sup>166</sup> The conflict in the *Kadi* case, *supra* n. 158, is distinguishable from those that typically arise in the investment arbitration arena. In subjecting the enforcement of U.N. Security Council mandates in Member States to restrictions based on fundamental rights in *Kadi*, the ECJ was not merely advancing EU policy in a field like state aids or competition law, but vindicating human rights interests that occupy a uniquely privileged place on the international plane.

<sup>167</sup> See *supra* n. 157, and accompanying text.

undermined. True, the EU is already a member of the Energy Charter Treaty,<sup>168</sup> but its participation in that system has not yet been tested. Were the EU to become a member of ICSID (or even the New York Convention), as is being contemplated at least in some quarters,<sup>169</sup> any claims to special treatment under those regimes would likewise seem problematic, if not untenable. As a full-fledged participant in the international investor protection system, the EU will not be well placed to assert the supremacy of its internal law over its investment treaty obligations. If EU membership in the WTO is any indication, special status under the international investment regime is not in the offing. Except insofar as the EU benefits from the WTO's built-in system of advantages for regional economic integration organizations, it does not claim and has not been given any immunity from the normative demands of that system.

It remains to be seen whether the ECJ will rally to this position, if and when it squarely faces eventual contradictions between EU law and the rulings of international investment tribunals. The fact is that, under the ECJ's existing case law, EU law measures are invalid and unenforceable to the extent they violate international agreements to which the EU is a party and whose provisions by their nature and specificity permit them to be invoked for that purpose.<sup>170</sup> Moreover,

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<sup>168</sup> Energy Charter Treaty, *supra* n. 107. According to ECT Article 38, a Regional Economic Integration Organization (REIO) may become a signatory member. Article 1.3 ECT defines an REIO as '[an] organization constituted by States to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.'

The Statement filed by the EU pursuant to ECT Article 26(3) (b) (ii) provides that '[the] European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.' OJ L 336, 23.12.1994, p.115. The Statement further provides that '[t]he Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.'

In the Statement, the EU avails itself of the right to exclude appeal to an international arbitral tribunal in the event the investor elects to bring its claim before a court of the European Union, rather than an international arbitral tribunal, in the first instance. That is the import of the EU's further declaration in its Statement that, in view of the availability of recourse by a foreign investor to the ECJ for vindication of its rights under ECT, 'the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.'

<sup>169</sup> See Tom Toulson, 'Could the EU end up at ICSID?', *Global Arbitration Review* (Nov. 9, 2010).

<sup>170</sup> The ECJ has conceded that 'where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union.' *Air Transport Association of America (ATA) v. Secretary of State for Energy and Climate Change*, Case C-366/10, [2011] ECR I-\_\_\_\_ (Dec. 21, 2011) (paras 50-51). In that case, the ATA charged in U.K. court that Directive 2008/101 of the EU, establishing an aviation greenhouse gas emissions trading scheme, was unlawful under both international treaty law and customary international law. Although the ATA invoked several international agreements, the ECJ found that only one of them – the E.U.-U.S. Open Skies Agreement – contained provisions whose nature does not preclude their being invoked and that are not 'unconditional and sufficiently precise,' meaning that the obligation set out in those provisions 'is not subject, in its implementation or effects, to the adoption of any subsequent measure' (paras 53-55). The ECJ accordingly reviewed the directive's compatibility with the relevant provisions of the Open Skies Agreement, ultimately interpreting both instruments in such a way as to avoid any conflict between them, and thus upholding the directive's validity.

the EU has condemned the United States precisely for flouting, or permitting its constituent states to flout, rulings of the International Court of Justice.<sup>171</sup> Future conflicts in the investment arbitration arena will make it difficult for the Court to draw different lessons for the EU.

[iii] *Looking Ahead: The Advent of EU Competence over Foreign Direct Investment*

The 2009 Treaty of Lisbon expressly gave the EU exclusive competence over foreign direct investment, as a component of its common commercial policy.<sup>172</sup> Prior to that time, the EU neither legislated directly within the field nor entered itself into international investment agreements, whether in the form of BITs or otherwise. In principle, arbitrations resulting either from intra-EU BITs or extra-EU BITs were of no direct concern to the EU.

This does not of course mean that a Member State's conduct in the foreign investment field could not infringe EU law. In the EU system, Member States are not permitted to act in *any* field in a way that offends applicable EU law and policy, including such key transversal principles as the free movement of goods, persons, services and capital.<sup>173</sup> Thus, even prior to the Lisbon Treaty, the Commission brought successful infringement proceedings against Austria,<sup>174</sup> Sweden<sup>175</sup> and Finland<sup>176</sup> on account of provisions in several of their BITs guaranteeing investors the free and immediate transfer, in freely convertible currencies, of all payments due in connection with investments.<sup>177</sup> The Court of Justice upheld the Commission's complaint that such guarantees ran afoul of Treaty provisions entitling the Council, under stated circumstances, to restrict the free movement of capital and payments between Member States and third countries.<sup>178</sup>

<sup>171</sup> Brief of Amici Curiae, The European Union and Members of the International Community in Support of Petitioner in *Jose Ernesto Medellin v. Doug Dretke, Director, Texas Department of Criminal Justice*, on writ of certiorari to the United States Supreme Court of Appeals for the Fifth Circuit (case no. 04-5928) ('The United States and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order').

<sup>172</sup> Treaty of Lisbon, *supra* n. 93.

Besides enabling the EU, going forward, to enter into new investment treaties and to occupy the front line in defending investor protection claims, the Lisbon Treaty authorises the EU to formulate an autonomous foreign direct investment policy. The EU may accordingly adopt legislation establishing a Union-wide set of policies for both inward and outward foreign investment protection. It is not yet clear what policy instruments the EU will develop pursuant to this authority. Marc Bungenberg, 'Centralizing European BIT Making under the Lisbon Treaty' (paper presented at 2008 Biennial Interest Group Conference, Washington DC, Nov. 13-15, 2008), pp. 15-16, available at <http://www.asil.org/files/ielconferencepapers/bungenberg.pdf>.

<sup>173</sup> Wölker, *supra* n. 126, at 435-36 (2010).

<sup>174</sup> *Commission v. Austria*, Case C-205/06, [2009] ECR I-1301.

<sup>175</sup> *Commission v. Sweden*, Case C-249/06. [2009] ECR I-1335.

<sup>176</sup> *Commission v. Finland*, Case C-118/07, [2009] ECR I-10889.

<sup>177</sup> On the cases, see Burgstaller, *supra* n. 107; Benedict, *supra* n. 109.

<sup>178</sup> TFEU, *supra* n. 3, arts 64, 66 and 75, previously EC Treaty, arts 57(2), 59 and 60(1). The Commission has sought to minimise such occurrences by requiring accession States, as a condition of accession, to renegotiate treaties with third countries to eliminate incompatibilities with EU law. See generally Anca Radu, 'Foreign Investors in the EU – Which 'Best Treatment'? Interactions between Bilateral Investment Treaties and EU Law', 14 *Eur. L.J.* 237 (2008).

The question naturally arises whether the tensions described in this section will be altered by the Lisbon Treaty's having made foreign direct investment an exclusive EU competence.<sup>179</sup> Strictly speaking, the Lisbon Treaty's grant of exclusive competence to the EU over foreign direct investment has no relevance to intra-EU investment, inasmuch as such investment by definition does not fall within the scope of the common commercial policy.<sup>180</sup> Still, for all the reasons that the EU and respondent Member States have advanced in the investment arbitrations discussed here, the European Commission contemplates that all existing intra-EU BITs will be terminated or, at least, be allowed to lapse.<sup>181</sup> Until such time as that occurs, however, they will continue to give rise to investment disputes of the sort seen in recent years.<sup>182</sup> Although it has been suggested that the EU should already start developing, in place of the intra-EU BITs, even more solid forms of protection for intra-EU investments than already exist, whether it will do so remains to be seen.<sup>183</sup>

Turning to extra-EU BITs, it is not yet fully clear how the EU will exercise its newly acquired competence,<sup>184</sup> or the extent to which it will authorise the Member States – as it may under EU constitutional law<sup>185</sup> – to continue acting within that sphere by way of delegation. In July 2010, the Commission issued a proposed regulation that, while affirming the Union's exclusive competence, would subject the continuation of existing Member State BITs with third countries to Commission review and authorisation, and even permit the States to negotiate and

<sup>179</sup> See *supra* n. 93, and accompanying text. See generally, Kessedjian, *supra* n. 94; Schill, *supra* n. 94, at 144-147.

<sup>180</sup> The common commercial policy covers only relations with third-countries. Accordingly, it is generally agreed that nothing in the EU's new competence over FDI results in automatic termination of the intra-EU BITs, though Member States are expected not to enter into any new ones. Shan & Zhang, *supra* n. 103, at 1068.

<sup>181</sup> European Commission letter of Jan. 13, 2006, quoted in *Eastern Sugar*, *supra* n. 127, para. 119. It is generally agreed widely thought that the EU's new FDI competence does not automatically terminate intra-EU BITs, though it does bar Member States from entering into new ones. Shan & Zhang, *supra* n. 103, at 1068. On the other hand, BITs commonly provide that, in the event of a unilateral (as opposed to negotiated) termination of a treaty, investments made prior to the denunciation continue to enjoy treaty protection for a period of years, usually ten to fifteen. Potestà, *supra* n. 100, at 235.

<sup>182</sup> It has been estimated that BITs between Member States and third-party States exceed 1300 in number, i.e. nearly half the total number of BITs world-wide. Shan & Zhang, *supra* n. 103, at 1054-1055.

<sup>183</sup> See Lavranos, *supra* n. 154, at 23, contemplating not only legislative action, but the possible creation of a specialised European investor protection tribunal.

<sup>184</sup> See generally Rudolf Dolzer, 'The European Approach to BITs', 24 *ICSID Rev. – Foreign Investment L.J.* 368 (2009); Markus Burgstaller, *supra* n. 149; Bungenberg, *supra* n. 172; Benedict, *supra* n. 109; Schill, *supra* n. 94, at 138-143; Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment: How will the New EU Competence on FDI Affect the Emerging Global Regime?', 15 *J. Int'l Econ. L.* 51 (2012); Note, 'Bilateral Investment Treaties and the EU Legal order: Implications of the Lisbon Treaty', 35 *Brook. J. Int'l L.* 851, 854 (2010).

<sup>185</sup> The Union's exclusive competence does not in principle bar the EU from authorizing continuing Member State activity in the field in question. See generally Koen Lenaerts & Piet van Nuffel, 'Constitutional Law of the European Union' (Robert Bray ed., 2d ed. 2005). For a recent circumstance in which the EU delegated to the Member States authority to act in areas otherwise subject to exclusive EU competence, see Regulation 662/2209 of the Parliament and Council of July 13, 2009, Establishing a Procedure for the Negotiation and Conclusion of Agreements between Member States and Third Countries on Particular Matters Concerning the Law Applicable to Contractual and Non-contractual Obligations, OJ L 200 (July 31, 2009).

enter into new ones, though only subject to Commission approval.<sup>186</sup> While existing extra-EU BITs would therefore not automatically terminate, they would have to be modified to eliminate incompatibilities with EU law.<sup>187</sup> In its reading of the proposed legislation, the European Parliament substantially reduced the Commission's power over existing extra-EU BITs, making its review and authorisation mandatory only in certain circumstances.<sup>188</sup> In fact, the Commission's power stands only to be weakened further when the proposal comes before the Council, in which Member State views dominate, since the prevailing view among the States is that existing extra-EU BITs remain in force until the EU itself enters into investment agreements (or investment chapters in free trade agreements) that would replace them.<sup>189</sup> Meanwhile, debate over whether the EU should even develop its own model BIT is already well underway.<sup>190</sup> Thus, while

<sup>186</sup> Proposal for a regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries COM (2010)344 final (July 7, 2010) , 2010/0197 (COD). Under the proposal, the Commission may deny or revoke authorizations if it finds in the agreements incompatibilities with EU law, overlaps with existing EU agreements with third countries, or obstacles to the development and implementation of an EU investment policy. To this end, Member States would have to submit the texts of proposed new BITs to the Commission for review prior to signature.

The proposal drew initial support from the Council. Council of the European Union, Conclusions on a Comprehensive European International Investment Policy (Luxembourg, Oct. 25, 2010). The European Parliament proposed certain amendments. Position of the European Parliament, doc. No. EP-PE\_TC1-COD(2010)0197 (May 10, 2011). For the Parliament's report on the matter, see COM (2010) 0344-C7-0172/2010-2010/0197 (COD) (April 14, 2011).

For background on the proposal, see Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Comprehensive European International Investment Policy,' COM (2010) 343 final (July 7, 2010).

<sup>187</sup> This is consistent with both the Vienna Convention, *supra* n. 126, and EU law. Article 30(4) of the Convention states

When the parties to [a] later treaty do not include all the parties to the earlier one: . . . (a) 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.

Similarly, TFEU, *supra* n. 3, art. 351 (ex ECT Article 307) states:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third countries, on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

<sup>188</sup> European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, plenary sitting, (COM(2010) 0344 – C7-0172/2010 – 2010/0197(COD)), Committee on International Trade, Rapporteur Carl Schlyter, A7-0148/2011 (Apr. 4, 2011). See also European Parliament: Press release: Bilateral investment treaties: Limiting the Commission's authority (May 10, 2011), available at <<http://www.europarl.europa.eu/news/en/pressroom/content/20110509IPR18971/html/Bilateral-investment-treaties-limiting-the-Commission's-authority>>.

For a more detailed account, see Yulia Levashova, 'Public Interest Norms in the European International Investment Policy: A Shattered Hope?', University of Oslo Faculty of Law Legal Studies, Research Paper Series, no. 2012-08 (June 13, 2012), available at <<http://ssrn.com/abstract=2083475>>.

<sup>189</sup> See Kleinheisterkamp, *supra* n. 165.

<sup>190</sup> Armand de Mestral, 'Is a Model EU BIT Possible – or Even Desirable?', 7 *Transnat'l Dispute Mgmt* (issue 1) (2010).

the EU may eventually become the sole party on the European side to BITs with third countries,<sup>191</sup> the Member States remain for now very much in the picture.

In June 2012, the Commission published a proposal for managing financial responsibility arising out of investor-State arbitration,<sup>192</sup> under which financial responsibility flowing from an award would be borne, as between the EU and the Member States, by the actor responsible for the treatment that gave rise to liability. The most interesting, but by no means rare, scenario is one in which Member State action produced the harm, but the action was mandated by EU law, as when EU competition law required termination of the long-term power purchase agreements at issue in the *AES Summit* case.<sup>193</sup> In this event, the EU alone would act as defendant and ultimately bear any financial responsibility. Where the offending measure was not required by EU law, both responsibilities rest with the Member States, though even then, the Commission might determine that it is in the interest of the EU to conduct the defence.

Under the Lisbon Treaty's new arrangements, the question of Member State compliance with investment treaty obligations will recede, while the question of the EU's own compliance with those obligations will come to the fore. Accommodation techniques, such as mitigation and interpretation, will play as important a role as they have up to now. But what may well change is the EU's view of its relationship to the international investor protection regime. As noted,<sup>194</sup> once the EU subjects itself directly, as participant, to that regime, it will have heightened difficulty in insisting that its internal norms – even those of a public policy nature – take precedence over its investment treaty obligations.

## V. CONCLUSION

EU law and international arbitration law have long had their respective 'first principles,' each developing its own in largely splendid isolation from the other's. For its part, the international arbitral regime is guided by concerns deemed paramount in that particular setting. These concerns are both institutional (as in the notion that the public policy defence to the enforcement of arbitral awards is to be narrowly construed) and substantive (as in enforcement of the principle of fair and equitable treatment of investors). At the same time, the ECJ attaches equally paramount importance to ensuring EU law's effectiveness within the

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<sup>191</sup> For this to come about, the Energy Charter Treaty, *supra* n. 107, to which at present both the EU and the Member States are parties, would need to be renegotiated. This raises in turn the prospect of EU accession to ICSID and/or the New York Convention. (EU membership in ICSID is not currently possible since the EU is not a State).

<sup>192</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is a party. COM(2012) 335 final.

<sup>193</sup> *AES Summit*, n. 105, *supra*. By comparison, when the then European Community signed the Energy Charter Treaty in 1998, the Commission issued a statement that the Communities and the Member States would determine between themselves, on a case-by-case basis, which of them would be the respondent party in any ECT arbitration. See *supra* n. 168.

<sup>194</sup> See *supra*, notes 166-171, and accompanying text.

national legal orders, deploying the notion of EU public policy as an important instrument in that effort, to the point of imbuing whole swathes of EU law with a public policy dimension.<sup>195</sup> The pattern is already well documented in the competition law and consumer protection fields, and promises to extend further.

It is small wonder, then, that the EU and international arbitration legal orders harbour public policy notions of strikingly different amplitude,<sup>196</sup> and that each regards maintaining its favoured amplitude as critical to its own success. As the connectedness between the two regimes becomes more evident, however, important fault lines are coming into view, as when a broadly conceived EU public policy renders international arbitral awards far more susceptible to annulment, non-recognition and non-enforcement than first principles of international arbitration law normally allow. The dissonance is felt most palpably by Member State courts, as they stand directly in the cross-fire between the demands of EU public policy, on the one hand, and the duty to affirm and enforce international arbitral awards, on the other.

The investor protection cases show that Member State courts are not, however, alone in this regard. Any conscientious investment arbitration tribunal itself, though firmly anchored in the international arbitration rather than the EU legal order, also experiences the dissonance. Even while examining an investor protection claim under international law (whether a BIT, the Energy Charter Treaty or general principles of international law), rather than EU law, a tribunal cannot help but take the demands of EU law into account in determining whether a State's apparent breach of an investment treaty obligation may somehow be justified. The state aid revocation cases provide the clearest examples, but others are in the offing. Conversely, the ECJ, while sitting at the apex of the EU legal order, must recognise the legitimate claims that emanate from other international legal regimes, including the regime of international arbitration.

The natural response in such situations is one of accommodation. Both time-honored and newer strategies of accommodation have surfaced as means of managing the resulting normative friction. All the adjudicatory bodies that are implicated – whether arbitral tribunals, national courts, or the ECJ itself – have in their arsenal mitigation techniques and canons of construction that enable them, within limits, to resolve normative conflicts. Member State courts have contributed to this process by recognizing that EU public policy is not violated, for award annulment purposes, in every circumstance in which a court or tribunal fails to fully respect a norm to which the EU legal order attributes public policy status. It only remains for the ECJ to relax the dictates of EU public policy to the extent of allowing Member State courts to follow such mitigation practices. For their part,

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<sup>195</sup> See F.-B. Weigand, 'Evading EC Competition Law by Resorting to Arbitration', 9 *Arb. Int'l* 249 (1993).

<sup>196</sup> Maud Piers, *supra* n. 74. See also Shelkyoplas, *supra* n. 1, at 15: 'Not surprisingly, neither of the standpoints [i.e., EU law or arbitration] leads to a constructive solution of the possible tensions inherent in the relations between arbitration, with its private-procedural character, and EC law, with its public-substantive nature, for they each lack an understanding of the other's underlying fundamental principles and objectives.' Put differently, 'it is not the infringement of law itself but the actual effect of the infringement seen through the lens of fundamental principles that should be covered by the public policy ground.' *Id.*, at 313.

investor-State arbitral tribunals have likewise demonstrated a capacity to accommodate norms emanating from both the EU and investor protection regimes. Accommodation techniques play a vital role in a world populated with multiple international legal orders and multiple first principles.

To the extent they succeed, accommodation techniques permit courts and tribunals to avoid prioritizing between competing legal regimes. But they do not always succeed. Moreover, conflicts are sometimes framed not as a contest between norms, but rather as a contest between legal orders. Investment tribunals have not thus far shied away from prioritizing the demands of investor protection law over those of EU law when conflicts emerge and cannot be otherwise resolved. National courts have not yet spoken squarely to the issue, though they soon enough will.

The Lisbon Treaty's conferral on the EU of exclusive competence in the foreign direct investment field makes the EU an even more conspicuous participant in the international investor protection regime. As the EU becomes an ever more integral and active member of the international investment community, it will become less comfortable requiring, or even permitting, Member State courts to subordinate their obligations under international investment law and arbitration to policies internal to the EU. If so, the ECJ may well be led to cede authority to the international investment legal regime to a much greater extent than it has thus far done in its relations with any other competing legal order.