

**PROCEDURAL ISSUES AND INTERPRETATIONS OF THE ARBITRARINESS OF  
DISPUTES RELATING TO BILATERAL INVESTMENT AGREEMENTS  
CONCLUDED BETWEEN EUROPEAN MEMBER STATES (BITS) <sup>1</sup>**

CUESTIONES DE PROCEDIMIENTO E INTERPRETACIONES EN LAS  
ARBIETRARIEDADES POR DISPUTAS EN RELACIÓN CON TRATADOS  
BILATERALES DE INVERSIÓN CONCLUIDOS ENTRE LOS ESTADOS MIEMBROS  
EUROPEOS (TBIs)

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**Abstract:** The present survey seeks to identify-without claiming to be exhaustive-the main problems that may arise from the arbitration proceedings concerning an intra-EU and non-EU BIT, as well as those relating to an agreement stipulating the EU. Therefore, it was a matter of purely procedural issues-with regard to the party that has the right to be judged and on which the financial and system-responsibility lies with regard to the compliance of the arbitration clause with European law and its validity.

**Key words:** intra-BITs, extra-BITs, UNCITRAL, International arbitration, EU arbitration, european procedural law, Energy Charter Treaty, WTO, amicus curiae.

**Resumen:** El presente estudio busca identificar, sin pretender ser exhaustivo, los principales problemas que pueden surgir de los procedimientos de arbitraje relativos a un TBI dentro de la UE y fuera de la UE, así como los relacionados con un acuerdo que estipula la UE. Por lo tanto, es una cuestión de cuestiones puramente procesales: con respecto a la parte que tiene derecho a ser juzgada y sobre la cual la responsabilidad financiera y del sistema reside en el cumplimiento de la cláusula de arbitraje con la legislación europea y su validez.

**Palabras Clave:** intra-TBI, extra TBI, CNUDMI, arbitraje internacional, arbitraje de la UE, derecho procesal europeo, Tratado sobre la Carta de la Energía, OMC, amicus curiae.

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## **1. Introduction.**

Since the entry into force of the Lisbon Treaty, the Union has begun the process that should end with the definition of a European investment policy. On the one hand, it has prepared Regulation n. 1219/2012<sup>2</sup>, which establishes a transitional legal framework within which the non-EU BITs subsume-those subscribed by Member States and third countries-and thus ensure that they remain in force. The ultimate goal is to get early to their replacement with European Union (EU) agreements. In so doing, the Union is proceeding similarly to what it had already done on the occasion of the conferral on it of competence in other matters. The procedural process followed by the Union seems to be the same: the transfer of powers from Member States to the Union must take place gradually, and this too, and perhaps above all, to guarantee commercial partners from third countries already bound by relations with Member states. Therefore, first we proceed to the definition of a transitional regime within which to subsume the agreements stipulated by the Member States-possibly also amending the forecasts that are contrary to EU law-after which the Union is active for the negotiation of new agreements with the same partners, destined to replace the previous ones. This solution is suitable for preserving the balance of an integrated regional system, such as the European one. Indeed, the effective exercise of a supranational competence can not be immediate; the literal reformulation of the institutive Treaties must be followed by a change in the internal structure of the EU system which will inevitably require some time. In the specific case of investments, the time it took the Union to start defining an autonomous policy was not much, far from it. The extension of the new European investment competence is outlined<sup>3</sup>, partly confirming the above mentioned position: in all the mandates to be negotiated adopted by the Board, there are also clauses concerning the protection of the investment. From this it emerges that the EU has interpreted the new competence as extended to both phases of the investment transaction: the pre-and post-establishment ones. This position seems to conform to the conclusions that would have been reached on the sole basis of a teleological-systematic interpretation of the normative dictate. In this way, the distortive consequences that could result if Member States were left to regulate the post phase, thus limiting the power of the Union to access policies alone, are avoided.

## **2. The lasting validity of the BITs that have become intra-EU from an international and European perspective.**

The legality of the referral to arbitration in relation to bilateral agreements concluded between Member States (Bilateral Investment Treaties (BITs)) intra-EU arises as a result of the accession of a party to the EU agreement thus transforming the relationship from extra-

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<sup>2</sup>Regulation n. 1219/2012 of the European Parliament and of the Council of the 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member States and third States, OJ L.351/30 of 20 December 2012. For analysis see: P. EECKHOUT, M. LOPEZ-ESCUADERO, *The EU's external action in times of crisis*, Hart Publishing, Oxford & Oregon, Portland, 2016. J. BAUGARTNER, *Treaty shopping and international investment law*, Oxford University Press, Oxford, 2016, pp. 235ss.

<sup>3</sup>M. MOSES, *Arbitration/Litigation interface: The European debate*, in *Northwestern Journal of International Law & Business*, 35 (1), 2014, pp. 8ss.

EU internal to the Union<sup>4</sup>. These investment relationships enter the EU system and give rise to questions of compatibility of the provisions contained therein with EU law, regardless of the transfer of powers pursuant to art. 207 TFUE<sup>5</sup>. In general, it is a question of the succession of treaties, given that the accession to the Union is, like the BITs, an international treaty.

One wonders, in such cases, whether the BITs, which subsequently became intra-EU BITs<sup>6</sup>, should be considered extinct as they are entirely replaced by the provisions of the Treaties which were established and applied as a result of the EU accession treaties. In the event of a negative reply, it is necessary to further assess whether certain forecasts contained in the same can be disregarded, as it is contrary to EU law<sup>7</sup>. And indeed, these agreements, although governed by international law, once ratified, become part of the state system and, therefore, like other national sources, must be compatible with the pre-eminent EU law<sup>8</sup>. The effects of a possible overlap or incompatibility between the two sources, the international and EU law, must be framed in light of the provisions of the Vienna Convention on Law of Treaties (VCLT) of 23 May 1969, some of which are part of customary international law and as such are binding for all Member States<sup>9</sup>. In particular, from the application of art. 59 VCLT<sup>10</sup> could result in the extinction of intra-EU BITs, while art. 30.3 VCLT would lead to the termination of the arbitration clause if the latter were incompatible with EU law<sup>11</sup>.

In practice, it is observed that the consequences that derive from the application of the VCRT are not uniform and depend on the interpretation, more or less broad, that is given to the presupposition necessary for the application of articles 59 and 30.3 VCTR contained

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<sup>4</sup>EU, Treaty of Athens, Treaty of Accession of the Czech Republic, Estonia, Cyprus, Republic of Latvia, Lithuania, Hungary, Malta, Polonica, Slovak Republic, AA2003 final of April 16, 2003 in Gazz. Uff. A. Eur. N L. 236.

<sup>5</sup>A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on EU law and private law, hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss. K. LENAERTS, I. MASELIS, K. GUTMAN, EU procedural law, Oxford University Press, Oxford, 2014, pp. 133ss.

<sup>6</sup>U. KRIEBAUM, The fate of intra-EU BITs from an investment law and public international law perspective, in *Elite Law Journal*, 1, 2015, pp. 28s. S.MIRON, The last bite of the BITs-Supremacy of EU law versus investment Treaty arbitration, 20 in *European Law Journal*, 20, 2014, pp. 332ss. A. RADU, Foreign investors in the EU: Which "best treatment"? Interactions between bilateral investment Treaties and EU law, in *European Law Journal*, 14, 2008, pp. 238ss.

<sup>7</sup>CJEU, 22/62, Van Gend en Loos of 5 February 1963, ECLI:EU:C:1963:1, I-00001. The fundamental characteristics of the Community legal order are in particular its pre-eminence over the rights of the Member States and the direct effect of a whole series of rules which apply to the citizens of those States, as well as to the States themselves. For an analysis on the fundamental principles of EU law.

<sup>8</sup>B. POULAIN, Quelques Interrogations sur le Statut des Traités Bilatéraux de promotion et de protection des Investissements au sein de l'Union Européenne, in *Revue Générale de droit international public*, 111 (3), 2007, pp. 802ss.

<sup>9</sup>According to art. 59 of VCTL of 1969. O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, Oxford University Press, Oxford, 2011.

<sup>10</sup>A. REINISCH, Articles 30 and 59 of the Vienna Convention on the Law of Treaties in action: The decisions on jurisdiction in the Eastern Sugar and Eureka investment arbitrations, 39 in *Legal Issues of Economic Integration*, 39, 2012, pp. 158ss, according to the author: "(...) the intra-EU BITs and the EU accession treaties of new members do not relate to the "same subject matter". The EU accession treaty made EU law applicable to them. It provides for a highly integrated economic union based on a customs union and is enriched by a vast set of additional common policies, whereas the BITs provide for a limited number of very specific investment protection standards, which may be enforced, among others, but most importantly, by direct investor-state arbitration. While there may be some partial overlap between BITs and EU law, this cannot change the fact that they are addressing different subject matters (...)"

<sup>11</sup>O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, op. cit.,

therein. The latter are in fact applied only if the object's equality is evident<sup>12</sup>.

The lively doctrinal dispute that developed on the issue was partially resolved following the arbitration proceedings *Eureko*<sup>13</sup> and *Eastern Sugar*<sup>14</sup>, in which the arbitrators, in assessing whether the defendant States-respectively the Czech Republic and Republic Slovak-acted in violation of the BITs underwritten by them, they have preliminarily investigated the question of the maintenance in force of such agreements and, subsequently, the compatibility of their clauses with EU law<sup>15</sup>.

By proposing very similar arguments, the arbitration boards accepted the position of the majority doctrine<sup>16</sup>. According to the latter, the conditions for the application of articles 59 and 30.3 of the VCLT<sup>17</sup>; as a consequence, the "new" intra-EU BITs should not be

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<sup>12</sup>It is noted that both forecasts are applied when the successive agreements between them are signed between the same parties. On this point, there is no doubt that the parts of the intra-EU BITs are also parts of the accession treaties and, consequently, of the institutional treaties. No part of the judgments has objected that the bilateral nature of the first and multilateral ones of the latter could exclude the application of the articles. 59 and 30.3 of the Convention.

<sup>13</sup>Perhaps the most significant cases are: Jan Oostergetel & Theodora Laurentius v. Slovak Republic (UNCITRAL) Decision on Jurisdiction of 30 April 2010; European American Investment Bank AG v. Slovak Republic (UNCITRAL) (PCA Case No 2010-17) Award on Jurisdiction of 22 October 2012; Charanne B.V. and Construction Investments S.à.r.l. v. Kingdom of Spain (SCC Case No 062/2012) Final Award of 21 January 2016; RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain (ICSID Case No ARB/13/30) Decision on Jurisdiction of 6 June 2016; Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain (SCC Case V 2013/153) Award of 12 July 2016; WNC Factoring Ltd v. Czech Republic (UNCITRAL) (PCA Case No 2014-34) Award of 22 February 2017; Anglia Auto Accessories Limited v. Czech Republic (SCC Case V 2014/181) Final Award of 10 March 2017; I.P. Busta and J.P. Busta v. Czech Republic (SCC Case V 2015/014) Final Award of 10 March 2017; and Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain (ICSID Case No ARB/13/36) Award of 4 May 2017. WNC Factoring LTD v. The Czech Republic, PCA Case No 2014-34, Award (hereinafter WNC award), 22 February 2017, par. 295. A.M. LÓPEZ-RODRÍGUEZ, P. NAVARRO, Investment arbitration and EU law in the aftermath of renewable energy cuts in Spain, in *European Energy & Environmental Law Review*, 25, 2016, pp. 4ss.

<sup>14</sup>Arbitration ad hoc, partial award of 27 March 2007, case Stockholm Chamber Commerce. No. 088/2004, *Eastern Sugar v. The Slovak Republic*; Permanent Court of Arbitration, Decision on Jurisdiction, Arbitration and Suspension of 26 October 2010, in case n. 2008-13, *Eureko B.V. v. The Slovak Republic* of 19 August 2005. For details see: C. BROWN, *Evolution in investment treaty law and arbitration*, Cambridge University Press, Cambridge, 2011, pp. 30ss. S. LUTTRELL, *Bias challenges in international commercial arbitration. The need for a "real danger" test*, Kluwer Law, The Hague, 2009, pp. 64ss. Y. AKSAL, *Implementing international economic law. Through dispute settlement*, Martinus Nijhoff Publishers, Leiden/Boston, 2011, pp. 158ss. I.A. LAIRD, B. SABQHI, F.G. SOURGENS, T.J. WEILER, *Investment treaty arbitration and international law*, Juris Publishing, New York, 2015. J.E. KJOS, *Applicable law in investor-State arbitration. The interplay between national and international law*, Oxford University Press, Oxford, 2013, pp. 123ss.

<sup>15</sup>Arbitration ad hoc, partial award of 27 March 2007, case Stockholm Chamber Commerce. No. 088/2004, *Eastern Sugar v. The Slovak Republic*; Permanent Court of Arbitration, Decision on Jurisdiction, Arbitration and Suspension of 26 October 2010, in case n. 2008-13, *Eureko B.V. v. The Slovak Republic*.

<sup>16</sup>A. DIMOPOULOS, *The validity and applicability of international investment agreements between EU Member States under EU and international law*, in *Common Market Law Review*, 47, 2011, pp. 64ss. H. WEHLAND, *Intra-EU Investment agreements and arbitration: Is EC law an obstacle?*, in *International Comparative Law Quarterly*, 58, 2009, pp. 298ss. T. EILMANSBERGER, *Bilateral Investment Treaties and EU law*, in *Common Market Law Review*, 46, 2009, pp. 384ss. M. BURGSTALLER, *European Law and Investment Treaties*, in *Journal of International Arbitration*, 26, 2009, pp. 182ss. C. SÖDERLUND *Intra-EU BIT investment protection and EC Treaty*, in *Journal of International Arbitration*, 24, 2007, pp. 456ss.

<sup>17</sup>Article 65 Vienna Convention on the Law of Treaties, 1969: "1. The party which, under the provision, the present Convention, invokes both a defect of its consent to be bound by a treaty, or a ground for challenging its validity or for supporting the termination of the treaty, the withdrawal from it or the suspension of its application, it must notify its claim to the other parties ". The notification must indicate the proposed measure

considered extinct and the arbitration clause should not be considered incompatible with EU law<sup>18</sup>. The conclusion of the arbitrators seems completely correct and legally founded. In particular, the aforementioned art. 59 VCLT provides that, in the presence of two successive agreements, the previous one can be considered extinct if there is at least one of the following assumptions: the clear intention of the parties to that effect or, alternatively, the perfect overlap of the provisions of the two agreements. As regards the first condition, it is to be excluded that the accession of a State to the EU implies the intention to terminate the international agreements previously stipulated by the same<sup>19</sup>. In fact, the express declaration referred to in the aforementioned rule must be made with the procedures enumerated in art. 65 VCLT<sup>20</sup>, according to which, to assert the extinction of a treaty, the party concerned must notify its claim to the other<sup>21</sup>. As an alternative to the express manifestation of the intention

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with regard to the Treaty and the reasons for it. However, the notification must have certain characteristics. In the *Eureka* case, the Court denies that an email sent by the State with the subject of a unofficial position may be notified, despite the fact that it expressed the latter's intention to terminate the BIT. On this point, the Court declares that: "it is plainly established that the parties to the BIT-Respondent and the Netherlands-subsequently intended that EU law should apply in full between them". *Case Eureka*, op. cit., par. 244. The fact that the Netherlands-Slovakia BIT was not concluded by the EU, suggesting that if that had been the case, the arbitration provision might have been compatible with EU law. This is the interpretation given by the Tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), award dated 16 May 2018, parr. 678-683. The Tribunal considered that the *Achmea* judgment: "(...) had no bearing upon the present case and was of only of limited application to BITs concluded between EU Member States. As such, the tribunal said it "cannot be applied to multilateral treaties, such as the ECT, to which the EU itself is a party (...)". Similar treatment (...) presupposes that those two taxable persons are regarded as being in the same situation (...) The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as Csongor István Nagya benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance. *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*. Even where such provisions extend to the situation of a company which is not resident in one of the contracting Member States, they apply only to persons resident in one of those Member States and, by contributing to the overall balance of the DTCs in question, are an integral part of them. The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence. See also: O. CORTEN, P. KLEIN, *The Vienna Conventions on the law of treaties. A commentary*, op. cit.

<sup>18</sup>Lodo, *Eureka v. The Slovak Republic*, op. cit., par. 65-77/86-96/109-119/127-138; Award, UNCITRAL, partial award of 27 March 2007, case no. 088/2004: *Eastern Sugar v. Czech Republic*, parr. 95-113. S. HINDELANG, *Circumventing Primacy of EU Law and the ECJ's Judicial monopoly by resorting dispute mechaniMember States provided for in Inter-States Treaties?*, in *Legal Issues of Economic Integration*, 39 (2), 2012, pp. 180ss.

<sup>19</sup>CJEU, C-284/16, *Slovak Republic v. Achmea BV* of 6 March 2018, ECLI:EU:C:2018:158, published in the electronic Reports of the cases.

<sup>20</sup>O. CORTEN, P. KLEIN, *The Vienna Conventions on the law of treaties. A commentary*, op. cit.

<sup>21</sup>S.R. CUENDET, *Les investissements intracommunautaires entre droit communautaire et Accord internationaux sur l'investissement: concilier l'inconciliable?*, in *Revue Générale de Droit International Privé*, 115 (4), 2011, pp. 853-895. Against, J.A. BISCHOFF, *Just a little bit of mxity? The EU's role in the field of international investment law*, in *Common Market Law Review*, 48, 2011. A. DE LUCA, *New Developments, on the scope of the EU Common Commercial Policy under the Lisbon Treaty*, in *Yearbook on International Investment Law & Policy*, 2010-2011, pp. 165-215. A. REINISCH, *Articles 30 and 59 VCLT: The Decisions on Jurisdiction in the Eastern Sugar and Eureka Investment Arbitration*, in *Legal Issues of economic integration*, 39 (2), 2012, pp. 158ss. C. SÖDERLUND, *Intra-EU BIT investment protection and EC Treaty*, in *Journal of International Arbitration*, 24, 2007.

of the parties, the extinction of the previous agreement occurs if the provisions of the second treaty are incompatible with the former, so much so that the simultaneous application of both is impossible.

In this regard, it can refer to what was established in the *Eureka* case, in which the defendant Member States claimed that the BITs were no longer effective because they were included in an integrated legal order, the EU one, offering investors the same substantial and procedural guarantees as the international bilateral agreement<sup>22</sup>. The overlapping of the two sources should have led to the extinction of the previous one, ie the BIT, which had become intra-EU. Adopting the internationalist perspective, however, this position can not be accepted. The concept of overlapping referred to in art. 59 VCLT must be interpreted in a teleological way; in this sense, the extinction of the previous agreement exists only when there is a conflict that prevents the application of the next one. This contrast, however, does not seem to be recognizable in the relationship between an intra-EU BIT and EU law; the application of the first, in fact, does not prevent the implementation of the second and vice versa.

It is clear also from a combined reading of the *Ascendi*<sup>23</sup>, *Merch Canada*<sup>24</sup>, *Genetech*<sup>25</sup> and *Electrabel*<sup>26</sup> judgments that arbitral tribunals whose jurisdiction emanates from an arbitration clause freely entered into by the parties in the course of their contractual negotiations do not fall within the meaning of the term “court or tribunal of a Member State” used by article 267 TFEU<sup>27</sup>. This effectively bars arbitral tribunals in commercial arbitration from submitting references for preliminary rulings to the Court of Justice of the European Union (CJEU). Therefore, jurisdiction over a preliminary reference submitted by such arbitral tribunals cannot be established by the Court without revisiting its case-law<sup>28</sup>.

According to our opinion the BITs and the EU legal order govern<sup>29</sup> the free movement of capital under uniform principles of non-discrimination and treatment, with a constant recognition of rights in property. Thus, they address the same subject matter, even if the scope of EU law is much wider, and thus qualify for the threshold application of tests of incompatibility found in the international law principles reflected in articles 59 and 30(3) of the VCLT<sup>30</sup>. Even if article 59(1) would provide for ex lege termination, such effect could

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<sup>22</sup>Against in case *Eastern Sugar*, the Board of arbitrators has excluded the applicability of the art. 30.3. precisely because it did not find a perfect overlap between the BIT and EU law, lacking in the second the arbitration clause. Award, *Eastern Sugar v. Czech Republic*, op. cit., parr. 180ss.

<sup>23</sup>C-377/13, *Ascendi* of 12 June 2014, ECLI:EU:C:2014:1754, published in the electronic Reports of the cases.

<sup>24</sup>CJEU, C-553/13, *Marck Canada* of 13 February 2014, ECLI:EU:C:2014:92, published in the electronic Reports of the cases.

<sup>25</sup>C-567/14, *Genentech* of 7 July 2016, ECLI:EU:C:2016:177, not yet published, parr. 59-61.

<sup>26</sup>C-357/14 P, *Electrabel et Dunamenti Erőmű v. European Commission* of 1st October 2015, ECLI:EU:C:2015:642, par. 171.

<sup>27</sup>N.N. SHUIBHNE, L.W. GORMLEY (a cura di), *From single market to Economic Union. Essays in memory of John A. Usher*, Oxford University Press, Oxford, 2012, pp. 176ss.

<sup>28</sup>G. BLANKE, *Actions under Article 101 and 102 TFEU in international arbitration*, in *Singapore Academy of Law Journal*, 22 (3), 2010, pp. 540ss.

<sup>29</sup>C.E. ANDERER, *Bilateral investment treaties and the EU legal order: Implications of the Lisbon Treaty*, 35 in *Brooklyn Journal of International Law*, 35, 2010

<sup>30</sup>For more analysis and details see: M. FITZMAURICE, O. ELIAS, P. MERKOURIS (eds), *Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on*, Martinus Nijhoff, The Hague, 2010, pp. 9ss. G. NOUTE, *Treaties and subsequent practice*, Oxford University Press, Oxford, 2013, pp. 224ss. E. BJORGE, *The evolutionary interpretation of treaties*, Oxford University Press, Oxford, 2014. O. CORTEN, P. KLEIN, *The Vienna Conventions on the law of treaties. A commentary*, Oxford University Press, Oxford, 2011. O. DÖRR, *Article 31. General rule of interpretation*, in O. DÖRR, K. SCHMALENBACH (a cura di), *Vienna Convention on the Law of Treaties. A commentary*, Springer, Heidelberg-New York 2012, pp. 536ss.

only be achieved when the contracting states agree over its applicability, which implies that the party that relies on the article would at least have had to consult the other party so as to ensure that a mutual intention to terminate exists. In some cases (e.g. in case *Binder v. Czech Republic*, Award on Jurisdiction, 6 June 2007 (note 27)) the argument about implied termination also failed to recognize that the claimant's cause of action related to events that preceded the respondent state's EU accession. BITs typically contain so called "sunset clauses"<sup>31</sup>, which stipulate that the treaties' provisions continue to be effective in respect of investments made before the date of termination for a further specified period (usually ten or fifteen years)<sup>32</sup>. Assuming that EU accession had miraculously terminated intra-EU BITs, such termination could not extend to sunset clauses without explicit agreement of the contracting States. To terminate sunset clauses with immediate effect, the contracting states would need to expressly agree on this; the 'general' application of article 59 (1) VCLT cannot, surely, create such effect<sup>33</sup>.

It must also be considered that the conditions and the aims of EU law and the BITs are not similar: the formulation of the protections for the investor in the two legal corpora is indeed different, as is the scope *ratione materiae*. The BITs contain broad and often unqualified protection clauses, to the point, almost, not to allow the courts to proceed with the balancing between private and public interests that they underlie<sup>34</sup>. Furthermore, the BITs are only signed to settle the investment transactions between the two States party to the agreement<sup>35</sup>. The forecasts of the founding Treaties are, on the contrary, more defined, thus reducing the freedom of judges to interpret them and therefore to apply them in a more or less extended way. Above all, the institutive Treaties contain forecasts aimed at protecting goals and objectives that go beyond the single investment transaction<sup>36</sup>.

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M. SAMSO, High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties, in *Leiden Journal of International Law*, 24, 2011, pp. 5ss. R. GARDINER, *Treaty Interpretation*, Oxford University Press, Oxford, 2008. G. NOUË, *Treaties and subsequent practice*, Oxford University Press, Oxford, 2013, pp. 224ss.

<sup>31</sup>M.A. GWYNN, *Power in the International Investment Framework*, Palgrave Macmillan, London, 2016

<sup>32</sup>M.A. GWYNN, *Power in the International Investment Framework*, op. cit. D. CARON, L. CAPLAN, *The UNCITRAL arbitration rules: A commentary*, Oxford University Press, Oxford, 2013. The establishment of rules at such fora might take longer and be more difficult, but the deficiencies of the current international investment framework have proven the problems that can derive from agreeing to something just because it is faster and more convenient. This is comparable to the effect of acquiring a cheap product that turns out to be of bad quality and inevitably does not last long. Further work to improve the current international investment framework lies in States' increase awareness of the advantages of a multilateral forum. It promises more success in overcoming the existing deficiencies, because actors at such a forum can reach an agreement on rules that are balanced because the rules reflect the interests of all parties at stake in the framework. Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No ARB/10/7 (formerly FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay), Award (8 July 2016). D. MOSVAN, The EU's competence on foreign investment: "New and improved"?, in *San Diego International Law Journal*, 18, 2017.

<sup>33</sup>C. SÖDERLUND, Intra-EU BIT investment protection and EC Treaty, in *Journal of International Arbitration*, 24, 2007.

<sup>34</sup>T. EILMANSBERGER, *Bilateral Investment Treaties and EU law*, op. cit., pp. 402ss. J. KLABBERS, *Treaty conflict and the EU*, Cambridge University Press, Cambridge, 2009, pp. 24ss.

<sup>35</sup>M. WIERZBOWSKI, A. GUBRYNOWICZ, *International investment law for the 21<sup>st</sup> century*, Oxford University Press, Oxford, 2015.

<sup>36</sup>In particular see the analysis of S. MENÉTREY, *Droit international des investissements et droit de l'Union Européenne*, in C. LEBEN (ed.) *Droit international des investissements et de l'arbitrage transnational*, ed. Pedone, Paris, 2015, pp. 614ss.

In the *Eureka* case to exclude the application of art. 30.3<sup>37</sup>, the arbitrators carried out the combined examination of each clause in the relevant legal sources, the BIT and EU law, focusing in particular on the clauses of the free transfer of capital and fair and equitable treatment, on the protection clause and security as well as on the arbitration clause. At the end of the investigation, the arbitrators of the *Eureka* case<sup>38</sup> found that the rights and obligations contained in the BIT inter partes did not overlap with EU law and that there was no incompatibility between the forecasts, not even with regard to the arbitration clause in the BIT object of the dispute but not in EU law. It is believed that the arguments of the Tribunal of First Instance (General Court after Lisbon Treaty) have been corrected, and in this sense they make two considerations. The presence in the BIT of some clauses absent in EU law—such as that on fair and equitable treatment and the arbitration clause—does not determine ex if the incompatibility of the provisions of the first with the second. On the contrary, these are mere differences and, in any case, the wider guarantees contained in the bilateral agreement can not be considered, in themselves, in contrast with the provisions of the founding Treaties. However, the GC's position regarding the absence of fair and equitable treatment guarantees in EU law can not be shared. In fact, there are three principles of EU law, the specification of which derives from the overlap with the international principle of fair and equitable treatment, guaranteed in every investment relationship<sup>39</sup>. This is the principle of non-discrimination, proportionality and legal certainty<sup>40</sup>. Contrary, in the *Eureka* case, the European executive highlights the reasons that must lead to considering the invalidity of the arbitration clause contained in the intra-EU BITs<sup>41</sup>. On the one hand, the principle of mutual trust<sup>42</sup> between the national forums of each Member State prevails in the EU system and

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<sup>37</sup>In *Eureka* for CJEU's affirmation of the prevalence of EU law in case of conflict with bilateral agreements between Member States see Case C-10/61, *Commission v. Italy* of 27 February 1962, ECLI:EU:C:1962:2, 00001; C-3/91, *Exportur SA v. Lor SA and Confiserie du Tech SA* of 10 November 1992, ECLI:EU:C:1992:420, I-5529, par. 8, "(...) the institution and pursuit of proceedings before the Arbitral Tribunal, in the circumstances (involving the application of EU law), involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected (...)"

<sup>38</sup>Case n. 2008-13, *Eureka B.V. v. The Slovak Republic* of 19 August 2005, op. cit.

<sup>39</sup>M.A. CLODFELTER, *The future direction of investment agreements in the EU*, in *Santa Clara Journal of International Law*, 12, 2013, pp. 160ss

<sup>40</sup>*As to the legitimate expectations principle under EU law, the CJEU according to conditions must be satisfied in order for a claim to entitlement to the protection of legitimate expectations to be well founded. EU or national authorities must have given precise, unconditional and consistent assurances to the person concerned. The assurances must be of such nature as to give rise to a legitimate expectation on the part of the person to whom they are addressed. The assurances "must comply with the applicable rules" (with reference e.g. to case from the CJEU: T-347/03, Branco v. Commission of 30 June 2005, ECLI:EU:T:2005:265, II-02555, par. 102 and T-282/02, Cementbouw Handel & Industrie v. Commission of 26 February 2006, ECLI:EU:T:2006:64, II-00319, par. 77.). The principle of legal certainty, in turn, requires that EU law rules be clear and precise so that interested parties can ascertain their position in situations and legal relationships governed by EU law. The CJEU held that the applicants had not received any assurances over the compatibility of the PPAs with EU law, meaning that no legitimate expectations had arisen. For details see also: A.H. TÜRK, *Judicial review in EU law*, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, *Steiner & Woods EU law*, Oxford University Press, Oxford, 2017, pp. 37ss C. BARNARD, S. PEERS, *EU law*, Oxford University Press, Oxford, 2017, pp. 788ss.*

<sup>41</sup>D. MOSKVAN, *The clash of intra-EU bilateral investment treaties with EU law. A bitter pill to swallow*, in *Columbia Journal of European Law*, 22, 2015-2016, pp. 105ss.

<sup>42</sup>See the ultimate Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, PE/38/2018/REV/1, OJ L 303, 28.11.2018, p. 1-38.



therefore the necessity-which gives rise to the investment arbitration<sup>43</sup>-to remove the disputes to the national courts in favor of a neutral one. On the other hand, the arbitration clause violates the principle of non-discrimination enucleated in art. 18 TFEU<sup>44</sup>, since it places on two separate levels the investors protected by a BIT, who can refer to arbitration and EU investors to whom this method of resolving disputes is precluded<sup>45</sup>.

The absence of incompatibility does not have any effect on the validity of the BIT and the arbitrators can therefore recognize their competence and apply the clauses contained in the agreement<sup>46</sup>. The principle of the primacy of EU law can, in fact, render the intra-EU BITs inapplicable limited to those forecasts contrary to the primary and secondary law of the Union, which the State has not conformed to EU law as prescribed by articles 4.3 TEU and 10 TFEU<sup>47</sup>. However, there is no incompatibility between the provisions of BIT and EU law, if a provision of the former can be respected without violating the EU law "this conclusion is not affected by the principles of supremacy, direct effect or direct application of EU law (...)"<sup>48</sup>.

Moreover, the primacy of EU law<sup>49</sup> and the principle of direct effect apply only in European terms and, therefore, can not be imposed also on relationships that find their source in another legal system, such as the international one<sup>50</sup>. The visible aspect of EU law can not go

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<sup>43</sup>J. WAINCYMER, Procedure and evidence in international arbitration, Kluwer Law International, Alphen aan den Rijn, 2012, pp. 5ss.

<sup>44</sup>C. BLUMANN, L. DUBOIS, Droit institutionnel de l'Union européenne, op. cit., N.N. SHUIBHNE, L.W. GORMLEY (a cura di), From single market to Economic Union. Essays in memory of John A. Usher, op. cit.,

<sup>45</sup>From the European perspective, the validity of intra-EU BITs clauses as well as for incompatibility with EU law could possibly be questioned if an infringement of the division of competences between the Union and Member States could be identified. But even this last violation does not exist because, until the entry into force of the Lisbon Treaty, the competence in matters of investments has been shared between the Union and the Member States and therefore the first have signed the BITs having jurisdiction. The transfer of powers deriving from the Lisbon Treaty has recognized the exclusive power of the Union to regulate foreign investments, but this can not lead to the cancellation of all pending relationships. This also applies to extra-EU BITs, now subject to the provisions of European Regulation no. 1219/2012 which defined the legal regime to ensure its maintenance in force.

<sup>46</sup>M. OLÍK, D. FYRBACH, The competence of investment arbitration tribunals to seek preliminary rulings from European Courts', in Czech Yearbook of International Law, 2, 2011, pp. 192ss.

<sup>47</sup>P. CRAIG, The Lisbon treaty. Law, politics and treaty reform, Oxford University Press, Oxford, 2012. V. CUESTA LOPEZ, The Lisbon treaty's provisions on democratic principles. A legal framework for participatory democracy, in European public Law, 13 (1), 2010, pp. 123ss. K. TUORI, The European financial crisis. Constitutional aspects and implications, in EUI Working papers-law 2012/28, pp. 4ss. A. BOGDANDY, The European lesson for international democracy. The significance of articles 9 to 12 EU Treaty for International Organizations, in Jean Monnet Working papers, n. 2/2011. M. POIARES MADURO, B. WITTE, M. KUMM, The euro crisis and the democratic governance of the euro: Legal and political issues of a fiscal crisis, in RSCAS Policy Papers 2012/08. J.H. BINDER, Komplexitätsbewältigung durch Verwaltungsverfahren? Krisenbewältigung und Krisenprävention nach der EU-Bankensicherungs und Abwicklungsrichtlinie, in Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, 173 (1), 2015, pp. 84ss.

<sup>48</sup>Against in case Eureko, the respondent State has stated that: "(...) as a matter of EU law, the Dutch-Slovak BIT's arbitration clause was no longer applicable since it was incompatible with the EU Accession Treaty (...) the arbitration clause provided for arbitral Tribunals to take into account Slovak law, of which directly applicable EU law forms part (...) EU law has direct effect and prevails over national law." Lodo Eureko v. The Republic Slovak, op. cit., par. 276.

<sup>49</sup>M. CLAES, The validity and primacy of EU Law and the "cooperative relationship" between National Constitutional Courts and the Court of Justice of the EU in Maastricht Journal of European and Comparative Law, 23 (1), 2016. M. AVBELJ, Supremacy primacy of EU Law-(Why) does it matter, in European Law Journal, 17 (6), 2011, pp. 746ss.

<sup>50</sup>In favor of this position they also issue two rulings in which, independently of the outcome of the trial, the

CJEU has had the opportunity to exclude the application of art. 344 TFEU to disputes between private parties, according to case: 459/03, *European Commission v. Ireland* of 30 May 2006, ECLI:EU:C:2006:345, I-4635. On the other hand, in the opinion of the Court of Justice, requested by the Council with regard to a project for the establishment of a single European patent court, the Court has contested the provision of exclusive jurisdiction of that court, as it is capable of rescinding national courts the overwhelming power to verify compliance with EU law, but also expressly reiterated that art. 344 applies exclusively to disputes between States. Opinion of 8 March 2011, in case 1/09, I- 01137. Opinion 1/09: The Court recognized that it has no jurisdiction to rule on disputes between individuals in the field of patents, as that jurisdiction belongs to national courts. Member States were not entitled to transfer that jurisdiction to a court such as the European and Community Patents Court, in as much as this would deprive national courts of their power to apply EU law and to use the preliminary reference procedure in the patent field. The Court underlined the importance of the preliminary ruling procedure in ensuring that EU law has the same effect in all member states and in all circumstances, and described it as indispensable to the preservation of the very nature of the law established by the Treaties. For practical purposes, and despite textual differences, the preliminary ruling procedure in the draft agreement was identical to the one established in Article 267 TFEU, but this was not enough for the Court, also because there were two more specific problems with the Unified Patent Court system. The first problem stemmed from the fact that under EU law member states are obligated to compensate damages (on certain conditions) that individuals incur as a result of violations of EU law, and this includes the obligation to compensate damages caused by decisions of judicial bodies. The second problem related to the fact that under EU law the Commission can start infringement proceedings against a member state if the decisions of its domestic courts violate EU law. In contrast, if the Unified Patent Court were to render decisions that violate EU law, those decisions could not be the subject of infringement proceedings, nor cause financial liability for any member state. Put differently, under the draft agreement the CJEU was not in a position to judicially review the decisions of the Unified Patent Court, and individuals incurring damages as a result of Unified Patent Court's decisions (which violate EU law) could not receive compensation. R. HILTY, T. JAEGER, M. LAMPING, H. ULLRICH, *The unitary patent package: Twelve reasons for concern*, Max Planck Institute for Intellectual Property & Competition Law Research Paper, 2012, pp. 12ss. M. LAMPING, *Enhanced cooperation-A proper approach to market integration in the field of unitary patent protection?*, in *International Review of Intellectual Property and Competition Law*, 8, 2011. M. TRONCOSO, *European Union Patents: A Mission Impossible? An Assessment of the Historical and Current Approaches*, in *Marquette Intellectual Property Law Review (International Intellectual Property Scholars Series)*, 17, 2013, pp. 232ss. H. ULLRICH, *Enhanced cooperation in the area of unitary patent protection and European integration*, in *ERA Forum*, 13 (4), 2013, pp. 589-610. J. PILA, C. WADLOW, *The unitary European Union patent system*, Hart Publishing, Oxford & Oregon, Portland, 2015. CJEU, C-235/87, *Matteucci* of 27 September 1988, ECLI:EC:1988:460, ECR 05589, para. 22. T. STOREY, A. PIMO, *Unlocking European Union law*, ed. routledge, London & New York, 2018. See also from CJEU: C-478/07, *Budějovický Budvar National Corporation v. Rudolf Ammersin GmbH* of 8 September 2009, ECLI:EU:C:2009:521, ECR I-07721, para. 44. CJEU, C-121/85, *Conegate Limites v. HM Customs & Excise* of 11 March 1986, ECLI:EU:C:1986.114, ECR I-01007. CJEU, *Joined cases C-241/91P and C-242/91P, Radio Telefís Eireann (RTE) and Independent Television Publications Ltd (ITP) v. European Commission* of 6 April 1995, ECLI:EU:C:1995:98, ECR I-00743. C-351/15P, *European Commission v. Total and Elf Aquitaine* of 18 January 2017, ECLI:EU:C:2017:27, published only in the electronic Reports of cases. C-434/13P, *European Commission v. Parker Hannifin Manufacturing and Parker-Hannifin* of 18 December 2014, ECLI:EU:C:2014:2456, published only in the electronic Reports of cases. T-747/15, *EDF v. European Commission* of 16 January 2018, ECLI:EU:C:T-2018:6, published only in the electronic Reports of cases. C-473/93, *European Commission v. Luxembourg* of 2 July 1996, ECLI:EU:C:1996:263, I-3207.E. ROSATI, *Originality in European Union copyright. Full harmonization through case law*, Edward Elgar Publishers, Cheltenham, 2013. C. BARNARD, *The substantive law of the European Union law*, Oxford University Press, Oxford, 2016. E. CLOOTS, *National identity in European Union law*, Oxford University Press, Oxford, 2015. S. ANDERSEN, *The enforcement of European Union law: The law of the European Commission*, Oxford University Press, Oxford, 2012. K. BRADLEY, N. TRAVERS, A. WHELAN, *Of courts and constitutions. Liber amicorum in honour of Nial Fennelly*, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 178ss. A. ILARDI, *The new european patent*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 146ss. W. TILMANN, C. PLASMANN, *Unified patent protection in Europe. A commentary*, Oxford University Press, Oxford, 2018, pp. 210ss. A. ROSAS, *The national judge as EU judge: Opinion 1/09*, in P. CARDONNEL, A. ROSAS, N. WAHL (eds) *Constitutionalising the EU judicial system: Essays in honour of Pernilla Lindh*, Oxford University Press, Oxford, 2012, pp. 105ss. T. LOCK, *Taking national courts more*

so far as to replace the provisions of international agreements which are binding on the Member State, where these agreements have been taken in an area which falls within the jurisdiction of the State and do not conflict with EU law<sup>51</sup>. The extension of European sovereignty to the relations between Member States that derive their origin from international law can not be reconciled with the current structure of relations between EU and international law. It is observed, in fact, that in cases where the Union has prevented the application of international rules in the EU system, it did so to protect its "constitutional" order, which, in the case of intra-EU BITs, does not seem to be questioned<sup>52</sup>. Ultimately, as long as such intra-EU BITs remain in force for international law, the arbitral tribunals can not disregard the rights and obligations set out therein<sup>53</sup>. Therefore, the guarantees of intra-EU BITs will continue to apply, if they are compatible with EU law. Otherwise, it will be the latter to find application.

### **3. Arbitration clause of intra-EU BITs: The (alleged) incompatibility with EU law and validity for the right of arbitration.**

Jurisprudential practice has not only excluded the extinction of intra-EU BITs due to the accession of the second part of the agreement to the European area, but has also declared the compatibility of the provisions of these agreements with EU law. Among these, the arbitration clause is included. There are two reasons for supporting the compatibility of this clause with EU law<sup>54</sup>. First of all, the founding Treaties do not exclude, directly or indirectly,

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seriously? Comment on opinion 1/09, in *European Law Review*, 36 (4), 2011, pp. 576ss. K. LENAERTS, I. MASELIS, K. GUTMAN, *European Union procedural law*, Oxford University Press, Oxford, 2014, pp. 552ss. M. PARISH, *International courts and the European legal order*, in *European Journal of International Law*, 23 (1), 2012, pp. 143ss. P. JAN KUIJPER, J. WOUFERS, F. HOFFMEISTER, *The law of European Union external relations: Cases, materials and commentary on the European Union as an international legal actor*, Oxford University Press, Oxford, 2018, pp. 520ss. M. DERLÉN, J. LINDOLM, *The Court of Justice of the European Union: Multidisciplinary perspectives*, Oxford University Press, Oxford, 2018. : T. JAEGER, *Shielding the unitary patent from the ECJ: A rash and futile exercise*, in *International Review of Intellectual Property and Competition Law*, 44 (4), 2013, pp. 389ss. J. PILA, C. WADLOW, *The unitary European Union patent system*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 93ss.

<sup>51</sup>C. SÖDERLUND, *Intra EU-BITs investment protection and the EC Treaty*, op. cit., pp. 455-468.

<sup>52</sup>In case *Eureka*, Bermann stated that: "(...) the Tribunal disagreed over matters related to the exclusivity of ECJ jurisdiction over matters touching on EU law and the fundamental principle of non-discrimination under EU law. More generally, the Tribunal held in effect that the EU may represent a new legal order for 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". G.A. BERMANN, *Navigating EU Law and the Law of international arbitration*, in *Arbitration International*, 28 (3), pp. 434ss.

<sup>53</sup>In its frequent interventions in intra-EU BIT arbitration proceedings, the European Commission has consistently stressed this conception. For example in its letter dated 11 October 2011 to the CPA concerning *European American Investment Bank AG (Austria) v. The Slovak Republic* of 22 October 2012 (PCA case n. 2010/17), the Commission indicated that: "(...) insofar as the arbitration claims involve questions of application and interpretation of law covered by the EU treaties, EU law takes precedence. Where there is a conflict with EU law, the general international law rule of "pacta sunt servanda" does not apply to treaties concluded between EU Member States (...) an investor cannot rely on provisions of bilateral investment treaties concluded between EU Member States which are inconsistent with EU law and the Union's judicial system (...)". For details see: M. SCHERER, *International arbitration in the energy sector*, Oxford University Press, Oxford, 2018, pp. 206ss. P. DUMBERRY, *A guide to state succession in international investment law*, Edward Elgar Publishers, 2018. J. D'ASPROMONT, S. BESSON, S. KNUCHEL, *The Oxford handbook of the sources of international law*, Oxford University Press, Oxford, 2017.

<sup>54</sup>C.I. NAGY, *Developments intra-EU bilateral investment treaties and EU law after Achmea: "Know well what leads you forward and what holds you back"*, in *German Law Journal*, 19 (4), 2018. C.I. NAGY, *Free*

the use of intra-Union arbitrations and, in this sense, the reference of art. 344 TFEU<sup>55</sup> to delegitimize the arbitration courts is juridically improper<sup>56</sup>. This provision, in fact, requires Member States to refer to the CJEU disputes which have two Member States as their partners and not a State and a private one, as happens in the investment arbitration. On the other hand "the same literal tenor of art. 344 TFEU<sup>57</sup> makes it clear that this provision applies only to disputes between Member States and not to (...) disputes between a contracting State and private individuals (...)"<sup>58</sup>. Secondly, the arbitration clause, normally included in the BITs, explains its effects also, and independently of the fact that it is not provided for by EU law. The parties to a BIT have in fact a legitimate expectation to devolve a dispute to arbitration tribunals. This expectation, which is a binding obligation enshrined in an international agreement, can not be frustrated by the European principle of mutual trust<sup>59</sup>. The latter is the principle of soft law and it derives from it, among other things, that each Member States puts trust in the jurisdictional system of the others<sup>60</sup>. In EU practice the

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trade, public interest and reality: New generation free trade agreements and national regulatory sovereignty 9 in Czech Yearbook of International Law, 9, 2018.

<sup>55</sup>D. LIAKOPOULOS, Art. 344 TFEU, in P.E. HERZOG, C. CAMPBELL, G. ZAGEL, Smit & Herzog on the law of the EU, ed. LexisNexis, 2018.

<sup>56</sup>In this regard, in the Eureko case, the Commission notes that, in any case, discrimination can not be resolved by extending the use of arbitration to all European investors as this would result in conflicts of jurisdiction and forum shopping. The referral to arbitration must therefore be excluded for all. On the other hand, the Commission always challenges the claim of the company, Eureko, that in the EU system there being no mechanism to obtain damages, then arbitration proceedings must be used. On this point, the executive emphasizes that in the Francovich ruling the plaintiff was recognized as compensation for damages deriving from the violation of EU law. Case, Eureko v. The Republic Slovak, op. cit., par. 186ss. J. BAUMGARTNER, Treaty shopping in international investment law, Oxford University Press, Oxford, 2016. D. LIAKOPOULOS, The case of referrals from the International Arbitration in the Court of EU, in International and EU Legal Matters, 2015.

<sup>57</sup>For example, whereas in the Charanne case the European Commission had objected in its amicus curiae to the jurisdiction of the arbitral tribunal apprised of the matter, the latter ruled that it did indeed have jurisdiction. Charanne BV and Construction Investments Sàrl v Kingdom of Spain (SCC Case No 062/2012) Final Award of 21 January 2016, par. 409. The CJEU was careful to distinguish between the BIT arbitral tribunal and commercial arbitration tribunals, the awards of which can be subject to limited review by the national courts. Indeed, the domestic courts can verify whether the fundamental provisions of EU law have been respected and, if necessary, refer questions to the CJEU for a preliminary ruling according to the case: C-394/11 *Belov* of 31 January 2013, ECLI:EU:C:2013:48, published in the electronic Reports of the cases, par. 38. The commercial arbitration procedure originates in the "freely expressed wishes of the parties", whereas the investment arbitration at issue stems from a bilateral treaty, by which Member States agree "to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law". (case *Achmea*)

<sup>58</sup>Alternatively, the arbitrator may also apply the national law of the country where the arbitration is based, which has a rule of law applicable to all international arbitrations established in its territory. This is the case with Swiss law, the Swiss Federal Code on private international law, which laid down regulative principles for the validity of the Arbitration Convention as regards the form, art. 187.1, both from the substantive point of view.

<sup>59</sup>A. BAKARDJEVA ENGELBREKT, N. BREMBER, A. MICHALSKI, Trust in the EU in challenges time. Interdisciplinary European studies, Palgrave Macmillan, London, 2018,

<sup>60</sup>In case *Eureko*, the Respondent State stated that: "(...) even if art. 59 of the VCLT does not operate to terminate the BIT, the Tribunal has no jurisdiction to decide this case because the arbitration clause in the BIT is not "compatible" with the EC Treaty within the meaning of art. 30 of the VCLT (...) in alternative, to a finding under the VCLT, Respondent argue that the Tribunal lacks jurisdiction as a matter of EU law, which the Tribunal is bound to apply in accordance with art.8.6 of the BIT (...) under German law (lex loci arbitri) award issued in non-arbitrable dispute may be set aside by a German Court, EU Law constitutes an integral part of the legal order applicable in Germany as an EU MS (...) EU does not allow the conferral on an arbitral tribunal of

principle of mutual trust<sup>61</sup> has led to the definition of Regulation 1215/2012 from January

jurisdiction over the area covered by the BIT and therefore the dispute would not be arbitral (...)"'. Case, *Eureko v. The Republic Slovak*, op. cit., par. 131-144.

<sup>61</sup>M. WELLER, Mutual trust in search of the future of EU private international law, in *Journal of Private International Law*, 11 (1), 2015, pp. 66ss. M. ZILINSKY, Mutual trust and cross-border enforcement of judgments in civil matters in the EU. Does the step-by-step approach work?, in *Netherlands International Law Review*, 64 (1), 2017, pp. 117ss. A. BAKARDJIEVA ENGELBREKT, N. BREMBER, A. MICHALSKI, Trust in the EU in challenges time. *Interdisciplinary european studies*, op. cit., pp. 179ss. See also: CJEU, joined cases: P. Aranyosi and R. Căldăraru, C-404/15 and C-659/15 of 5 April 2016, ECLI:EU:C:2016:198, published in the electronic Reports of the cases. In particular the attitude of the Luxembourg courts in relation to the interpretation of the principle of mutual recognition and mutual trust in civil procedural matters is intended to align with the "warnings" enucleated by the European Court in *Avotins*. The reasons behind the less rigorous interpretation of this principle in the aforementioned ruling-based on the derivation of a new mandatory reason for non-execution of a European arrest warrant, where such execution exposes the person concerned to the actual risk of suffering treatment inhuman or degrading-they can not in fact move perfectly within the civil procedural matter, considering the ontological difference of the fundamental rights at stake. The CJEU has gone further on the mutual recognition and has been based on another interpretative way stating that the art. 3 of the ECHR and 4 of the CFREU must be interpreted: "(...) in a convergence between (...)". In particular the Advocate General Yves Bot ha dichiarato relativamente che: "(...) In the AG's search for balance he considers first whether Article 1(3) FDEAW constitutes a ground for non-execution of an arrest warrant. He rejects such a notion for the following three reasons. First off, interpreting Article 1(3) as a non-execution ground would run counter to the phrasing of that Article, which due to its place and wording does not express a non-execution ground, but rather the principle of mutual trust. Secondly, such a notion would not be in agreement with the EU legislator's intent to create a system of surrender with exhaustively enumerated non-recognition grounds, whereby, in addition to the grounds in Articles 3, 4, and 4a FDEAW, only in the exceptional circumstances described in Recitals (10) and (13) surrender can be suspended or removal, expulsion or extradition can be prohibited. Last, a ground of non-recognition in Article 1(3) would severely damage mutual trust between judicial authorities on which the Framework Decision is based and would, as a result, make the principle of mutual recognition meaningless (...)". We are also talking about another principle-value of the Union, that of proportionality as a balancing of interests and the widening of the discretionary sphere of the internal judge, and the circumstances in speciem. Criminal cooperation does not seem to be comparable with the similar ground and dates back to the experience of the single market, in terms of decisive jurisprudential protagonism. Let us not forget that criminal cooperation has been based on the definition of common minimum standards for delineating spaces and limits of cooperation between judicial and police authorities in the areas selected by the Member States and by the Union legislator. Of course we can speak of a positive and normative unification for years in the criminal sector and especially after the Treaty of Lisbon the merit belongs to the principle of mutual recognition of judicial decisions which continues to guarantee a median solution to integration that is summarized in the protection of rights fundamental rights, the inalienable rights of individuals and a continuous progress dictated by the Member States towards an increasingly active and proactive contribution, a harbinger of innovations and achievements with the main objective among others the continuous accelerated integration but within a harmonious development and development of all the individual interest and not the state one. S. GÁSPÁR-SZILÁGYI, Joined cases Aranyosi and Căldăraru. Converging human rights standards, mutual trust and new grounds for postponing a european arrest warrant, in *European Journal of Crime, Criminal Law and Criminal Justice*, 24 (1), 2016, pp. 198ss. K. BOVEND' EERDT, The joined cases Aranyosi and Căldăraru: A new limit to the mutual trust presumption in the Area of Freedom, Security and Justice?, in *Utrecht Journal of International and European Law*, 32, 2016, pp. 112ss. M. GUIRESSE, Confiance mutuelle et mandat d'arrêt européen: Evolution ou inflexion de la Cour de justice?, in *GDR-ELSJ*, 12 avril 2016. R. NIBLOCK, Mutual recognition, mutual trust?: Detention conditions and deferring an EAW, in *New Journal of European Criminal Law*, 24 (2) 2016, pp. 250ss. A.E. VERVAELE, Mutual legal assistance in criminal matters to control (transnational) criminality, in N. BOISTER, R.J. CURRIE (a cura di), *Handbook of transnational criminal law*, ed. Routledge, London & New York, 2015, pp. 123ss. N. SYBESMA-KNOL, The european system for the promotion and protection of human rights, in *Georgia Journal of International & Comparative Law*, 20, 2014. N. FOSTER, *EU law directions*, Oxford University Press, Oxford, 2014, pp. 51ss. D. MANSSELL, The european arrest warrant: The role of Judges when human rights are at risk, in *New Journal of European Criminal Law*, 2 (1), 2011, pp. 133ss. A. TINSLEY, Protecting criminal defence rights through EU Law: Opportunities and challenges, in *New Journal of European Criminal Law*, 3 (3), 2013, pp. 461ss. L.

2015-which establishes, inter alia, the automatic recognition of judgments rendered by Member States' authorities. The rulings are excluded from the scope of the Regulation and, therefore, it is assumed that the arbitration proceedings must be able to be initiated without being subject to principles that, vice versa, are valid only in relations between Member States.

In speciem, article 71 of the Brussels I Regulation<sup>62</sup> expressly states that the Regulation will not undermine the duties of Member States under other international treaties regarding the jurisdiction, recognition, and enforcement of judgments. The CJEU has confirmed this broad exclusion of arbitration in several judgments concerning the admissibility of preliminary references from arbitral tribunals such as the *Marc Rich*<sup>63</sup>, *Van Uden*<sup>64</sup>, and *West Tankers* cases<sup>65</sup>. Most problematic was the judgment in the *West Tankers* case that shed light on the efficiency of the arbitration exclusion under EU law and its consequences for lis pendens and parallel arbitration and litigation proceedings. the CJEU stated that the issues at stake, including those concerning the validity of the arbitration agreement, did fall within the scope of the Brussels I Regulation. Furthermore, the CJEU noted that granting an anti-suit injunction in the case before it was incompatible with EU law for policy reasons<sup>66</sup>.

Actually, the scope of the arbitration agreements' exclusion is not clear in article 1(2)(e) of the Rome I Regulation<sup>67</sup>. It is stated that these applicable laws are, at least, the law governing the arbitration agreement itself, the law governing the arbitration proceedings (the curial law or the lex arbitri) and the law governing the merits of the dispute (the applicable law, the governing law, the proper law or the substantive law)<sup>68</sup>. Besides the application of EU competition law, the arbitrators' duty to apply the secondary EU law can also be raised by considering the CJEU's decision in *Ingmar GB Ltd v. Eaton Leonard Technologies Inc*<sup>69</sup>.The CJEU interpreted those provisions which are designed to protect commercial

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WOODS, P. WATSON, Steiner & Woods EU law, Oxford University Press, Oxford, 2017, pp. 37ss. L. BACHMAIER, Mutual recognition instruments and the role of the CJEU: The grounds for non-execution, in *New Journal of European Criminal Law*, 5 (4), 2015, pp. 505ss. E. SMITH, Running before we can walk? Mutual recognition at the expense of fair trials in Europe's Area of Freedom, Justice and Security, *New Journal of European Criminal Law*, 3 (1), 2013, pp. 82ss. S. SWOBODA, The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters: A small note on a fundamental misunderstanding, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2015, pp. 361ss. M.P. BROBERG, N. FENGER, Preliminary references to the Court of Justice of the EU and the right to a fair trial under article 6 ECHR, in *European Law Review*, 23 (4), 2016, pp. 602ss. T. WISHMEYER, Generating trust through law? Judicial cooperation in the EU and the "principle of mutual trust", in *German Law Journal*, 17, 2016, pp. 342ss.

<sup>62</sup>F. DE LY, The interface between arbitration and the Brussels Regulation, *n American University Business Law Review*, 5, 2015, pp. 407ss.

<sup>63</sup>CJEU, C-190/89, *Marc Rich and Co AG v. Società Italiana Impianti PA* of 25 July 1991, ECLI:EU:C:1991:319, I-03855.

<sup>64</sup>CJEU, C-391/95, *Van Uden Maritime v. Kommanditgesellschaft in Firma Deco-Line and others* of 17 November 1998, ECLI:EU:C:1998:543, I-07091.

<sup>65</sup>CJEU, C-185/07, *West Tankers* of 10 February 2009, ECLI:EU:C:2009:69, I-00663

<sup>66</sup>N. DOWERS, S.T. ZHENG, Arbitration in EU jurisdiction Regulation: Brussels I Recast and a new proposal, in *Groningen Journal of International Law*, 3 (1), 2015, pp. 126ss. M. ILLMER, Brussels I and arbitration revisited: The European Commission's Proposal COM (2010) 748 final, in *Rabels Zeitschrift für ausländisches und Internationales Privatrecht*, 75, 2011, pp. 646ss.

<sup>67</sup>Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6

<sup>68</sup>N. BLACKABY, C. PARTASIDES, A. REDFERN, M. HUNTER, *Redfern and Hunter on international arbitration*, Oxford University Press, Oxford, 2009, par. 3.07;

<sup>69</sup>CJEU, C-381/98, *Ingmar GB Ltd v. Eaton Leonard Technologies Inc* ("Ingmar") of 9 November 2000,

agents as mandatory and stated that they must be observed throughout the Union. Having considered the Union legal order, it was held that the principal cannot simply evade those provisions by a choice of-law clause<sup>70</sup>. In the light of the decision, the application of mandatory EU provisions by arbitrators can also be argued by taking account of a possible challenge of the arbitral award under the public policy exception in case of the non-application of those provisions, if such an exception is available in the arbitration law of the Member State in question. The answer depends on the arbitrators' right or power to raise issues of law of their own motion under the procedural law of the arbitration. If they have such a right or power under the procedural law of the arbitration, they will be required to raise issues of EU law including the Rome I Regulation of their own motion. If they are not enabled to raise issues of law of their own motion, they will not be required to apply the Regulation provided that the parties have been given an effective opportunity of enforcing their rights founded on EU law<sup>71</sup>. The consequences of the non-application of the Rome I Regulation by arbitrators sitting in the EU would constitute an error of law and a breach of EU law. The arbitral award could be challenged if recourse to the courts for an error of law is available under the national law of the Member State in which the arbitration was held, such as English or Scots law. Due to the breach of EU law, the aggrieved party could also bring an action for damages against that Member State under the principle of state liability. The use of arbitration, as provided for only in the BITs, could at most create discrimination between investors who can resort to them and those to which, instead, access to the arbitration courts is precluded. The appeal to an internal judge is not, by its nature, less favorable than resolution by arbitration or, as such, a source of discrimination for investors who can not resort to arbitration. Excluding the incompatibility of the arbitration clause with EU law, it is necessary to consider its validity with respect to the right of arbitration, which is a legitimate assumption of the jurisdiction of the arbitrators. In fact, when the arbitral tribunals are appealed for the alleged violation of a bilateral agreement or the contractual regulation inter partes, they must first assess the existence of their jurisdiction by looking at the source from which they derive their power of judgment, that is to say only to the arbitration clause. The principle of autonomy of the arbitration clause<sup>72</sup> allows the latter to operate independently from the validity, suspension or extinction of the source-contract or BIT-in which it is inserted. The arbitrator therefore has the power to decide his own jurisdiction even if the existence or validity of the arbitration agreement is questioned, as has happened in the disputes concerning intra-EU BITs. The validity of the arbitration clause does not therefore depend on the compatibility with EU law, but on the existence of the conditions identified by the right of arbitration: the ability and power to compromise in

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ECLI:EU:C:2000:605, I-9305.

<sup>70</sup>V. BEHR, Rome I Regulation a-mostly-unified private international law of contractual relationships within-most-of the EU, in *Journal of Law and Commerce*, 29, 2010-2011, pp. 238ss. X.E. KRAMER, The interaction between Rome I and mandatory EU private rules-EPIL and EPL: Communicating vessels?, in P. STONE, Y. FARAH, *Research Handbook on EU private international law*, Edward Elgar Publishing, Cheltenham, 2015, pp. 250ss. A.L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ, *Litigación internacional en la Unión Europea II*, ed. Comares, Granada, 2017, pp. 106ss.

<sup>71</sup>A.R. BRAND, The Rome I Regulation rules on party autonomy for choice of law: A U.S. Perspective, in *University of Pittsburgh Legal Studies Research Paper Series*, 2011, n. 29. M. MCPARLAND QC, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, Oxford, 2015. M. CZERWIŃSKI, The law applicable to employment contracts under the Rome I Regulation, in *Adam Mickiewicz University Law Review*, 2015, pp. 150ss. M. MCPARLAND, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, Oxford, 2015.

<sup>72</sup>K. VON PAPP, Clash of autonomous legal orders, in *Common Market Law Review*, 50, 2013, pp. 1

arbitrators, the exact definition of the object of the arbitration agreement, the form of the latter and the arbitrability of the disputes. An international arbitrator is not bound by the *lex fori*<sup>73</sup> and, therefore, to assess the existence of the aforementioned requirements, applies the law or conflict rule<sup>74</sup> that the parties have indicated to him or, in the absence, the rules he deems most appropriate. EU law does not take into account the extent to which it is part of the applicable national law or is directly referred to; in any case, in the absence of express bans on the arbitration provided for by EU law-and such as to be valid as regards public order rules<sup>75</sup> or of necessary application-there is no obligation on the part of the colleges to decline their jurisdiction for the only reason that, otherwise, there would be an alleged violation of EU law. For the right of arbitration, therefore, is the presence of the two requisites-validity of the clause and consent of the parties-which legitimizes the arbitration proceedings, in general and intra-Union in particular. In the jurisprudential practice of the european BITs, the colleges have correctly rejected the exceptions of lack of jurisdiction, based on the relationship between EU law and international law and on the presumed incompatibility between the two<sup>76</sup>; on the contrary, they recognized it, noting the existence of the aforementioned conditions and the criteria defined by the procedural Regulation applied by them.

In this regard, in the *Electrabel* case<sup>77</sup> the Court replied to the exceptions of lack of jurisdiction, noting that “the Tribunal is an international Tribunal established under the Energy Charter Treaty, and the ICSID Convention<sup>78</sup>. From its perspective under international law, the Court notes the establishment under international law of Parties’ consent to international arbitration under ICSID Convention and also the effect of article 26 of the ICSID convention, providing for ICSID arbitration to the exclusion of any other remedy<sup>79</sup>. The Court based this on a negative interpretation of article 351 TFEU<sup>80</sup> and meant that EU law must prevail over earlier agreements concluded between two Member States. According to our opinion the role of EU law in investor-state arbitration commenced under an ECT is analogous to that within intra-EU BITs, so that EU law may be applied for the identification of rights in rem and as a tool for the interpretation of the investment agreement. The Court’s reasoning regarding the relationship of ECT and EU law could be applied to the relationship of intra-EU BITs and the EU law.

Actually we notice that arbitral tribunals operating under the ICSID Arbitration Rules, however, seem to view *amicus* under a different light. In the *Suez/Vivendi v. Argentina*

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<sup>73</sup>J. RODRÍGUEZ-ARANA MUÑOZ, J.I.G. HERNÁNDEZ, *El derecho administrativo global y el arbitraje internacional de inversiones*, ed. INAP, Madrid, 2016.

<sup>74</sup>A. REINISCH, C. KNAHR, *Conflict of interest in international investment arbitration*, in A. PETERS, L. HANDSCHIN, D. HOEGGER (eds), *Conflict of interest in governance-An interdisciplinary outlook on the global, public, corporate and financial sphere*, Cambridge University Press, Cambridge, 2012, pp. 104ss.

<sup>75</sup>T. CORTHAUT, *EU ordre public*, Kluwer Law International, The Hague, 2012.

<sup>76</sup>ICSID, *Decision on jurisdiction, applicable law and responsibility of 30 November 2012*, case ARB/07/19, *Electrabel v. Hungary*, par 5.36. for details see: M. MARQUIS, R. CISOTTA, *Litigation and arbitration in EU competition law*, Edward Elgar publishers, Cheltenham, 2015, pp. 311ss.

<sup>77</sup>ICSID, *Decision on jurisdiction, applicable law and responsibility of 30 November 2012*, case ARB/07/19, *Electrabel v. Hungary*, par 5.36. A. PARRA, *The history of ICSID*, Oxford University Press, Oxford, 2012.

<sup>78</sup>A. PARRA, *The history of ICSID*, op. cit.

<sup>79</sup>ICSID, *Decision on jurisdiction, applicable law and responsibility of 30 November 2012*, case ARB/07/19, *Electrabel v. Hungary*, op. cit.

<sup>80</sup>M. WIERZBOWSKI, A. GUBRYNOWICZ, *International investment law for the 21st century*, Oxford University Press, Oxford, 2015.



*case*<sup>81</sup>, the tribunal defined the role of amici in the following terms: "(...) the traditional role of an amicus curiae in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as amicus curiae is an offer of assistance—an offer that the decision maker is free to accept or reject. An amicus curiae is a volunteer, a friend of the court, not a party (...)"<sup>82</sup>. The tribunal in *Biwater v. Tanzania* stated that: "(...) amicus are not expected (...) to consider themselves as simply in the same position as either party's lawyers, or (...) see their role as suggesting to the Arbitral Tribunal how issues of fact or law as presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself) (...)"<sup>83</sup>.

As far as international law is concerned, therefore, there are no legal reasons for excluding the validity and applicability of the arbitration clause even before having carried out the aforementioned survey<sup>84</sup>. Ultimately, it seems that, in the view of those who deny the legitimacy of arbitration, the real problem is not the arbitration proceeding as such, the more the protection of the uniform application of EU law.

On this point, it is noted that the effects of arbitration decisions on the interpretation of EU law are not a problem anyway, since they only bind the parties to the proceedings and are not intended to extend or reinterpret the *acquis communautaire*. In any case, the direct effectiveness of EU law, as well as the supremacy of this body of law, can not replace a provision of international law to which the Member States have chosen to be bound, which is fully effective for the right of arbitration and which, on the other hand, is not incompatible with EU law<sup>85</sup>. The most reasonable conclusion seems to be the one proposed by the ad hoc College in *Mr. and Ms. O. v. the Republic Slovak* case<sup>86</sup>, or which the legitimacy of the arbitration and the non-incompatibility of the intra-EU BITs can be sustained until a final decision on the merits of the CJEU can be found, which recognizing the incompatibility may not be well known legal bases—to exclude their effectiveness.

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<sup>81</sup>*Aguas Argentinas, S.A. v. The Argentine Republic*, ICSID Case. No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, par. 13 (May 19, 2005).

<sup>82</sup>*Aguas Argentinas, S.A. v. The Argentine Republic*, ICSID Case. No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, op. cit.

<sup>83</sup>*Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, par. 64, (Feb. 2, 2007).

<sup>84</sup>In the continuation of the discussion we will try to show that, if the arbitrators are to apply European law, there are *presidii*, which intervene in the *ex ante* and *ex post* proceedings, and ensure the uniform application. Likewise, it can be ruled out that such rulings are intended to interpret Union law in accordance with the law on investments; in fact, these are two sectors which, with regard to the objects, the object and the contents, maintain their autonomies and differences which can not be annulled by arbitration. See in argument: W. AZOULAI, L. BEN HAMIDA, *La protection des investissements par le droit primaire-droit conventionnel des investissements: en droit primaire communautaire: étude comparée des régimes et des approches*, in C. KASSEDJIAN, C. LEBEN (sous la direction de), *Le droit européen et l'investissement*, ed. Pedone, Paris, 2009, pp. 72ss. *Case Eureka v. The Republic Slovak*, op. cit. par. 239-267.

<sup>85</sup>It is noted that if the EC's concerns about the non-compatibility of the arbitration clause with EU law had a legal basis, it could have for some time already opened infringement proceedings against Member States which, taking part in arbitration proceedings, in fact violate European law. It is reported that the Economic and Financial Committee of the Commission in its latest report has shown that most Member States do not share the Commission's concerns about arbitration proceedings and possible discrimination of treatment for investors. In fact, the States do not feel the need to terminate or renegotiate their Agreements to make them compatible with EU law. Council of EU Report to the Commission and the Council on the movement of Capital and Freedom of Payments, Council's document n. 17363/08, 2008, par. 16-18.

<sup>86</sup>Arbitral ad hoc UNCITRAL, award of 23 April 2013, in case *Mr. e Ms. O v. The Republic Slovak* of 30 April 2010.

#### 4. The admissibility of the arbitration clause in extra-EU BITs.

We have to make two separate observations regarding the legitimacy of the use of arbitration in the judgments that remain in the context of intra-EU BITs, one wonders whether the referral to arbitration in the disputes arising in relation to an extra-EU BIT is admitted.

On the one hand, it is a question of legitimizing the use of arbitration proceedings in cases of disputes arising on non-EU BITs that have been signed before the transfer of powers pursuant to art. 207 TFEU<sup>87</sup>. On the other hand, the question concerns the inclusion of the arbitration clause in the investment agreements that the Union will sign with third countries, precisely because of the aforementioned passage. With regard to the first problem concerning non-EU BITs signed before the transfer of powers, the question is solved by looking for the effects of art. 207 TFEU: one wonders, therefore, whether the transfer of powers referred to in the aforementioned law has had not only substantial effects, but also procedural effects<sup>88</sup>. In this regard, it seems reasonable to exclude these seconds: this is stated in the light of a literal interpretation of the norm and a systemic consideration. Firstly, the letter of the provision says nothing about a presumed legitimation of the Union to the arbitration proceedings arising on the basis of the BITs signed by the Member States. Secondly, legitimizing the participation of the Union in substitution of Member States, would imply recognition of retroactive ex tunc effectiveness of the new formulation of art. 207 TFEU<sup>89</sup>, since the provision contained therein would have effects on agreements before its entry into force. Given this, it can be ruled out that the aforementioned rule has invalidated the arbitration clause inserted by the parties-rectius by the Member State and the third country-agreement. Excluding the procedural effects, if disputes arise on an extra-EU BIT stipulated before 2009 and maintained in force due to the provisions of Regulation no. 1219/2012<sup>90</sup>, the reference to arbitration is legitimate, if it is compatible with EU law and the arbitration clause is valid. As for the intra-EU BITs, the solution to the question is found by adopting a double perspective, of EU and international law. As regards the compatibility of the arbitration clause contained in pre-EU BITs stipulated before Lisbon, it is noted that the non-compliance of the aforementioned clause with EU law has never been raised. On the contrary, the recognition by the Union of the arbitral proceedings arising on the basis of these agreements has been confirmed by the jurisprudential practice. In this regard, suffice it to consider that the European Commission (EC) has agreed with the CJEU three Member States, noting that the clause on the transfer of capital contained in the extra-EU BITs signed by them was incompatible with the European principle of free movement of capital<sup>91</sup>. The

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<sup>87</sup>G. VILLALTA PUIG, B. AL HADDAB, The common commercial policy after Lisbon. An analysis of the reforms, in *European Law Review*, 24 (2), 2011, pp. 290ss.

<sup>88</sup>G. VILLALTA PUIG, B. AL HADDAB, The common commercial policy after Lisbon. An analysis of the reforms, *op. cit.*

<sup>89</sup>E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, *Complete EU law. Texts, cases and materials*, Oxford University Press, Oxford, 2013. G. CONWAY, *EU law*, ed. Routledge, London & New York, 2015. F. NICOLA, B. DAVIES, *EU law stories*, Cambridge University Press, Cambridge, 2017.

<sup>90</sup>Regulation n. 1219/2012 of the European Parliament and of the Council of the 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member States and third States, OJ L351/30 of 20 December 2012. for analysis see: P. EECKHOUT, M. LOPEZ-ESCUADERO, The EU's external action in times of crisis, *op. cit.* J. BAUGARTNER, *Treaty shopping and international investment law*, *op. cit.*,

<sup>91</sup>These are three judgments, c.d. BITs cases, initiated at the end of the preliminary ruling of the infringement procedure opened by the Commission against Austria, Sweden and Finland. CJEU, C-205/06, *European*

arbitration clause, although contained in the agreements, has not been challenged. The absence of judgments about the incompatibility of the arbitration clause with EU law leads us to suppose that the latter does not give rise to questions of compatibility, so that an analysis of the validity of the aforementioned clause is required to establish the jurisdiction of the arbitrators. For procedural purposes, therefore, it does not matter that the State has lost jurisdiction over the subject matter of the BIT. If this were not the case, and therefore if the investor was obliged to sue the Union because of the transfer of powers, he would be deprived-if only to the extent possible-of his "natural" counterpart<sup>92</sup>. On the other hand, the rule of the process requires that the rights arising from an agreement between the parties can only be actuated by one against the other; the exclusion of the legitimate passive can not be imposed on the plaintiff, but should eventually be accepted by the plaintiff and/or the referee judge. Any agreement between the defendant and a third party, which intended to replace the first, would not in fact be applicable to the plaintiff.

In *speciem*, in the same argument we could say that there are of course a number of differences between extra-EU BITs and the Open Skies agreements<sup>93</sup>. First, the Council had used its competence (under what is now article 100(2) TFEU) to regulate air transport, whereas prior to the Lisbon Treaty the EU's competences over FDI were not express (whether shared or exclusive)<sup>94</sup> in the sense that the competences related to areas that touched upon some aspects of foreign investments. Second, the provisions of the Open Skies agreements over which the EU had exclusive competence regulated narrow technical matters in a particular business sector, whereas extra-EU BITs regulate across-the-board, as all qualified investors and investments in all business sectors come within their protective scope. Third, investment protection (in respect of non-direct investments) and investment arbitration is an area of shared competence, whereas the EU's competences in the area of air transport were exclusive. Whether these differences matter, and what the CJEU really meant in the relevant parts of the Open Skies judgments<sup>95</sup>, remain open questions. This short

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Commission v. Austria of 3 March 2009, ECLI:EU:C:2009:118, I-01301; C-249/06, European Commission v. Sweden of 3 March 2009, ECLI:EU:C:2009:119, I-0130; 118/07, European Commission v. Finland of 19 November 2009, ECLI:EU:C:2009:715, I-10889. In these judgments, the Court developed the hypothetical compatibility test which allows the Member States to be convicted if a clause in the international agreement signed by the same is also hypothetically incompatible with EU law. By adopting this approach, the Court on the one hand sought to protect the interests of the Union and, on the other, imposed an immediate revision and renegotiation of all non-EU BITs already underwritten, which contain clauses of a similar content to that considered illegitimate. A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (a cura di), *A constitutional order of States. Essays in EU law in honour of Alan Dashwood*, Oxford University Press, Oxford, 2011, pp. 7ss. I. TRAKMAN, N. RANIERI, *Regionalism in international investment law*, Oxford University Press, Oxford, 2013. M. BUNGEWBERG, J. GMEBEL, S. HINDELANG, *International investment law and EU law*, ed. Springer, 2011, pp. 59ss. A. BIONDI, P. EECKHOUT, S. PIPELEY, *EU law after Lisbon*, Oxford University Press, Oxford, 2012.

<sup>92</sup>A. BIONDI, P. EECKHOUT, S. PIPELEY, *EU law after Lisbon*, op. cit.

<sup>93</sup>F.W. VON PAPP, *Competition law, extraterritoriality & bilateral agreements*, in A. WZRACHI (ed.), *Research handbook on international competition law*, Edward Elgar Publishers, Cheltenham, 2012. M. ZWARTJES, L. VAN LANGEHOVE, S. KINGAH, L. MAES, *Determinants of regional leadership: Is the EU a leading regional actor in peace and security?*, in *Southeast European and Black Sea Studies* 12 (3), 2012, pp. 394ss. C. WOLL, "Open skies, closed markets: Future games in the negotiation of international air transport", in *Review of International Political Economy*, 19 (5), 2012, pp. 921ss. T. DELREUX, *The relation between the European Commission and the EU member states in the transatlantic Open Skies negotiations: An analysis of their opportunities and constraints*, in *Journal of Transatlantic Studies* 9 (2), 2011, pp. 114ss.

<sup>94</sup>J. BAUGARTNER, *Treaty shopping and international investment law*, op. cit.,

<sup>95</sup>CJEU, *Judgments in Cases C-466/98, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2002:624, I-09427; C-467/98 *Commission of the European*



discussion shows that the question of competence is shrouded in uncertainty. Generally speaking, the above discussion has demonstrated that it would appear that member state BITs violate the principle of non-discrimination as a matter of EU law. The following section discusses whether this finding is undermined by countervailing considerations and what the implications of such finding are as a matter of EU law and international law.

In 26 May 2017, the CJEU published the Opinion 2/15<sup>96</sup> where it held that matters related to Foreign Direct Investment fall within the exclusive competence of the EU<sup>97</sup>, apart from investment protection (to the extent it relates to non-direct investments) and investment arbitration, which fall within a competence shared between the EU and the member States. As to extra-EU BITs, in Opinion 2/15 the CJEU held that investment protection, to the extent it relates to non-direct investments, and investment arbitration fall within a competence shared between the EU and the member states. This indicates that member State parliaments have to ratify EU agreements containing provisions on investment protection and arbitration before they can enter into force. What implications does this have for extra-EU BITs? It seems clear that the EC will not raise the issue of discrimination for political reasons, and the main purpose of the Grandfathering regulation is to allow extra-EU BITs to remain in force, even if their provisions may conflict with EU law. That Member States are obligated to eliminate conflicting provisions from extra-EU BITs is a truism, but this obligation should be seen against the broader political context. Extra-EU BITs are perceived as important (in particular) for the protection of outbound investments of the old member states, and the EC has no interest in challenging them under the principle of non-discrimination, also because investment protection and arbitration has been a central part of the EU's own investment policy. In this light, whether extra-EU BITs breach the principle of non-discrimination is an academic concern<sup>98</sup>.

### **5. The non-EU BITs stipulandi and sources different issues.**

In these cases, it is a matter of understanding whether there are grounds for the Union to include the arbitration clause in it. The insertion of the latter would in fact amount to the

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Communities v. United Kingdom of Denmark of 5 November 2002, ECLI:EU:C:2002:625, I-09519; C-468/98, Commission of the European Communities v. United Kingdom of Sweden of 6 November 2002, ECLI:EU:C:2002:626, I-0957; C-469/98, Commission of the European Communities v. Republic of Finland of 5 November 2002, ECLI:EU:C:2002:627, I-08627; C-471/98, Commission of the European Communities v. Kingdom of Belgium of 6 November 2002, ECLI:EU:C:2002:628, I-09681; C-472/98, Commission of the European Communities v. Grand Duchy of Luxembourg of 5 November 2002, ECLI:EU:C:2002:629, I-09741; C-475/98, Commission of the European Communities v. Republic of Austria of 5 November 2002, ECLI:EU:C:2002:630, I-09797; C-476/98, Commission of the European Communities v. Federal Republic of Germany of 5 November 2002, ECLI:EU:C:2002:631, I-09855. For details see: M. CHAROKOPOS, Asserting a leading role for the EU in international aviation: when aspirations meet reality, in *International Journal*, 70 (1), 2015, pp. 42ss.

<sup>96</sup>ECLI:EU:C:2017:376, par. 305

<sup>97</sup>A. MYBURG, J. PANIAGUA, Does international commercial arbitration promote foreign direct investment?, in *The Journal of Law and Economics*, 59 (3), 2016. D.H. ENDRAWAN, Arbitration and justice denial on foreign direct investment, in *Indonesian Journal of International Law*, 13, 2015-2016, pp. 438ss.

<sup>98</sup>For analysis see: M. CREMONA, Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017, in *European Constitutional Law Review*, 14, 2018, pp. 232ss. D. GERAERTS, Changes in EU trade policy after opinion 2/15, in *Global Trade and Customs Journal*, 13, 2018, pp. 14ss. D. KLEIMANN, G. KÜBEK, The signing, provisional application, and conclusion of trade and investment agreements in the EU-The case of CETA and Opinion 2/15, Robert Schuman Centre for Advanced Studies Research Paper No RSCAS 2016/58, November 2016.

consent to arbitration and, therefore, would determine for the Union the obligation to take part, as an actor or defendant, in proceedings that could be incardinated before foreign jurisdictions. Therefore, for the non-EU BITs<sup>99</sup> stipulating the admissibility of the arbitration clause can only be assumed if the availability of the Union to accept the jurisdiction of foreign courts in general and arbitration, in particular, is recognized. In this regard, the jurisprudential guidelines that emerged and the practice (ie, the EC Regulation Proposal No. 2012/0163) lead us to believe that the arbitration clause will be included in future non-EU BITs<sup>100</sup>.

The Union has already recognized the jurisdiction of foreign courts; on the other hand, the EU commercial agreements signed by the Union before the Treaty of Lisbon already contain the reference to the arbitration-State-to resolve the disputes that might arise. With regard to the first point, it is sufficient to recall that the Union has already taken part in judgments before extra-european forums. More specifically, since 1994 the Union, becoming a member of the WTO, has also been bound by the Dispute Settlement Understanding, which defines an exclusive mechanism for resolving disputes between States Parties of WTO<sup>101</sup>. This has led the Union, and for it the CJEU, to renounce its jurisdiction over cases involving it under WTO law<sup>102</sup>. The Union, then, together with Member States, is part of the Energy Charter

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<sup>99</sup>Award, 27 December 2016, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, par. 289. In the same spirit see: CJEU, 6 March 2018, Cases C-52/16 and C-113/16 "SEGRO" Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v. Vas Megyei Kormányhivatal of 6 March 2018, ECLI:EU:C:2018:157, published in the electronic Reports of the cases. As of today, extra-EU BITs, including arbitration clauses, are still applicable. In a more or less near future, they will progressively disappear as a consequence of the transfer to the EU of exclusive competence over foreign direct investment by the Lisbon Treaty. BITs entered into by Member States with third States will continue to exist until they are replaced by EU agreements.

<sup>100</sup>European Commission, 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 EU is party, n. 2012/0163 (COD), 21 June 2012.

<sup>101</sup>J. ERRICO, *The WTO in the EU: Unwinding the knot*, in *Cornell International Law Journal*, 44, 2011, pp. 180ss. As the CJEU put it: "To accept that the role of ensuring that Community law complies with those rules [i.e. WTO rules] devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners (...)". See, C-149/96, *Portuguese Republic v. Council* of 23 November 1999, op cit., par. 40-47 (the quote is from par. 46). For a general analysis of this matter, H. RUIZ-FABRI, *Is there a case-legally and politically- for direct effect of WTO obligations?*, in *European Journal of International Law*, 25 (1), 2014, pp. 152ss, according to the author: "(...) the Court has shown some acceptance of WTO rulings. After the AB had ruled that the so called "zeroing" method breached WTO law, the ECJ held that the method violated EU law as well, but the judgment made no references to the AB ruling, as the violation was based solely on a relevant EU regulation (...)". in the same spirit see also: CJEU, C-351/04, *Ikea Wholesale Ltd v. Commissioners of Customs & Excise* of 27 September 2007, ECLI:EU:C:2007:547, I-07723. Similarly, the CJEU has held that a DSB decision may in certain circumstances be used to interpret EU law. See *Joined Cases C-319/10 and C-320/10, X and Y & X BV* of 10 November 2011, ECLI:EU:C:2011:720, I-00167. See for details: H. LENK, *Investment arbitration under EU investment agreements: Is there a role for an autonomous EU legal order?*, in *European Business Law Review*, 28, 2017, pp. 136ss. S. MAZUMDER, *Can i stay a BIT longer? The effect of bilateral investment treaties on political survival*, in *The Review of International Organizations*, 11, 2016, pp. 478ss. M. MENDEZ, *The legal effects of EU agreements*, Oxford University Press, Oxford, 2013.

<sup>102</sup>WTO litigation settles disputes between two Member States of the Organization. The procedure is governed by Annex II of the WTO Agreement which contains the rules and procedural rules of the Member States of dispute resolution. As a preliminary step, the parties are expected to seek the solution through negotiations. In the event of a negative outcome, a panel will proceed with the dispute, whose members are chosen by the parties in a pre-established list of names-if the parties do not reach agreement, the panel members are identified in the light of the art. 8 of Annex II. The panel report can be appealed before the

Treaty<sup>103</sup>, multilateral international treaty, which contains an entire section dedicated to investments for which said substantive and procedural norms<sup>104</sup>. As for the latter, art. 26 reference is made to an arbitration panel if a dispute arises between a State party to the Treaty and an investor from another State party<sup>105</sup>. In the case of proceedings against the Union for violation of the Energy Charter Treaty<sup>106</sup>, the Union must appear before the arbitral tribunal constituted, without being able to raise exceptions on the jurisdiction based on its domestic law<sup>107</sup>. In order the commercial agreements signed by the Union, in autonomy or in concert with Member States, since 2000 the EU has also included mechanisms for the resolution of disputes, created along the lines of the WTO<sup>108</sup> model. By way of example, in the third chapter of the EU-Chile Agreement of 18 November 2002, the provisions for the settlement of disputes between two States Parties are included and it is prescribed that, after seeking a mutual agreement, they are referred to a arbitration board<sup>109</sup>. In any case, the reference to the arbitration proceeding, which supports the traditional ones-

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Appellate body. If the unsuccessful party does not comply with the recommendation of the court, then the party can comply with commercial sanctions, in the form of suspension of concessions (Article 22) or may request the initiation of an arbitration proceeding.

<sup>103</sup>A. EZRACHI, EU competition law. An analytical guide to the leading cases, Hart Publishing, Oxford & Oregon, Portland, 2018. R. LEAL-ARCAS, A. FILIS, The energy community and the Energy Charter Treaty: Special legal regimes, their systemic relationship to the EU, and their dispute settlement arrangements, in *Oil, Gas & Energy Law Intelligence*, 12, 2014.

<sup>104</sup>“(…) One of the chief features of the ECT is indeed the promotion and protection of investments in the energy sector. Part III of the Treaty, entitled "Investment promotion and protection", offers protection that is similar to that accorded by most bilateral investment treaties, including such rights as the fair and equitable treatment, the most constant protection and security of investments, the prohibition of discriminatory measures, the most-favored-nation treatment, and the payment of prompt, adequate and effective compensation for any nationalization, expropriation or measures having an effect equivalent to nationalization or expropriation(…)”, according to: E. GAILLARD, Investments and investors covered by the energy charter Treaty, in C. RIBEIRO (eds.), *Investment arbitration and the energy charter treaty*, in *Arbitration institute of the Stockholm Chamber of commerce*, Jurisnet, pp. 56ss.

<sup>105</sup>Art. 26.4.b: "If an investor chooses to submit the dispute for settlement pursuant to paragraph 2, letter c), he must also notify in writing his consent that the dispute is subject to: b) a single arbitrator or a ad hoc arbitration tribunal, established in accordance with the arbitration rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or c) an arbitration proceeding by the Arbitration Institute of the Stockholm Chamber of Commerce".

<sup>106</sup>CJEU, C-264/09, *European Commission v. Slovakia*, Opinion of AG Jääskinen of 15 March 2011, ECLI:EU:C:2011:580, I-000, par. 109. "(…) the detailed provisions contained in Directive 2003/54 (...) cannot be overridden by the more general provisions contained in the Energy Charter Treaty (...) EU energy law as it stands (...) cannot be considered as failing to achieve the standards required by the Energy Charter Treaty (...) with respect to the enjoyment and protection of investments, the general level of the protection of fundamental rights provided by EU law affords protection to investors, which fulfils the obligations resulting from Articles 10(1) and 13(1) of the Energy Charter Treaty (...)". For details see: D. KOCHENOV, F. AMTENBRINK, *The EU's shaping of the international legal order*, Cambridge University Press, Cambridge, 2014. L. TRAKMAN, N. RANIERI, *Regionalism in international investment law*, Oxford University Press, Oxford, 2013, pp. 376ss.

<sup>107</sup>“(…) as the EU becomes an even 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”, according to G.A. BRENNAN, *Navigating the EU law and law of international arbitration*, in *Arbitration international*, 28 (3), 2012, pp. 438ss.

<sup>108</sup>E. RAMIREZ-ROBLES, *Political and quasi-adjudicative dispute settlement models in EU free trade agreements. Is the quasi-adjudicative model a trend or is it just another model?*, in *Staff Working Paper ERSD-2006-09*, November 2006.

<sup>109</sup>EU, *Association Agreement between the European Community, Member States and the Republic of Chile* of 30 December 2002, in *Gazz Uff. A. Eur.*, N. L. 352 vol. 35, artt. 182 ss.

consultations and mediations-mostly political in nature-certainly marks a passage of great importance in the recognition of foreign jurisdictions. Among the agreements that come into force after Lisbon, we refer to the Association of Free Exchange with South Korea of 14 May 2011 which provides for the mechanism for resolving state-to-state disputes<sup>110</sup>. More specifically, in art. 84 of the aforementioned agreement, it is provided that if a dispute arises, the parties-always after a conciliatory experiment-refer it to a panel of arbitrators<sup>111</sup>. It is very likely that the solution adopted in this agreement will become a model for the subscription of the next, in terms of investment.

In the aforementioned cases, the commercial arbitration, then the arbitration between states, has inevitably been introduced, since the agreements mainly concern commercial exchanges, having been signed at a time when the Union did not yet have exclusive competence on foreign direct investment<sup>112</sup>. The next step will be to legitimate the state-private arbitration. On the other hand, when the Union prepares "an effective and expedient state-to state dispute settlement, that will in the future cover the investment provisions of EU trade and investment agreements (...)"<sup>113</sup>. On this point, the European Institutions have shown a tendency to admit the reference to this type of proceedings, even though they have conditions of no secondary importance. Firstly, the EC, already in the 2010 Communication attached to the Proposal for a Regulation for the definition of a transitional regime for non-EU BITs<sup>114</sup>, stated that "future EU agreements including investment protection should contain provisions on the resolution of disputes between investors and the State"<sup>115</sup>. This resolution system is, in fact, the one that most guarantees the investor and therefore constitutes an indispensable tool without which it would be difficult to arrive at the conclusion of future agreements with third countries. The intent of the executive is to "exploit the practice of Member States to define an ideal mechanism to ensure transparency (of procedures) and consistency and predictability (to stem the problems fragmentation of the modalities of resolution and interpretation)"<sup>116</sup>. The EC, therefore, has admitted the use

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<sup>110</sup>EU, Free Trade Agreement between the EU and the Republic of Korea, of May 14, 2011, OJ L. 127, vol. 54.

<sup>111</sup>The agreement provides that the arbitrators will be chosen by the parties or, if the agreement is missing, identified by the Trade Committee established by "(...) the task of overseeing the implementation of the FTA (Free Trade Agreement) and to study the ways to foster more intense commercial relations between the parties. An effective mechanism for the resolution of disputes is also envisaged (...)". Council, Proposal for a Council Decision authorizing the signing and provisional application of the free trade agreement between the EU and its Member States, of the one part, and the Republic of Korea, of the other part COM2010/0936, of 9 April 2010, par. 2.

<sup>112</sup>See for details: C. HERRMANN, J. CRÁMER, Foreign direct investment. A "coincidental" competence of the EU?, in *Hitotsubashi Journal of Law and Politics*, 43, 2015, pp. 87ss.

<sup>113</sup>"(...) tout récemment en vigueur, cet accord de libre-échange donne une perspective de l'intérieur de ce à quoi ressemble un système de règlement de différends interétatiques acceptable à l'Union, du moins en matière de commerce international (...)". S. NAPPERT, *Composition du Tribunal Arbitral*, in C. KASSEDJIAN (sous la direction de), *Le droit européen et l'arbitrage d'investissement*, op. cit., p. 125.

<sup>114</sup>A. C. SÖDERLUND, *The future of the Energy Charter Treaty in the context of the Lisbon Treaty*, in G. COOP (ed.), *Energy dispute resolution: Investment protection, transit and the Energy Charter Treaty*, JurisNet, Huntigton, 2011, pp. 99-124. S. EL. BOUDOUCHE, *L'avenir des traités bilatéraux d'investissement conclu par les Etats membres de l'Union européenne avec des Etats tiers*, *Revue Trimestrielle de Droit Européenne*, 47 (1), 2011, pp. 85ss. P. JUILLARD, *Investissement et droit communautaire. A propos des accords bilatéraux d'investissement conclu entre Etats membres et Pays tiers*, *Liber Amicorum Philippe Manin*, ed. Pedone, Paris, 2010, pp. 446ss.

<sup>115</sup>S. MIRON, *The last bite of the BITs versus investment treaty arbitration*, in *European Law Journal*, 20 (3), 2013, pp. 334ss.

<sup>116</sup>See fore details: S. GÁSPÁR SZILÁGUI, *Transparence investment protection and the role of the European Parliament*, in *European Investment Law and Arbitration*, 2 (1), 2017, pp. 372ss. D. EULER, M. GEHRING,

of arbitration provided that this allows to achieve greater transparency, not only with regard to the identification of arbitrators, but also with regard to access to information of proceedings, the participation of third parties, the publication of praise, the latter guaranteeing the consistency and predictability of decisions<sup>117</sup>. The intent is therefore to evaluate which arbitration center, as well as which procedural rules<sup>118</sup>, can guarantee the EC under these three resolutions<sup>119</sup>. The Council, in October 2010, reiterated the need to prepare State-private resolution mechanisms in future European international agreements. In the mandate to negotiate with India, Singapore and with the United States of America, the Council then envisaged the inclusion of the arbitration clause; in the latter, it has been specified that the investor-state resolution procedures will have to provide "transparency"<sup>120</sup>, independence of arbitrators and predictability of the Agreement including through the possibility of binding interpretation of the Agreement by the parties (...) considerations should be given to the possibility of creating an appellate body"<sup>121</sup>. The European Parliament in Resolution of April 2011 stated that "in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection"<sup>122</sup>. The European Institutions have taken a unanimous

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M. SCHEREL, *Transparency in international investment arbitration. A guide to the UNCITRAL rules on transparency in treaty based investor-State arbitration*, Cambridge University Press, Cambridge, 2015. A. MARQUES DA SILVA MARTINS, *Challenges to transparency and ethics in alternatives to arbitration in the realm of international investments*, in *Revista de Direito Internacional Econômico e Tributário-RDIET*, 11 (1), 2016, pp. 329ss. J.A. MAUPIN, *Transparency in investment law. The good, the bad and the murky*, in A. BIANCHI, A. PETERS, *Transparency in international law*, Cambridge University Press, Cambridge, 2013.

<sup>117</sup>G. RUSCALLA, *Transparency in international arbitration: Any (concrete) need to codify the standard?*, in *Groningen Journal of International Law*, 3 (1), 2015.

<sup>118</sup>See the analysis of B. WIECZOREK, A.R. SCHÜTZE and others (eds.), *Zivilprozessordnung und Nebengesetze Großkommentar*, De Gruyter, Hamburg, 2014, pp. 602ss.

<sup>119</sup>On the subject of transparency, it is noted that, if the Union wants to maintain the format of the agreement with Korea, in future agreements the criteria for identifying the arbitrators who are identified among people in the Agreement with Korea are better considered: "Specialized knowledge or experience of law and international trade. They shall be independent, serve in their individual capacities (...) comply with annex 14-C". These are conditions that, due to their vagueness, reduce the transparency of the selection and identification process; transparency which, on the other hand, is one of the requirements that the institutions demand to admit the use of arbitration proceedings. Also the mechanism of choice adopted in the WTO system would seem to be excluded due to the low level of transparency that guarantees in the choice of the panelist. More specifically, para. 8.2 of Annex II of the WTO Agreement is provided that: Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience che vengono scelti dalla parti, con il supporto del Segretariato tra quelli di una lista predefinita. Al para è prescritto che: "4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9)".

<sup>120</sup>See in particular: J. RIBEIRO, M. DOUGLAS, *Transparency in investor-State arbitration: The way forward*, in *Asian International Arbitration Journal*, 11 (1), 2015, pp. 50ss. L. MALINTOPPI, N. LIMBASAN, *Living in glass houses? The debate on transparency in international investment arbitration*, *BCDR International Arbitration Review*, 2 (1), 2015, pp. 32ss.

<sup>121</sup>Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM/2017/0493 final: "(...) the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements and invites the Commission to carry out a detailed study on the relevant issues concerning international arbitration systems, including inter alia the legal and political feasibility of EU membership in international arbitration institutions as well as the question of liability arising from arbitration procedures and the responsibilities of the Member States in this respect (...)".

<sup>122</sup>Council, Recommendation for a decision authorizing on negotiations on a comprehensive trade and



stance on the opportunity to foresee the postponement to arbitration in future international agreements with third countries. The last confirmation is found in the recent Proposal for Regulation n. 2012/0163, in which the EC sanctioned the admissibility of arbitration in the State-investor disputes<sup>123</sup>, on agreements to which the Union is also a member; in this way, it confirms the intention to include the arbitration clause in the next commercial agreements. It is noted that the need to include the arbitration clause in future EU agreements is a consequence of the new Union's recognized competence in the field of investment<sup>124</sup>. The Union, indeed, because part of the agreements defines its substantive norms and, inevitably, the control on the effective implementation must be delegated to a center that is a guarantee of third party respect to the parties. Hence the choice, almost obligatory, to admit the reference to the arbitration proceeding. Any other solution, such as the appeal before the CJEU, could not be accepted by the European business partners. On the other hand, the arbitration proceedings arise precisely from the need to "delocalize" the disputes<sup>125</sup> outside the national forums which, despite the guarantee of a well-structured and functioning court system, equipped with complex procedural rules, still have the limit of do not act as a third party between the parties. Therefore, with the entry into force of the Lisbon Treaty and the provisions contained therein, the inclusion of the arbitration clause in future investment agreements is no longer a faculty, but becomes a soft law obligation. Moreover, once the State-State arbitration proceedings have been admitted and therefore the fear that a third judge is deciding on matters that may involve a European State and, even if only indirectly, EU law, the next step will be the one to recognize the EU-investor arbitration.

#### **6. The procedural legitimacy of arbitration regarding investments. Proceedings between Member States and between Member States and third Countries with regard to extra-EU BITs stipulated before the Treaty of Lisbon.**

One wonders now on the part, EU or Member States, legitimized to stand trial if the dispute arises on an extra-EU BITs<sup>126</sup>. In general, in the arbitration judgments, the parties who have given their valid consent to refer any disputes before arbitrary courts have the capacity to stand trial. The capacity concerns the subjective situation of the party that has signed the arbitration clause that can be a natural person or a juridical person distinguishing himself, in this second case, between a juridical person of public or private right. When part of the relationship is a juridical person, it is opportune to look for which organ has the power to

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investment agreement, called the Transatlantic trade and investment partnership, between the EU and the United States, COM(2013)136, def., of 21 May 2013, p. 15. See also: European Parliament, Report on the Future European International Investment Policy (2010/2203(INI)), adopted on 22 March 2011.

<sup>123</sup>F. BAETENS, *Investment law within international law. Integrationist perspectives*, Cambridge University Press, Cambridge, 2013, pp. 399ss.

<sup>124</sup>F. BAETENS, *Investment law within international law. Integrationist perspectives*, Cambridge University Press, Cambridge, 2013, pp. 399ss.

<sup>125</sup>F. BAETENS, *Investment law within international law. Integrationist perspectives*, op. cit.

<sup>126</sup>Procedural capacity is a very different matter than responsibility; this second fact concerns the merit of the dispute, being instead the first necessary requirement for the activation and continuation of the trial activity. The lack of responsibility leads to a ruling on merit, with effects of *res judicata*, which precludes the repetition of equal questions between the same parties. Otherwise, a ruling on the procedural aspects, therefore also on the procedural capacity of the parties, does not prejudice the merit, thus allowing the beginning of a new procedure between parties who are entitled to stand trial.

form the will of the subject and thus manifest it outside. The same is true when part of the agreement is a state. In the arbitration judgments it is necessary to distinguish between capacity and power to compromise for arbitrators. The power to compromise consists in exercising the right to engage and therefore presupposes that the part that lends it to the organ of the State has the capacity to assume that commitment. In other words, capacity is a logical antecedent of the power to compromise: in the litigation phase, such power confers to the subject, active and passive, the relationship powers or faculties or burdens and provides them with rights or duties or, in some cases, even responsibility. The ability to compromise a State and public juridical persons can give rise to some problem about the subject legitimated to give consent; the State normally has jurisdictional immunity and, therefore, if it appears that the consent given to arbitration with the arbitration clause is invalid, because it has not been given by an organ that has the power to compromise, the award can not be his comparisons-even, the procedure, should have been concluded with a non-place ruling to proceed.

If, in fact, it has been excluded that the law in question derives effects such as to delegitimize the consent to arbitration posed by Member States, it is now necessary to assess whether art. 207 TFEU<sup>127</sup> applies as consent of the Union, determining, in this case, the passage of the legitimacy to stay in court by the member State of the BIT to the same Union. If this effect is also excluded, then it will be necessary to question the need to lay down specific obligations of conduct on the part of the State towards the Union once it is involved in an arbitration proceeding. The first question, which concerns the party entitled to stand trial, must be resolved by assessing whether the provision contained in art. 207 TFEU may apply as a consensus to the arbitration given by the Union. Article 207 TFEU would be worthy of recognition of power over substantive matters and would at the same time give the EU the power to take legal action in place of Member States<sup>128</sup>. The rule in question, therefore, would legitimize the Union to represent Member States in the proceeding, thus exercising all the rights and obligations that fall on the part of the judgment-choice of the arbitrators, drafting the defense briefs.

The basis of this assumption is a rather extensive interpretation of direct foreign investment pursuant to art. 207 TFEU<sup>129</sup>, which includes all the issues that, even indirectly, involve this

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<sup>127</sup>J. USHERWOOD, S. PINDER, *The EU. A very short introduction*, Oxford University Press, Oxford, 2018.

<sup>128</sup>CJEU, 45/07, *European Commission v. Greece* of 12 February 2009, ECLI:EU:C:2009:81, I-00701, par. 30-33. In this case, the Commission has agreed on Greece, part of the International Maritime Organization (IMO)-of which the EU is not a member-pleading against the alleged infringement, among others, of the principle of loyal cooperation requiring each Member State to act in compliance with European obligations and to promote Union action. In fact, Greece would have proposed at international level the adoption of a Regulation on a matter which has become the exclusive competence of the Union, without submitting the proposal to the scrutiny of the competent European Committee for the regulation of maritime safety. The Court condemns Greece for breaching the principle of loyalty cooperation.

<sup>129</sup>See in particular: R.V. PUIG, *The scope of the new exclusive competence of the EU with regard to "foreign direct investment"*, in *Legal Issues of Economic Integration*, 40 (2), 2013, pp. 134ss. M. BUNGENBERG, S. HOBE, *The relationship of international investment law and EU law*, in M. BUNGENBERG, J. GRIEBEL, S. HOBE, A. REINISCH, *International investment law*, Hart Publishing/Nomos, Baden-Baden/Oxford, 2015, pp. 1602ss. C. BROWN, I. NAGLIS, *Dispute settlement in future EU investment agreements*, in M. BUNGENBERG, A. REINISCH, C. TIETJE (eds), *EU and investment agreements: Open questions and remaining challenges*, Hart Publishing/Nomos, Oxford/Baden-Baden, 2013, pp. 18ss. A. TITI, *The right to regulate in international investment law*, ed. Nomos, Baden-Baden, 2014. C. HENCKELS, *Indirect expropriation and the right to regulate: Revisiting proportionality analysis and the standard of review in investor-State arbitration*, in *Journal of International Economics Law*, 15 (1), 2012, pp. 223. R. DOLZER, C. SCHREUER, *Principles of international investment law*, Oxford University Press, Oxford, 2012, pp. 146ss.

matter, so that substantial and procedural issues would be included. As a result of the latter, the Union also accepted to be a party to arbitration proceedings. In reality, this position does not seem to be acceptable for an absorbing reason. Article 207 TFEU confines itself to conferring on the Union only the power to sign and implement international agreements, not to resolve disputes that originate from those already stipulated by Member States.

The aforesaid provision therefore produces only substantial effects, since it expressly attributes to the Union exclusive competence over a raw material of shared competence. The recognition of exclusive jurisdiction, however, does not affect the legitimacy in court. Given that it derives from the consensus-except for certain exceptions such as the hypothesis of death of the physical person, extinction of the legal person or representation-in the absence of an express provision that may be valid as such, the aforementioned rule should not produce procedural effects, leaving so that the counterpart legitimated to be in court is, and remains, the Member State. From this it follows, as a corollary, that the non-EU BITs that remain in force due to the provisions of Regulation no. 1219/2012<sup>130</sup> are not modified and, therefore, the parties to the agreement are unchanged and, for them, who has given the valid consent to the arbitration proceedings. This situation is similar to that which arises when judgments arise on an international agreement concluded by a Member State, which regulates a matter which, after signing, becomes the exclusive competence of the Union. In these circumstances, the position expressed by the CJEU goes in the sense of not justifying the replacement of Member States by the Union<sup>131</sup>. Thus, in the *C-45/07 case, European Commission v. Greece* of 12 February 2009, the CJEU has ruled that if an international agreement concerns a matter that has become of exclusive EU competence, then the EU, or becomes part of the agreement or has the right to exercise, in an international context, the Member States, replacing it. In this regard, the CJEU stated that "the fact that the Community does not have the status of a member of an international organization does not prevent its external competence from being effectively exercised, in particular through the Member States acting jointly in the interest of the Community (...)"<sup>132</sup>. Therefore, Member States acting in an area which has become the exclusive competence of the Union must relate to the EU in accordance with the principle of loyal cooperation<sup>133</sup> enshrined in the Founding Treaties, but the provisions of the international agreement, both substantive and procedural, remain unchanged. The Member States remains the only counterpart of the third country. Moreover, from a perspective of international law, the transfer of powers within the Union could in no case produce effects on third parties. Conclusions to the contrary would

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<sup>130</sup>J. BAUGARTNER, Treaty shopping and international investment law, op. cit.

<sup>131</sup>The duty of loyalty cooperation comes in a series of obligations on the part of the Member States, which take shape in the light of the matter and / or the context in which that duty is to be applied. These obligations have been overlapped over time by jurisprudence and doctrine. As for the first, in the case of the *Commission c. Ireland*, states that: "the requirement of close cooperation in the context of a mixed agreement implied, according to Ireland, a duty to inform and consult with the competent Community institutions before launching a procedure for resolving the dispute regarding the MOX plant in the context of the Convention". CJEU, C-459/03, *European Commission v. Ireland*, op. cit., par. 179. See also: M. CREMONA, *Defining competence in EU external relations: lessons from the Treaty reform process*, in A. DASHWOOD, M. MARESCAU, *Law and Practice of EU external relations*, Cambridge University Press, Cambridge 2008, pp. 34-69.

<sup>132</sup>K. LENAERTS, I. MASELIS, K. GUTMAN, *EU procedural law*, Oxford University Press, Oxford, 2015

<sup>133</sup>A. VON BOGDANDY, M. IOANNIDIS, *Systemic deficiency in the rule of law: What is this, what has been done, what can be done*, in *Common Market Law Review*, 51, 2014, pp. 64ss. A. JAKAB, D. KOCHENOV, *The enforcement of EU laws and values. Ensuring member States compliance*, Oxford University Press, Oxford, 2017. C. KLAMMERT, *The principle of loyalty in EU law*, Oxford University Press, Oxford, 2014.

violate the principle set out in article 34 VCLT<sup>134</sup>.

It can be considered that the provision referred to in art. 207 TFEU does not imply consent to the arbitration and, therefore, the Union does not acquire the legitimacy to stand trial in the event that there are disputes over the BIT signed before Lisbon between a Member State and a third country. The above provision, therefore, does not prejudice the right of Member State to be convened in an arbitration proceeding arising on an extra-EU BIT stipulated before the Lisbon Treaty of which the EU is not a party. Given this, the only remaining issue concerns the nature of the relationship established between the Member State and the Union when an arbitration proceeding begins. This question finds a solution in art. 4.3 TFEU<sup>135</sup> which enumerates the principle of sincere cooperation. The Member State involved in the proceeding acts in such a way that it does not violate the primauté and the direct effect of EU law and does not adversely affect the future exercise by the EU of the competence referred to in article 207 TFEU<sup>136</sup>. In order not to violate the aforementioned principle, the Member State must keep the Union continuously informed of the progress of the procedure and, if requested, facilitate the participation of the EC in drafting the defense briefs. Obviously, nothing prevents the EC from intervening in the proceedings-if the procedural rules applied allow it<sup>137</sup>-as a third party to the dispute or is brought to trial directly by the judging panel to express its position on any controversial aspects of EU law<sup>138</sup>.

### **7.(Follows) Disputes relating to agreements concluded after the Treaty of Lisbon: Solution of *lege ferenda*.**

Since arbitrations find the basis and legal legitimacy in the arbitration clause, the legitimation of the case will be recognized to the party, or to the parties, who will, or will, have signed the next commercial and investment agreements including the aforementioned clause. If a Member State, due to the provisions of Regulation n. 1219/2012, is authorized to enter into a new BIT with a third country, the legitimacy of the case falls to him alone. The Member State is the only party to the agreement and, as such, is the only one to have the ability to include the arbitration clause, thereby giving consent to the arbitration<sup>139</sup>. The

<sup>134</sup>C. SÖDERLUND, Intra-EU BIT investment protection and EC Treaty, op. cit.

<sup>135</sup>A. ARNULL, C. BARNARD, M. DOUGAN, E. SPAVENTA (a cura di), A constitutional order of States. Essays in EU law in honour of Alan Dashwood, Oxford University Press, Oxford, 2011, pp. 7ss.

<sup>136</sup>J. USHERWOOD, S. PINDER, The EU. A very short introduction, op. cit.

<sup>137</sup>K. LENAERTS, I. MASELIS, K. GUTMAN, EU procedural law, op. cit.

<sup>138</sup>ICSID, final award of 23 October 2010, case ARB/07/22, AES Summit Generation Limited and AES-Isza Eromu Kft v. Hungary, par. 3.25, which is stated that: “under cover of a letter of 15 January 2009, the European Commission filed a written submission pursuant to ICSID Arbitration Rule 37, in accordance with the Tribunal’s Procedural Order No. 3”. Otherwise, in the Eureko case, the Court requested the Commission to participate in the procedure:“(…) after the hearing on the Intra-EU Jurisdictional Objection and following consultations with the Parties, on 10 May 2010, the Tribunal wrote to the Director General of the Legal Service of the European Commission providing information about the present arbitration, referring to observations that the European Commission had made in the Eastern Sugar BV (Netherlands) v. Czech Republic arbitration (“Eastern Sugar”) concerning the effect upon the Tribunal’s jurisdiction of the fact that both the Respondent and the national State of the Claimant are Member States of the EU,13 and inviting the European Commission to submit any further observations on that jurisdictional question that it might wish to communicate to the Tribunal (...)”, PCA, Eureko v. The Republic Slovak, op. cit., par. 31.

<sup>139</sup>European Commission, 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 EU is party, COM(2012) 355 final of 21 June 2012.

second case contemplates, instead, the hypothesis in which the future agreements are signed in mixed form, between the Union, Member States and a third country. In this last circumstance, the ability to stand before arbitration courts falls to all parties to the agreement. In fact, both the Union and the Member States, by signing the international agreement containing the arbitration clause, have given their consent to the arbitration and, therefore, both have the capacity to act or stand trial. The hypothesis that Member States are authorized to sign new bilateral investment agreements is not remote. In Article 7 of Reg. 1219/2012 is in fact prescribed that: "under the conditions set out in articles 8 to 11, a Member State is authorized to enter into negotiations with a third country in order to amend a bilateral agreement on existing investments or conclude a new one (...)"<sup>140</sup>.

The hypothesis in which the Union will sign the future agreements autonomously is less probable; as a rule, in fact, the Union signs multidisciplinary agreements, which include matters for which exclusive competence is not attributed to it and which, therefore, require the intervention of Member States. The same applies to the hypothesis in which the Union intends to sign BITs; In fact, such agreements normally also regulate portfolio investments for which it is not clear whether the Union can exercise exclusive implicit competence. Assuming this, one wonders then if there are criteria to identify the part that will take part in the judgments. This issue is purely internal to the Union, without taking into account at international level, except in the limits in which the investor can be affected by the scarce timeliness of the choice. For a solution to the problem now under consideration, interesting insights can be found in the recent Proposal for Regulation n. 2012/0163<sup>141</sup>. The Member States, for their part, respond for their actions or if the Union has recourse to article 2.1 TFEU<sup>142</sup>. In this second case, the Member State acquires procedural legitimacy in judgments concerning a matter which, although the exclusive competence of the Union, has been re-delegated to it<sup>143</sup>. It is noted, however, that the principle of parallel Member States between legitimacy to respond in judgment and responsibility by non-fulfillment-rectius financial responsibility-is not perfect. In fact, the Proposal for Regulation establishes cases in which the Member State, although responsible, does not act independently in court. In article 8.2 of the Proposal for a Regulation, the Union is expected to respond in court if it could indirectly suffer financial consequences<sup>144</sup>, the role of its own emanation is questioned

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<sup>140</sup>L. PANTALEO, Member States prior agreements and newly EU attributed competence. What lesson from foreign investment, in *European Foreign Affairs Review*, 9 (2), 2014. N. DE SADELEER, The end of the game. The autonomy of the EU legal order opposes arbitral tribunales under bilateral investment treaties concluded between two member States, in *European Journal of Risk Regulation*, 9 (2), 2018, pp. 358ss.

<sup>141</sup>It is noted that the Union replaces the Member State even if the dispute is resolved through the consultative procedure. In such circumstances, the Member State conducting the proceedings can reconcile provided that it recognizes its financial responsibility, the conciliation agreement is only enforceable against it, the provisions of this agreement comply with EU law and there is no greater Union interest preventing the conciliation. In any case, the forecast under consideration establishes that the Commission and the State enter into consultations before the latter reaches the conciliation with the plaintiff. Finally, so as to ensure the monitoring of the work of the Member State, the Commission must receive a draft of the conciliation agreement and, in the ninety days following the notification, has the right to initiate a revision procedure. If the term lapses, the principle of silent consent is valid for which the State can sign the agreement.

<sup>142</sup>J.L. DA CRUZ VILAÇA, EU law and integration. Twenty years of judicial application of EU law, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, Principles of EU law, including Brexit, West Academic, Minnesota, 2017, pp. 278ss.

<sup>143</sup>In point 12 of the premises of the Proposal, the power to replace the Union is established in rather vague terms: "(...) It is appropriate that the Commission decide, within the framework set down in this regulation, whether the Union should be the respondent or whether a Member State should act as respondent (...)".

<sup>144</sup>N. DE SADELEER, The end of the game. The autonomy of the EU legal order opposes arbitral tribunales

or, as a result of a probabilistic judgment, and this reversal of roles is justified, as shown from point 11 of the premises, because of the need to ensure the interest of the Union and, therefore, of all Member States. The cases listed in art. 8.2 of the Proposal, in the opinion of EC<sup>145</sup>, deserve to be dealt with directly by the Union to ensure, in addition to integration and uniform external representation, also compliance with art. 4.3 TUE<sup>146</sup>. The failure to obtain the qualified majority vote in the Council would thus thwart the EC's efforts to establish such a new policy. The situation could be different if the EC first managed to obtain a series of mandates for including the sought features into bilateral EU agreements with third countries so as eventually to show a "concerted strategy" for the inclusion of such features which could suffice for then forcing recalcitrant member states to fulfil their duty of cooperation as to abstain from blocking a renegotiation. This constellation is, however, quite unlikely to arise, and, once the EC has consolidated its outline for a new EU investment policy, including certain concessions to the member states, it can be expected that the member states will accept moving towards new standards of investment protections also in the Energy Charter Treaty.

The criteria set by the Proposal should resolve any doubts as to the identification of the party that has legitimacy to be in court, but in this regard it is noted that the provision referred to in the aforementioned art. 8.2 are rather vague formulations: It is not clear whether the EC can impose its choice, to replace itself, or to be replaced by the Member State or, conversely, the latter has room for reply and, if so, if the solution can become object of definition of the CJEU; and the conditions that can justify the substitution of the Union are too vague, especially when they refer to similar claims-it is not clear whether similarity should relate to the petitum or the petendum-to overriding Union interests or ultimately to the unsettled issues of law - where law is presumed to refer to EU law<sup>147</sup>.

The European Parliament approved at first reading a text of the partially amended proposal, which helps the interpreter on certain issues. Specifically, in art. 2 lett. j) the definition of overriding interests of the Union<sup>148</sup> has been added; the co-legislator then proposed to insert a provision as a result of which the choice of the Union to replace the Member State is binding on the plaintiff and the Arbitration Tribunal. The EC solution and the amendments of the European Parliament comply with the rules of the arbitration procedure, which is based on the consent of the parties. However, this solution could not guarantee the right process, since the right of Member States to defend itself independently could be precluded. For the sake of completeness, however, it is noted that no case has been made of the possibility of a joint legal participation, as defendants, of the Union and the Member State. Such a solution, if ever it should be proposed, would not be excluded from the arbitration

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under bilateral investment treaties concluded between two member States, op. cit.

<sup>145</sup>N. DE SADELEER, The end of the game. The autonomy of the EU legal order opposes arbitral tribunales under bilateral investment treaties concluded between two member States, op. cit.

<sup>146</sup>J. USHERWOOD, S. PINDER, The EU. A very short introduction, op. cit.

<sup>147</sup>N. DE SADELEER, The end of the game. The autonomy of the EU legal order opposes arbitral tribunales under bilateral investment treaties concluded between two member States, op. cit.

<sup>148</sup>In the amendment proposed by the Parliament, it is added to the art. 2 the letter (ja) which prescribes that: "(...) overriding interests of the Union' means any of the following: (i) there is a serious threat to the consistent or uniform application or implementation of investment provisions of the agreement subject to the investor-to-state dispute to which the Union is a party (ii) a Member State measure may conflict with the development of the Union's future investment policy, (iii) the dispute implies a possible significant financial impact on the Union budget in a given year or as part of the multiannual financial framework (...)". European Parliament, Amendments adopted by the European Parliament on May 2013 on the Proposal for a Regulation n. 2012/0163 A7-0124/2013 of 23 May 2013.

rules. On the contrary, the solution proposed in the Proposal seems to go in the direction of avoiding the inconveniences that could derive from the joint participation of the Union and the Member State involved<sup>149</sup>. Internationally, the practice seems oriented in the opposite direction.

The Convention on the Law of the Sea (Montego Bay) does not preclude the possibility that an organization and its member state may take legal action or be jointly agreed<sup>150</sup>. The responsibility derives, in fact, from the competence on the subject matter of the dispute. In article. 7.3 of Annex IX of the aforementioned Convention<sup>151</sup> it is prescribed that: "when, however, a Member State has chosen only the International Court of Justice (ICJ) it is considered that the organization and the Member State involved have accepted the arbitration provided for by Annex VII, unless the parties to the dispute decide otherwise (...)"<sup>152</sup>.

The solution adopted by the aforementioned Proposal aims to preserve the external

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<sup>149</sup>«La Communauté et ses Etats membres participent à l'accord mixte dans un mesure différente, mais l'étendue de leur participation est une question intra-communautaire (...) au niveau de la conclusion de l'accord mixte on ne distingue pas la Communauté de ses Etats membres, puisque la répartition intra-communautaire des compétences reste une question intra-communautaire". E. NEFRAMI, *Les Accords mixtes de la Communauté Européenne: aspects communautaires et internationaux*, ed. Bruylant, Bruxelles, 2007, pp. 447ss.

<sup>150</sup>Arbitral tribunals will not make formal declarations on alleged breaches of EU law. EU law can be part of the applicable law only if a member state argues that its obligation to implement an EU act takes priority over its BIT (or UNCLOS) obligations, which assume the existence of conflict, but even in this scenario the tribunal would not rule on breaches of EU law, as the conflict could only be resolved by applying a conflict rule of international law. The point of this quibbling is that unless conflict arguments are raised, EU law is necessarily a factual element in the tribunal's analysis, although it may constitute a direct (and only) basis for the finding that the challenged measure was (or was not) a rational public interest measure which does not breach the BIT. Another scenario is one where the member state argues that the challenged measure is attributable to the EU, which would render the claim inadmissible as a matter of international law, but here too EU law would not be part of the applicable law as the question of attribution is decided on the basis of the relevant rules of international law.

<sup>151</sup>D. KÖNIG, *The enforcement of the international law of the sea by coastal and port States*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 62, 2002, pp. 6ss. H. RINGBOM, *The EU maritime safety policy and international law*, The Martinus Nijhoff Publishers, Leiden/Boston, 2008, pp. 216ss.

<sup>152</sup>In Article. 26.3.b.ii. of the Energy Charter it is prescribed that: "the 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 parties". As regards the correct interpretation to be given to this clause, in the *Electrabel* case, the Commission has tried to show that, since the Energy Charter was not attached, a specific division of responsibilities between the Union and Member States was not attached, part actress has the burden of starting a procedure by quoting both and letting them decide, within a period of 30 days, which of the two is legitimated to respond: "(...) the 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 request of the investor, the Communities and the member States concerned will make such determination within a period of 30 days". ICSID, *Electrabel v. Hungary*, op. cit., par. 47, part V, p. 48. According to Rhine Convention was stated that: *Nella Convenzione per la protezione del Reno, è stabilito che: "In the event of a dispute between two Contracting Parties, of which only one is a Member State of the European Community, also a Contracting Party, the other Party shall address the request both to this Member State and to the Community, which shall notify the joint reply, within two months of receipt of the request, if the Member State, the Community or the Member State and the Community jointly form part of the dispute. In the absence of such notification within the prescribed period, the Member State and the Community shall be regarded, for the purposes of applying the provisions of this Annex, as one and the same party to the dispute. The same provision shall apply if the Member State and the Community are jointly constituted part of the dispute (...)"*. Convention for the protection of the Rhine of 27 June 200, in *Gazz. Uff. A. Eur. C. n. 177*, art. 8, attached.

representation of the Union<sup>153</sup> and, at the same time, for reasons of purely political opportunities, preserves the definition of internal relations, preventing the arbitrator from ruling on the EU-Member States relationship.

The purpose of the Proposal seems to be to clarify the relations between the parties to a mixed agreement, providing for binding and knowable *ex ante* solutions. It is therefore assumed that in future agreements signed jointly by the Union and Member States, a clause of the same standard as the ones already provided for in some mixed agreements will be inserted<sup>154</sup>; they provide that, in the event of a dispute, the defendant in court must rule on who, between the Union or Member States, has the legitimacy to stand in court. In the event of a dispute that arises on future investment agreements, this clause should lead the defendant, EU or Member States, to resolve the question of passive legitimacy by making reference to the content of the Proposal, which will hopefully soon become Regulation.

### **8.(Follows) The case of financial responsibility.**

The principle of attribution is one of the fundamental principles of the EU, by virtue of which it can act only within the limits of the competences expressly attributed to it by the Treaties, those recognized in application of the jurisprudential theory-implicit powers or flexibility clause, pursuant to art. 352 TFEU<sup>155</sup>. In the event of a dispute over a mixed agreement, the judge can not decide on matters relating to the division of competences between EU and Member States. The search for the part that has jurisdiction over the subject matter of the litigation and which, as a consequence, is entitled to stand trial, can only be performed within the EU system. The provisions on the division of competence within the Union are not, in fact, opposable to third parties and, therefore, can not be relied upon either by the EU or by the Member States to exclude their responsibility or, in parallel, must be referred to by the third party<sup>156</sup>.

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<sup>153</sup>N. DE SADELEER, *The end of the game. The autonomy of the EU legal order opposes arbitral tribunales under bilateral investment treaties concluded between two member States*, op. cit.

<sup>154</sup>See in particular: S. LALANI, R. POLANCO LAZO, *The role of the State in investor State arbitrator*, Martinus Nijhoff Publishers, The Hague, 2014. M. AKBABA, G. CAPURRO, *International challenges in investment arbitration*, ed. Routledge, New York, 2018.

<sup>155</sup>D. LIAKOPOULOS, Art. 352 TFEU, in P.E. HERZOG, C. CAMPBELL, G. ZAGEL, *Smit & Herzog on the law of the EU*, ed. LexisNexis, 2018.

<sup>156</sup>(...) Pour un grand partie de la doctrine la Communauté et ses Etats membres sont considérée comme conjointement responsable, sans qu'ils puissent opposer une fin de non recevoir lorsque le tiers s'adressent à l'un ou à l'autre, selon l'imputabilité de l'acte ou de considérations d'opportunité. Pour précisément, les auteurs qui acceptent la responsabilité limitée a la violation des dispositions qui relèvent des compétences respectives on préalablement accepté l'opposabilité de la répartition intra-communautaire des compétences au niveau de la conclusion de l'accord. En revanche, pour les auteurs qui acceptent la non-répartition de l'effet obligatoire de l'accord mixte lorsqu'une telle répartition ne découle pas de son texte, la Communauté et ses Etats membres sono conjointement responsable de l'ensemble de l'accord". See the opinions of the Advocate General Jacobs and Tesouro in case: CJEU, 316/94, *European Parliament v. Council of 6 February 1997*, ECLI:EU:C:1997:59, I-02785; 53/96 *Hermès International v. FHT marketing choice BV. of 16 June 1998*, ECLI:EU:C:1998:292, I-3603. With regard to the second, Tesouro noted that: "it should be recognized that the Member States and the Community constitute, in relation to the third party contracting parties, a single contractual party or at least contracting parties equally responsible with respect to any breach of the agreement. The obvious consequence is that, in the hypothesis of this type, the division of competences is of only internal relevance. This same circumstance, as will be better seen, may not be irrelevant to the solution of the problem that concerns us". In practical terms, the recognition of joint liability takes place in the first instance of the proceedings, when the third party then notifies the beginning of the proceedings to the Union or to the State or to both. The defendants, the Union and the Member States, can not plead the defect of their powers, which is



In this regard, it is noted that the Proposal for Regulation no. 2012/0163<sup>157</sup> distinguishes between internal and external responsibility. The first concerns the relationship between Member States and Union, while the second one has international repercussions since it defines the part that assumes responsibility and which, as already mentioned, is not necessarily the one that has competence on the subject in which the violation occurred<sup>158</sup>.

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an intra-union issue. Following notification, recognition of responsibility takes place, in the light of the division of intra-EU competences. In this sense, the request for judgment proposed by the third party will therefore be answered by the party, Union or Member State, which will have jurisdiction to stand in court because, for EU law, directly or indirectly responsible.

<sup>157</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 EU is party, COM/2012/0335 final-2012/0163 (COD). For details see: J. BONNITCHA, *Substantive protection under investment treaties. A legal and economic analysis*, Cambridge University Press, Cambridge, 2014. J. KLEINHEISTERKAMP, *Financial responsibility in european international investment policy*, in *International & Comparative Law Quarterly*, 63 (2), 2014, pp. 450ss. J. KLEINHEISTERKAMP, *Investment protection and EU law: The intra-and extra-EU dimension of the energy charter treaty*, in *Journal of International Economic Law*, 15 (1), 2012, pp. 86ss.

<sup>158</sup>In this regard, it is noted that the CJEU has accepted that the Union and the Member States can take part in meccaniMember Stasesi to resolve international disputes, provided that this is done with respect for the autonomy of the European legal order and the monopoly of the Court of Justice for the interpretation of EU law. For the jurisprudence of the Court of Justice on this point, please refer, ex multis, to: Opinion in case 1/91 of 14 December 1991, ECLI:EU:C:1991:490, I-06079, par. 39-40; In Opinion 1/91, on the first EEA agreement, the CJEU proclaimed the constitutional character of the EU, asserting that this constitutional nature distinguished it from international law. In Opinion 1/00 the Court stated more specifically: "(...) preservation of the autonomy of the Union legal order requires therefore, first, that the essential character of the powers of the (Union) and its institutions as conceived in the Treaty remain unaltered (...) it requires that the procedures for ensuring uniform interpretation of the rules of the (...) Agreement and for resolving disputes will not have the effect of binding the (Union) and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of (Union) law referred to in that agreement (...)". See also the Opinion 1/00, Opinion pursuant to Article 300(6) EC-Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area) of 18 April 2002, ECLI:EU:C:2002:231, I-03493, par. 12-13, to which par. 12 states that: "Ensuring the autonomy of the Community legal order therefore presupposes, on the one hand, that the competences of the Community and its institutions, as conceived in the Treaty, are not distorted: "(...) since the draft agreement substantially establishes a new jurisdictional structure, it is necessary to recall, in the first place, the fundamental elements of the legal system and the judicial system of the Union, as conceived by the founding Treaties and developed by the jurisprudence of the Court in order to assess the compatibility with those elements of the TB institution (...)". In Opinion 1/00 the Court stated more specifically: "(...) preservation of the autonomy of the Union legal order requires therefore, first, that the essential character of the powers of the (Union) and its institutions as conceived in the Treaty remain unaltered (...) it requires that the procedures for ensuring uniform interpretation of the rules of the (...) Agreement and for resolving disputes will not have the effect of binding the (Union) and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of (Union) law referred to in that agreement (...)". from the perspective of the autonomy of EU law, it is not clear at all that the principle of mutual trust, as a "specific characteristic" of EU law, trumps the protection of fundamental rights. It is true that the principle is a cornerstone of the Area of Freedom Security and Justice, and that the relevant TFEU provisions make several references to mutual recognition. But the protection of fundamental rights is a foundational EU value, and the TFEU's opening provision on the AFSJ predicates the area on respect for fundamental rights-such respect is also a "specific characteristic" of EU law. According to our opinion arbitral tribunals have no obligation to keep up to date and take account of the CJEU's case law when the disputing parties invoke EU law arguments. Tribunals can of course do so either on their own initiative or by hearing the parties and expert witnesses, but the essential question is whether the general ability of arbitral tribunals to interpret and apply EU law, to be discussed further below, constitutes a problem in light of Opinions 1/91 and 1/00. Situations where the CJEU's rulings are open to different interpretations, or where the Court has not clarified the meaning of specific EU law provisions may arise, and this will compel the tribunals to interpret the relevant rulings and provisions in one or another way. See for details: B. DE WITTE, *EU law: How*

With regard to the division of internal responsibility between the EU and the Member States, the Proposal indicates that for the division of competences reference should be made to the institutive Treaties<sup>159</sup>. In other words, regardless of who answers and takes responsibility in court, any compensation arising from the sentence is attributed to the party that has jurisdiction over that particular matter on the basis of the criterion of allocation EU-Member States<sup>160</sup>. The party who acted in a matter for which he is responsible is financially responsible<sup>161</sup>. The identification of the responsible party is therefore a particularly sensitive matter, since the recognition of responsibility results in the obligation to pay compensation, with consequences that may be particularly burdensome for the finances of the Union or the State<sup>162</sup>.

At this stage the foreign investor-actor of the *instaurando* judgment-and the arbitration panel

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autonomous is its order?, in *Zeitschrift für Öffentliches Recht*, 65, 2010, pp. 162ss. P. JAN KUIJPER, J. WOUFERS, F. HOFFMEISTER, *The law of EU external relations: Cases, materials and commentary on the EU as an international legal actor*, Oxford University Press, Oxford, 2018, pp. 520ss. M. DERLÉN, J. LINDOLM, *The Court of Justice of the EU: Multidisciplinary perspectives*, Oxford University Press, Oxford, 2018. F. CASTILLO DE LA TORRE, Opinion 1/00, Proposed agreement on the establishment of a European Common Aviation Area, in *Common Market Law Review*, 39 (6), 2002, pp. 1373-1393 pp. 1392ss.

<sup>159</sup>Consequently, in the case of disputes arising from an agreement concluded in mixed form, in order to identify the competence on a matter and thus divide the financial responsibility between the Union and the Member State, one must have regard to the internal provisions of the founding Treaties. Mixed agreements are, indeed, underwritten both by the Union and by the Member States and include matters that can be attributed to the competence of the first, second or both competing.

<sup>160</sup>For the identification of the responsible party, in light of the practice of the Mixed International Agreements, two options can be developed. In some cases it is the same text of the Agreement that specifies the division of responsibility between the Union and the Member States. Among these, we recall the art. 6.2, Annex IX of the UNCLOS 1982 Convention for which: "The parties that have the competence pursuant to article 5 of this annex are responsible for the non-fulfillment of the obligations and any other violation of the present convention" and the art.4.5 of the Kyoto Protocol, 1999 which states that: "If the Parties, acting jointly, do so within the framework of a regional organization of economic integration and in concert with it, any variation in the composition of said organization, subsequent to the adoption of the present Protocol, will not affect the commitments undertaken under this Protocol. Any change in the composition of the organization will only take effect for the purposes of implementing the commitments referred to in Article 3 that are adopted after the modification". A second type of Agreement, which represents the rule, is silent on the division of responsibility, more specifically it does not crystallize it when the Agreement is signed and therefore imposes the reference to the norms of the Institution Treaties which, in fact, provide for the distribution of competences Union and, therefore, the division of responsibility. In Article. 104 of the Agreement between the European Community and Russia, for example, it has been established that: "for the purposes of this Agreement, the term" shall mean the Community, or its Member States, or the Community and its Member States, in accordance with their respective powers, of the one part, and Russia, of the other part (...)". EU, Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, doc. n. 21997A1128(01) 24 June 1994.

<sup>161</sup>The CJEU clarified that the Member States are bound by Community obligations (now European), in fact: "establishing a Community without any duration limitation, endowed with its own bodies, personality, legal capacity, representation capacity at international level, and in particular of effective powers deriving from a limitation of jurisdiction or a transfer of powers of the States to the Community, these (the Member States) have limited their sovereign powers, albeit in limited fields, and thus created a binding legal framework for their citizens and for themselves (...)". case: 6/64, *Costa v. ENEL* of 15 July 1964, ECLI:EU:C:1964:66, I-01141, p. 1144. From this it follows that, if we accept the theory of control, that if the Member States does not respect the obligations imposed by the Union, the latter can be held responsible.

<sup>162</sup>"Should it be the case that both the EU and the Member States are parties to an Agreement and it needs to be decided who is responsible as a matter of International law for any particular action, the Commission takes the view that this has to be decided not by the Author of the Act but on the basis of the competence for the subject matter of the international rules in question, as set down in the Treaty". European Commission, Proposal for a Regulation n.2102/0163, Explanatory memorandum, op. cit., par.1.2.

appealed to, have no power, being a choice purely internal to the Union<sup>163</sup>. As a rule, in fact, in mixed agreements<sup>164</sup>, the Union and the Member State have a joint responsibility towards the third party-take note that they are not subsidiary-so they are presented to the latter both as direct responsables<sup>165</sup>. On the other hand, the question concerning external liability, which as such, assumes importance under international public law, is different. In this regard, in the Proposal for Regulation n. 2012/0163 an approach was adopted on the basis of which the party who, in light of the founding Treaties, has jurisdiction over the matter concerned by the non-compliance is not always in court. The Member State, on the other hand, replies to the direct debts directly attributable to him<sup>166</sup>. Regarding the allocation of external responsibility between the Union and Member States, it is noted that doubts may arise regarding the choice of the EC-not modified in the first reading by the European Parliament-to recognize responsibility for acts performed by the State member acting as a result of a european restriction<sup>167</sup>. In the case of EU, not being able to speak of a federal state, the legitimacy of EC's choice to hold the Union accountable for an act performed by Member States must be assessed in light of the sources of international law prepared for International Organizations<sup>168</sup>. Therefore, the division of responsibility must comply with the regime

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<sup>163</sup>In this regard, it should be noted that even from a purely internal EU perspective, therefore referring to the provisions of the institutional treaties, doubts may arise regarding the traceability of a specific sector to the exclusive competence of the Union or concurrent Union-Member States. The tax sector, for example, falls within the exclusive competence of the Member States, but is nevertheless subject to the impact of international agreements between the Union and third States. In the area of education, then, Member States provide for the organization of home education, leaving the EU with a supporting competence on the basis of which it can adopt legislative acts for the achievement of the objectives in the aforementioned sector (Article 165.4 TFEU). In terms of external relations, this means that the education sector can be included among the subjects regulated by a mixed investment agreement. In these circumstances, it may happen that the foreign investor agrees with the EU attaching that certain legislative measures taken by the Member State violate, for example, the national treatment clause included in an Investment Agreement between the EU and the third country. In these cases, the Union has no exclusive jurisdiction over the subject-matter of the dispute and therefore may not be responsible for the conduct of the Member State, unless the latter has acted in compliance with European obligations.

<sup>164</sup>P. CRAIG, G. DE BÚRCA, *EU law. Text, cases and materials*, op. cit.

<sup>165</sup>This position is shared by the majority doctrine as well as by the Special Rapporteur Prof. Gaja, of the Draft of articles on the responsibility of international organizations that on the topic establishes: “in case of infringement of a mixed agreement that does not distinguish between the respective obligations of the EC and its member States-either directly or by referring to their respective competencies-responsibility would be joint towards the non-member States party to the agreement”. ILC, Second report on responsibility of international organizations, Special Rapporteur Gaja, 53<sup>th</sup> session, UN DOC A/CN.4/541 of 2004, pp. 4-5.

<sup>166</sup>The Proposal then provides for the hypothesis where responsibility lies with more than one Member State. In these cases, as required by art. 47.1 of the draft article on the responsibility of States, the responsibility between the parties can be common in the sense that a plurality of states can be at the same time responsible for the commission of an offense. The provision referred to in art. 47 does not establish a general rule for identifying joint and solidary liability always in the case of mixed agreements; it simply states that two states can be simultaneously responsible for the same internationally illegal act. This depends on the circumstances and obligations that derive from each State. See, ILC, Report of the International Law Commission, 53<sup>rd</sup> session, A/756/10 of 2001, pp. 341.

<sup>167</sup>There is a great deal of jurisprudence on the alleged violation by a State of an international agreement for the execution of a European obligation. Former multis, please refer to: ICSID, Decision containing the settlement agreement of the parties of March 11, 2011, in case ARB/09/6, Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Germany; ICSID, Decision on jurisdiction, applicable law, responsibility of 30 November 2012, in case ARB/07/19, Electrabel S.A. v. Hungary; ICSID, Decision on jurisdiction of 13 September 2006, in case ARB/04/15, Telenor Mobil Communications A.S. v. Hungary; ICSID, Award of 8 October 2009, in case ARB/05/13, EDF (Services) Limited v. Romania.

<sup>168</sup>As a rule, for third parties, part of an agreement with a federal state, it is indifferent at what level of state the

established by the text on the Responsibility of International Organizations, approved in second reading by the International Law Commission (ILC) in 2011<sup>169</sup>, which provides for International Organizations a subsidiary responsibility with respect to the main one of the State party that allegedly committed the violation object of the judgment<sup>170</sup>.

Therefore, even in the case of the Union, the Member State should be held responsible for breaches of an agreement arising from conduct attributable to it, irrespective of whether the latter acted in compliance with a European restriction. However, art. 64 of the aforementioned text recognizes that these provisions do not apply if the responsibility of International Organizations is defined by its own internal regulations, which are of the nature of *lex specialis* and, as such, prevail<sup>171</sup>. International Organizations can therefore define an autonomous system of division of responsibility; this is the case of liability between the Union and the Member State if disputes arise over an investment agreement. From the foregoing, it follows that the solution of the Proposal to impute the conduct of the State to the Union if the same conduct has been carried out to respect a European bond is in

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violation was committed; international responsibility is always and only the head of the federal state, regardless of whether the violation is directly attributable to it, or has only been carried out on its territory. Obviously, differences can be found between the individual jurisdictions of the federal states that depend on the existence-Germany-or not-the United States and Canada-of express constitutional provisions that divide the responsibility among the various entities of the federal state. For an analysis of the division of responsibility within federal states. See in argument: C. TIETJIE, E. SIPIORSKI, G. TOPFER, Responsibility in investor-State-arbitration in the EU-managing financial responsibility linked to investor-State dispute settlement Tribunals established by EU's international investment agreements, in *Transnational Dispute Management*, 10, 2013.

<sup>169</sup>For details see: S. D. MURPHY, Codification, progressive development, or scholarly analysis? The art of packaging the ILC's work product, in M. RAGAZZI (ed.), *Responsibility of International Organisations-Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, Leiden, Boston, 2013, pp. 29-40. N.M. BLOKKER, Preparing articles on responsibility of International Organisations: Does the International Law Commission take International Organisations seriously? A midterm view, in J. KLABBERS, A. WALLEND AHL (eds), *Research handbook on the law of International Organisations*, Edward Elgar Publishers, Cheltenham 2011, pp. 313ss. F. HOFFMESITER, Litigating against the EU and its member States: Who responds under the ILC's draft articles on international responsibility of International Organisations?, in *European Journal of International Law*, 21, 2010, pp. 724ss. A. DELGADO CASTELEIRO, The international responsibility of the EU-The EU perspective: between pragmatism and proceduralisation, in *Cambridge Yearbook of European Legal Studies*, 15, 2012-2013, pp. 564ss. M. SZABÓ, International legal responsibility of the EU according to the Draft Articles of the International Law Commission, in M. SZABÓ (ed.), *State responsibility and the law of treaties*, Eleven International, The Hague, 2009, pp. 186ss. V. LANOVOY, *Complicity and its limits in the law of international responsibility*, Hart Publishing, Oxford & Oregon, Portland, 2016.

<sup>170</sup>In 2002 the International Law Commission appointed G. Gaja special rapporteur for the codification of the responsibility of international organizations. Gaja presented eight reports and, according to them, the ILC adopted the text of 67 articles at second reading. With Resolution 66/100 of 27 February 2012 the United Nations AG took note of the codification work and postponed to a subsequent session the decision about the legal framing of the text. For a detailed analysis of the division of responsibilities between the Union and the Member States.

<sup>171</sup>ILC, Draft Articles of International Organisations, UN Doc. A/CN.4/L.778 del 30 Maggio 2011, art. 64: "These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members". ILC, Report of International Law Commission, Responsibility of international Organizations, Sixty first session UN doc. A/64/10, del 2009, pp. 173-175. CDI, A/57/10, Report del 2002, Cap. VIII, par.465-488; CDI, A/58/10, Report (2002), cap. IV, par.

conformity with international law. In these circumstances, the act is imputed to the Union as a result of the theory of control, enucleated in the second and third reports of the ILC on the responsibility of international organizations. The aforesaid situations are regulated in light of the provision referred to in art. 17 of the draft article on the responsibility of States that applies, by analogy, also to international organizations<sup>172</sup>. The responsibility of the Union is, therefore, determined in relation to the effective degree of control exercised by the same on the State. The latter, indeed, remains responsible for the acts carried out by the Member States in compliance with a European restriction, except in the case where the EU has no connection with the action taken by the State. The responsibility of the Union exists, as *culpa in vigilando*, since the same did not exercise effective control over the action of the state. In other words, the Union, by placing a restriction contrary to an obligation, has not guaranteed the correct implementation by the State of international obligations<sup>173</sup>. In these cases, therefore, the control theory<sup>174</sup>, is correctly applied, from which the Union's responsibility is derived from the third parties of the violated agreement. The position adopted by the ILC in the articles on the responsibility of International Organizations is therefore in conformity with the provisions of international law, interpreted in the light of the theory of control<sup>175</sup>. However, it is noted that, in general, the division of responsibility

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<sup>172</sup>On the other hand, according to settled jurisprudence, international agreements become European sources and for the effect, a State that violates or does not correctly apply it, is in contrast with a European obligation and can, for this reason, suffer a procedure by the Union. Article. 8 of the articles on the responsibility of international organizations provides that: "The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions".

<sup>173</sup>Against, "The fact that a member State may be bound towards an international organization to conduct itself in a certain manner does not imply that under international law conduct should be attributed to the organization and not to the State", ILC, Second report on responsibility of international organizations, Special Rapporteur Gaja, 53<sup>o</sup>session, UN DOC A/CN.4/541 del 2004, p. 7. For details see: A. DELGADO CASTELEIRO, The international responsibility of the EU-The EU perspective: between pragmatism and proceduralisation, in Cambridge Yearbook of European Legal Studies, 15, 2012-2013, pp. 564ss. M. SZABÓ, International legal responsibility of the EU according to the Draft Articles of the International Law Commission, in M. SZABÓ (ed.), State responsibility and the law of treaties, Eleven International, The Hague, 2009, pp. 186ss. V. LANOVOY, Complicity and its limits in the law of international responsibility, Hart Publishing, Oxford & Oregon, Portland, 2016.

<sup>174</sup>Against: "During the discussions which led to the adoption of the ILC articles on the responsibility of international organizations, the European Commission took a different view on the attribution of conduct implementing obligations under EU law. According to this view, State organs act quasi as organs of the EU when they implement an obligation under EU law which leaves them no discretion. Responsibility for their conduct would have to be attributed only to the EU, which, unlike other international organizations, does not shy away from international responsibility (...)". ILC, Second report on responsibility of international organizations, Special Rapporteur Gaja, 53<sup>o</sup>session, UN DOC A/CN.4/541 del 2004, p. 7. For details see: J. KLABBERS, A. WALLEND AHL (eds), Research handbook on the law of international organizations, Edward Elgar Publishers, Cheltenham 2011, pp. 313ss. F. HOFFMESITER, Litigating against the EU and its member States: Who responds under the ILC's draft articles on international responsibility of international organizations?, in European Journal of International Law, 21, 2010, pp. 724ss. G. NOLTE, The International Law Commission facing the second decade of the twenty first century, in U. FASTENRATH et al., From bilateralism to community interests, Oxford University Press, Oxford 2011, pp. 782ss. S. VILLALPANDO, Codification light. A new trend in the codification of international law at the United Nations, in Brazilian Yearbook of International Law, 2013, pp. 118ss. Y. CHEN, Structural limitations and possible future of the work of the ILC, in Chinese Journal of International Law, 2010, pp. 478ss.

<sup>175</sup>ECtHR M. & Co. v. Germany of 9 February 1990: "(...) the Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European

between the Union and Member States does not always take place according to the aforementioned approach and accepted in the Proposal.

Indeed, in the Union Accession Agreement to the European Convention of Human Rights (ECHR)<sup>176</sup>, in spite of the EC-instances that would have liked to frame EU-Member States

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Communities (...) This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the conventional organs (...)"

<sup>176</sup>Opinion 2/13, Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECJ, 18 December 2014, ECLI:EU:C:2014:2454. CJEU, opinion of 18 December 2014, P-2/13. L. HALLESLOV STORGAARD, EU law autonomy versus european fundamental rights protection. On opinion 2/13 on EU accession to the ECHR, in *Human Rights Law Review*, 15 (3), 2015, pp. 487ss. On the one hand, the art. 53 does not oblige the States to guarantee a higher level of protection than that of the ECHR, on the other the same CFREU must guarantee the same level of protection of the ECHR so that there is no conflict between the two provisions. Moreover, the CJEU has evoked the specificity of the Union's control system on respect for fundamental rights, in particular the principle of mutual trust in the areas of civil and criminal judicial cooperation, visa, asylum and immigration, namely the area of freedom, security and justice that obliges each member state to presume respect for fundamental rights by the other member states and the absence of their jurisdictional powers in the field of foreign and security policy. See also in case: C-168/13 PPU, *Jeremy F. of 30 May 2013*, ECLI:EU:C:2013:358, published in the electronic Reports of the cases. The CJEU affirmed that: "(...) the absence of the necessary provisions of the Framework it frameworks, it must be that the framework for the implementation of the objectives of the framework to a European Arrest Warrant (...)". In the same spirit see also. CJEU, C-399/11 *Stefano Melloni* of 26 February 2013, ECLI:EU:C:2013:107; C-396/11 *Ministerul Public-Parchetul de pe lângă Curtea de Apel Constanța v. Radu* of 29 January 2013, ECLI:EU:C:2013:39, both of them published in the electronic Reports of the cases. F.M.W. BILLING, *The right to silence in transnational criminal proceedings. Comparative law perspectives*, ed. Springer, Berlin, 2016, pp. 323ss. C. JANSSENS, *The principle of mutual recognition in EU law*, Oxford University Press, Oxford, 2013, pp. 208ss. F. KORENICA, *The EU accession to the ECHR: Between Luxembourg's search for autonomy and Strasbourg's credibility on human rights protection*, ed. Springer, Berlin, 2015, pp. 282ss. S. MORANO-FOADI, L. VICKERS (eds.), *Fundamental Rights in the EU-A matter for two Courts*, Oxford University Press, Oxford, 2015. T. 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POTTEAU, *Quelle adhésion de l'Union Européenne à la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?*, in *Revue Générale Droit International Public*, 115, 2011, pp. 77-111. A. TORRES PEREZ, *Too many voices? The prior involvement of the Court of Justice of the EU?* in *European Journal of Human Rights*, 40, 2013, pp. 565-583. L. BESSELINK, M. CLAES, J.H. REESTMAN, *A Constitutional moment: Acceding to the ECHR (or not)*, in *European Constitutional Law Review*, 11, 2015, pp. 2ss. D. HABELSTAM, *It's autonomy stupid. A modest defense of Opinion 2/13 on EU accession to the ECHR, and a way forward*, in *Michigan Law Paper* 105, 2015. L.H. HALLESKOV STORGAARD, *EU law autonomy versus european fundamental rights protection-On Opinion 2/13 on EU accession to the ECHR*, in

responsibility reports along the lines of what was proposed for investment agreements -the opposite approach has been favored, for which the State is responsible for the acts carried out by its own bodies, regardless of whether the conduct was carried out in compliance with a European restriction. This approach is clearly expressed in the dictum of the European Court of Human Rights (ECtHR) for which "a Convention Party is responsible under article 1 of the ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations (in the case in hand, obligations under EU Law)"<sup>177</sup>. Therefore, a Member State can be held liable when the conduct of one of its bodies conflicts with the provisions of the ECHR-its reasoning may apply to any international agreement-regardless of whether the body of that State acted in compliance with obligations imposed on him by other legal systems. The ECtHR first articulated the principles by which it would afford protection to award creditors in its 1994 decision in *Stran Greek Refineries & Stratis Andreadis v. Greece (Stran)* of 9 December 1994. The Stran case concerned the validity and enforcement of a purely domestic arbitral award-although the ECtHR would extend the same principles to international arbitral awards in its subsequent jurisprudence<sup>178</sup>. In case

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Human Rights Law Review, 15, 2015, pp. 485. J.P. JACQUÉ, CJUE-CEDH: 2-0, in Revue Trimestrielle de Droit Européen, 40 (4), 2014 pp. 823ss. C. KRENN, Autonomy and effectiveness as common concerns: A path to ECHR accession after Opinion 2/13, in German Law Journal, 16 (1), 2015, pp. 147ss. S. LAMBRECHT, The sting is in the Tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights, in European Human Rights Law Review, 15 (1), 2015, pp. 185ss. M. PETITE, The battle over Strasbourg: The protection of human rights across Europe has suffered a setback, thanks to the Court of Justice of the EU, in Competition Law Insight, 2015, pp. 10ss. R.A. WESSEL, A. ŁAZOWSKI, When Caveats Turn into Locks: Opinion 2/13 on Accession of the EU to the ECHR, in German Law Journal, 16, 2015, pp. 179ss. B. DE WITTE, Article 53, in S. PEERS et al. (eds.), The EU Charter of Fundamental Rights, A Commentary, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 1523-1538. J. MEYER (ed.), Charta der Grundrechte der Europäischen Union, ed. Nomos, Baden-Baden, 2014, pp. 813-826. J.P. JACQUÉ, La Cour de Justice de l'Union et l'application de la Charte dans les Etats membres: "Mehr Licht", in European Yearbook on Human Rights, 14, 2014 pp. 125-147.

<sup>177</sup>ECtHR, Bosphorus case of 30 June 2005 and in the case of Michaud v. France of 6 December 2012. See in argument: A. JAKUBOWSKI, K. WIECZYŃSKA, Fragmentation vs the constitutionalisation of international law: A practical inquiry, ed. Routledge, London & New York, 2016. C. LACCHI, The ECtHR's interference in the dialogue between National Courts and the Court of Justice of the EU: Implications for the preliminary reference procedure, in Review of European Administrative Law, 9 (1), 2015, pp. 96ss. D. SPIELMANN, L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme, (Réunion conjointe de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme-Réseau des présidents des Cours suprêmes judiciaires de l'Union européenne, Helsinki 6 septembre 2013). A. TIZZANO, Les Cours européennes et l'adhésion de l'Union à la CEDH, in Il Diritto dell'Unione Europea, 2011, pp. 12ss. X. GROUSSOT, T. LOCK, L. PECH, Adhésion de l'Union européenne à la Convention européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2001, in Fondation Robert Schuman/Question d'Europe, n. 218 (7 novembre 2011), pp. 5ss. T. LOCK, Beyond Bosphorus: The European Court of Human Rights case law in the responsibility of Member States of international organizations under the European Convention on Human Rights, in Human Rights Law Review, 10 (4), 2010, pp. 530ss. C. COSTELLO, The Bosphorus ruling of the European Court of Human Rights: Fundamental rights and blurred boundaries in Europe, in Human Rights Law Review, 6 (1), 2006, pp. 88ss. S. DE VRIES, U. BERNITZ, S. WEATHERILL, The EU Charter of fundamental rights as a binding instrument: Five years old and grooming, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 32ss. J. NEGRELIIUS, E. KRISTOFFERSSON, Human rights in contemporary European law, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 17ss. C. BÜYÜKBAY, D. ERTIN, EU-Skeptizismus am Bosphorus?, in Zeitschrift für Internationale Beziehungen, 2017, n. 2.

<sup>178</sup>In the same spirit see the next cases: *Bramelid and Malmström v. Sweden* of 12 December 1983; *Nordström-Janzon and Nordström-Lehtinen v. the Netherlands* of 27 November 1996; *Miceleff v. Malta* of 15 October 2009.

*Regent Company v. Ukraine* of 3 April 2008, involved an arbitral award rendered under the auspices of the Ukrainian Chamber of Commerce in favor of a Czech company and against a State-owned corporation. In *Kin-Stib & Majkić v. Serbia* of 20 April 2010 and went further still in *Sedelmayer v. Germany* of 1st July 2011. The regional human rights courts—and in particular the ECtHR—provide a potential avenue of public law redress to award creditors frustrated by a State’s interference with the arbitral process or an arbitral award. While there are substantial gateway issues limiting access to the three human rights courts surveyed above, the jurisprudence of the ECtHR has developed in a reasonably protective manner. A State’s wrongful annulment of an arbitral award or agreement, or its failure to enforce a binding award in full and within a reasonable (if expansive) timeframe, can result in liability under either Protocol 1-1 or article 6 of the ECHR. The chief open question concerns when an arbitral award will be sufficiently enforceable to constitute “property” for purposes of the Protocol 1-1 (or article 6) analysis, and in particular the level of scrutiny the ECtHR would be willing to apply in cases of arguably justified setting-aside or non-enforcement. According to the ECtHR it was established that an arbitration agreement is not a blanket waiver of procedural human rights guarantees. Irrespective of the dispute resolution method, the essence of procedural guarantees must be preserved. By consenting to arbitration the parties merely renounce their right of access to a State court and the right to a public hearing. However, fair trial guarantees still apply. In this regard, the ECHR explicitly ruled that no one is entitled to waive ex ante the right to independent and impartial tribunal. The question whether arbitrators consider themselves bound by article 6(1) remains open. Answering the question would necessitate analysis of the relationship between the ECHR and arbitral proceedings from the viewpoint of arbitration rather than from the perspective of requirements imposed by the ECHR as interpreted by the controlling organs<sup>179</sup>.

This approach would be moreover compliant with the general principle of attribution enumerated in art. 4.1 of the Draft of Articles on the International Liability of the State pursuant to which "the conduct of any State shall be considered as an act of that State under the international law, or the organ exercises legislative, executive, judicial or any other functions"<sup>180</sup>. On the other hand, the Commentary to the draft articles does not establish that, if the organ of the State acted as a result of a supranational obligation, the responsibility passes from the State to the Organization to which it belongs. The proposal's approach, which could anticipate the forecasts that will be contained in future EU agreements, takes on the opposite view, namely that the States act in the same way as bodies of the Union and that, therefore, the latter is called to respond acts they perform in violation of international obligations<sup>181</sup>. By setting the control theory as its legal basis, the EC provides for the transfer of responsibility to the Union for the conduct of Member States in violation of the obligations of the international agreement, but in compliance with the European constraint. Although not shared because it distinguishes the perpetrator of the infringement and the legitimized party to stand trial, the choice made can be understood in light of the fear of the Union to open up to foreign judges in general and, in particular, in case of courts arbitrators

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<sup>179</sup>J. NEGRELIIUS, E. KRISTOFFERSSON, Human rights in contemporary European law, op. cit.

<sup>180</sup>J. KLABBERS, A. WALLEND AHL (eds), Research handbook on the law of international organizations, op. cit.

<sup>181</sup>Convention of Washington, 1965, art. 25: “(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally”.



untied from any legal system. In practical terms, in fact, the traceability of the conduct of the State to the Union allows the latter to participate in most of the proceedings that may arise on an extra-EU BIT and thus to have control over the correct application and interpretation of EU law. On the basis of the foregoing, it emerges that the EC preferred to adopt a "special" system to guarantee the possibility of bringing proceedings in the largest number of cases and thus to defend the correct and uniform application of EU law. The role of the Union is thus strengthened, since the ultimate aim of the proposal is to maintain the unity of the internal and external representation of this regional organization. The approach is also in line with international and EU law, although there remains the doubt that the role of Member States has been excessively compressed. In any case, as it is a proposal still at the beginning of the complex legislative process described in art. 218 TFEU<sup>182</sup>, it is possible to expect the Council to impose amendments aimed at rebalancing the role between the parties.

### **9. "Problematic" jurisdiction and choices of procedural rules for judgments arising from future European agreements.**

Until now, in fact, for the EU the problem has never been posed to take part in arbitration proceedings regarding investment and, therefore, the referral to some Member States, such as the ICSID one, as a rule preferred by the investor. In the formulation of the arbitration clause, the identification of the jurisdiction and the procedural rules to be applied must be the result of a balance between the foreclosures that limit the options for the Union and the needs expressed by the European Institutions on this point. In fact, the latter have expressed their willingness to accept arbitration proceedings within the limits in which transparency, disclosure of information and rulings, as well as the participation of third parties is guaranteed<sup>183</sup>. These requirements guarantee to the institutions that, if a Member State is called to respond and not the Union, the latter may intervene in court or be informed in every stage of the proceedings and thus be able to adopt, where appropriate, the appropriate precautions of the Member States. Pending the conclusion of the next international agreements on investment, we can only hypothesize-in light of the advantages, limits and preclusions of each-which is the institution and the Regulation of procedure that the Union may have interest in refer to the arbitration clause. With regard to foreclosures, it is better to specify the reasons why it is argued that, at present, the use of ICSID<sup>184</sup> arbitration by the

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<sup>182</sup>R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, C.H. Beck, München, 2016. M. DECHEVA, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018. C. BARNARD, S. PEERS, *EU law*, Oxford University Press, Oxford, 2017, pp. 586ss.

<sup>183</sup>ICSID, Additional Procedural and Facility rules, 10 April 2006, art. 2.

<sup>184</sup>We noticed from ICSID the annulment in case of *Piero Foresti v. South Africa* (*Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.) and refused amicus briefs in four cases (*Caratube International Oil Company v. Kazakhstan* (*Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12.) *Von Pezold/Border v. Zimbabwe* (*TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23.) *Apotex v. USA* and the annulment proceedings in *Iberdrola Energía v. Guatemala* (*Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5), *Apotex Holdings Inc. (Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1.). In each of these cases, the tribunal referred to various criteria within the amicus provisions of the ICSID Arbitration Rules or the ICSID Additional Facility Rules when accepting or denying applications to file amicus briefs. G.A. AVILA, *ICSID Annulment procedure: A balancing exercise between correctness and finality*, Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Kluwer Law International, The Hague, 2011, pp. 292ss. D. KIM, *The annulment committee's role in multiplying inconsistency in ICSID arbitration: The need to move away from an annulment based system*, in

Union does not represent a solution in any of the possible modalities<sup>185</sup>.

Firstly, as regards the bilateral appeal, art. 25 of the Washington Convention on 18 March 1965<sup>186</sup> prescribes the conditions under which an ICSID Tribunal has jurisdiction to settle the dispute; more specifically, and for the part that interests us, the ICSID is competent if the dispute is between the investor of a Contracting State and another State<sup>187</sup>, part of the

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New York University Law Review, 86, 2011, pp. 272ss. For the cases of annulment see also the enxt cases: TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Annulment Decision, 5 April 2016, para 73. Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Annulment Decision, 1 March 2011, para. 144. Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Annulment Decision, 10 July 2014, para. 232. Mr. Tza Yap Shum v. Republic of Peru ICSID Case No. ARB/07/6 Annulment Decision, 12 February 2015.

<sup>185</sup>Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. Arb/05/20 (Dec. 11, 2013); Commission Decision (EU) 2015/1470 of 30 March 2015 on State Aid SA.38517(2014/C) (ex 2014/NN) Implemented by Romania-Arbitral Award Micula v. Romania of 11 December 2013, 2015 O.J. (L. 232/43); European Commission Press Release IP/15/4725, Micula, et al. v. Government of Romania, Case No. 15 Misc. 107(LGS), 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015) (resulting in an order and judgment recognizing the award). Romania appealed the decision and the United States Court of Appeals for the Second Circuit held that the Foreign Sovereign Immunities Act (FSIA) provided the only and exclusive means for the enforcement of an ICSID arbitration award against a sovereign and the summary ex parte proceeding utilized to convert the award into a judgment did not meet the requirements of the FSIA, including service of process on the sovereign; furthermore, New York was not an appropriate venue. See Micula, et al. v. Government of Romania, 714 F. App'x 18 (2d Cir. 2017). Accordingly, a petition to confirm the ICSID arbitration award and enter judgment was submitted to the US District Court for the District of Columbia (Civil Action No. 17-CV-2332). The tribunal in Micula v. Romania specified that the EC should “bear its own costs incurred in connection with its participation in the proceeding, including any costs relating to any appearance by the EC’s representatives (...) at the hearing (...). On the annulment proceedings that ensued, on its decision on costs, the committee held that: “(...) the present case involved a ‘difficult and novel question of public importance’ due to the intervention of the EC representing the EU’s interests (...)”. For details see: H. LENK, Challenging the notion of coherence in EU foreign investment policy, 8 in European Journal of Legal Studies, 8, 2015, pp. 6ss. C.I. NAGY, Hungarian cases before ICSID Tribunals: The hungarian experience with investment arbitration, 58(3) in Hungarian Journal of Legal Studies, 58 (3), 2017, pp. 292ss. C.I. NAGY, Clash of paradigms: Actors and analogies shaping the investment treaty system, in American Journal of Internatonal Law, 107, 2013, pp. 46ss. A. ROBERTS, State-to-State investment treaty arbitration: A hybrid theory of interdependent rights and shared interpretive authority, in Harvard International Law Journal, 55 (1), 2014, pp. 6ss. T.S. VOON, A.D. MITCELL, J. MUNRO, The impact of mutual termination of investment treaties on investor rights, 9(2) in ICSID Review-Foreign Investment Law Journal, 9 (2), 2014, pp. 456ss. A. ROBERTS, Triangular treaties: The extent and limits of investment treaty rights, 56 in Harvard International Law Journal, 56 (3), 2015, pp. 354ss. G. ZARRA, The arbitrability of disputes arising from intra-EU BITs, 25 in American Review of International Arbitration, 25, 2014, pp. 574ss. M. DOUGAN, Judicial review of Member State action under the general principles and the Charter: Defining the “scope of Union law,” 52 in Common Market Law. Review, 52, 2015, pp. 1203ss. N. LAVRANOS, Member States’ Bilateral Investment Treaties (BITs): Lost in transition?, in Hague Yearbook of International Law, 25, 2012, pp. 282ss. H. WELAND, The enforcement of intra-EU BIT awards: Micula v. Romania and beyond, in The Journal of World Instrument & Trade, 17 (6), 2016, pp. 944ss.

<sup>186</sup>S.G. TONDAPU, International Institutions and dispute settlement: The case of ICSID, in Bond Law Review, 22 (1), 2010.

C. LENG LIM, J. HO, M. PAPARNSKIS, International investment law and arbitration. Commentary, awards and other materials, Cambridge University Press, Cambridge, 2018 pp. 63ss. P. WAUTELET, T. KRUGER, G. COPPENS, The practice of arbitration. Essays in honour of Hans Van Houtte, Hart Publishing, Oxford & Oregon, Portland, 2012.

<sup>187</sup>As we noticed form the next cases in particular: Eli Lilly, ICSID Case No. UNCT/14/2, Procedural Order No. 4 (Feb. 23, 2016).Philip Morris, ICSID Case No. ARB/10/7, Procedural Order No. 3 (Feb. 17, 2015) and Procedural Order No. 4, (March 24, 2015).Philip Morris, ICSID Case No. ARB/10/7, Award (July 8, 2016), parr. 49-55. LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37. Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5. The tribunal stated that-the most important criteria is (...)

Convention<sup>188</sup>. The unilateral-only recourse by investors from EU countries, part of the Convention-to ICSID arbitration should also be excluded. In fact, it is an abstractly practicable option<sup>189</sup>, but in fact hardly feasible since it involves more risks than benefits. On the one hand, not all European investors can appeal to it, since some Member States, including Poland, are not members of the 1995 Washington Convention. On the other hand, third States can not agree to include in future agreements with the EU an arbitration clause referring to the ICSID arbitration, considering that its investors will be precluded from the possibility of starting such arbitration against the EU<sup>190</sup>, which is not a member of the Convention.

Still remaining in the ICSID<sup>191</sup>, system, we note the possibility of using the Additional Procedural and Facility rules, which can be applied if one of the conditions-subjective or objective-of the ICSID arbitration procedure is lacking. These rules, therefore, can be applied in the event that only one of the parties has acceded to the Washington Convention of 1995, but do not guarantee the same benefits that vice versa are assured by a "classical" ICSID arbitration<sup>192</sup>. The parties using the ICSID's Additional Procedural and Facility

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whether the applicant's submission would assist the Tribunal and pointed out that the amicus provisions contained only non-exhaustive-criterial and not-conditions (...)". According to our opinion the lessons from the above cases are: a) increasing receptiveness towards amicus briefs continues; b) amidst the increasing receptiveness, there is a notable countervailing concern about the potential effects such an approach may have on proceedings. These effects include increased costs to disputing parties and delay in proceedings caused by the need to deal with an amicus brief; c) considering an application to file an amicus brief, tribunals are guided predominantly by the question of whether the brief will assist the tribunal (by providing perspective, knowledge or insight that is different from that already before it); d) some uncertainty remains as to the extent to which an amicus should be "independent" and precisely what that term means; e) the wording of amicus provisions is by no means settled. Amicus provisions will continue to evolve, and possibly diverge, across a spectrum of legal instruments.

<sup>188</sup>Against, European Parliament, Report on the future European International Investment policy, A7-0070/2011, (2010/2203(INI)) of 22 March 2011, par. 33.

<sup>189</sup>M. BURGSTALLER, Investor-State Arbitration in EU International Investment Agreements with third States, in *Legal Issues of Economic Integration*, 39 (2), 2012, pp. 215. The author stresses the limits of the procedural rules adopted by the Arbitration Centers administered and by UNCITRAL to resolve commercial disputes and this leads to the reluctance of States to use these Centers to resolve disputes arising from an Investment Agreement. Contra, it is observed that in the Charter they build according to the needs; the impasse, if one wishes to define it, can therefore be overcome by calling, as the case may be, referees expert in the matter or forming new ones.

<sup>190</sup>See also *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/03, Award (embodying the parties' settlement agreement), 10 February, 1999, par. 94 ((...) sans doute la détermination du droit applicable n'est-elle pas, à proprement parler, faite par les parties au présent arbitrage (Burundi et investisseurs requérants), mais par les parties à la Convention d'investissement (Burundi et Belgique). Comme cela a été le cas pour le consentement des parties, le Tribunal estime cependant que la République du Burundi s'est prononcée en faveur du droit applicable tel qu'il est déterminé dans la disposition précitée de la Convention belgo-burundaise d'investissement en devenant partie à cette Convention et que les investisseurs requérants ont effectué un choix similaire en déposant leur requête d'arbitrage sur la base de ladite Convention (...)).

<sup>191</sup>*Vattenfall AB v. Federal Republic of Germany (II)*, ICSID Case No ARB/12/12 (*Vattenfall II*). N. Bernasconi, Background Paper on *Vattenfall v. Germany Arbitration*, IISD, 2009, par. 4ss. N. BERNASCONI-OSTERWALDER, R.T. HOFFMANN, The German nuclear phase-out put to the test in international investment arbitration? Background to the new dispute *Vattenfall v. Germany (II)*, IISD, 2012, pp. 5ss. J. LEVASHOVA, T. LAMBOUY, E. DEKKER (eds), *Bridging the gap between international investment law and the environment*, Eleven Publishing, The Hague, 2016, pp. 340ss.

<sup>192</sup>This reformulation makes it possible to align the rules of the UNCITRAL procedure with those of the ICSID arbitration, widely revisited in 2006 to guarantee more transparent and public procedures. The revision of the ICSID procedure rules has been defined "a step in the right direction towards transparency, allowing for interested third parties to intervene in arbitral proceedings at the discretion of the tribunal and to attend

rules<sup>193</sup> waive the particularly advantageous cancellation procedure in the ICSID system, as entrusted to the ad hoc Committee, as well as to the automatic recognition mechanism of the awards<sup>194</sup> and to the facilitated procedure for the execution of the same. It follows from the foregoing that two options remain to the Union which the arbitration clause may refer to, alternative or concurrent. Firstly, the Union may decide to resort to arbitrations administered under the aegis of the main international arbitration institutions, the International Chamber of Commerce ("ICC") and the Stockholm Chamber of Commerce ("SCC")<sup>195</sup>. The EU can hypothesize the establishment of ad hoc arbitrations that apply the UNCITRAL arbitration Regulation whose rules are open to all, without distinction between States and international organizations<sup>196</sup>.

Competence and specialization in a sector seems more appropriate to dwell on the advantages and limits that derive from each of the aforementioned procedures to identify the one, or those, which are more suitable to guarantee the interests of EU<sup>197</sup>. With regard to ad hoc arbitration with UNCITRAL rules<sup>198</sup>, it is noted that the recent adoption of the Rules on Transparency in the Treaty-based Investor-State Arbitration of 1st April 2014<sup>199</sup> ("Rules of Transparency")<sup>200</sup>, seems to have grasped the requests, from more advanced parties, more transparent arbitration proceedings. In practical terms, the new transparency rules provide for a general obligation to exchange information, memoirs and documents - with the limit for those particularly sensitive-and recognize to the courts the possibility of admitting third

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hearings, although not automatically to see documents created as part of the proceedings (...)"

<sup>193</sup>M. BURGSTALLER, *Investor-State Arbitration in EU International Investment Agreements with third States*, op. cit.

<sup>194</sup>William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. L.N. SKOVGAARD POULSEN, E. AISBETT, *Diplomats want treaties: Diplomatic agendas and perks in the investment regime*, in *Journal of International Dispute Settlement*, 7 (1), 2016, pp. 73ss.

<sup>195</sup>See in particular the next cases: *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À R.L. v. Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 and *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Award, 12 July 2016. The tribunal rejected the claimants' claims based on the scaling back of the subsidies. In the *Isolux* arbitration, the tribunal assessed the same measures as the *Eiser* tribunal, but saw that these did not constitute a breach of the claimant's legitimate expectations. In case *Isolux*, the *Charanne* arbitration concerned earlier modifications to the aid scheme, but again the tribunal rejected the claimant's claims.

<sup>196</sup>The Union could build its own arbitration clause in the light of those normally included in the bilateral agreements. Practically, the compromise clauses of the BITs refer to more than one arbitration proceedings and may be of two types: the first type refers to either the ICSID Convention, or ad hoc arbitration regulated by the UNCITRAL rules. The second type, on the other hand, is defined as multi tiered because it foresees that the investor has a wide range of possibilities to choose from to resolve the dispute - this is a different approach to the 'oppositional' approach, typical of the first type of clauses. A. REINISCH, *Expropriation*, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford 2008, pp. 693ss.

<sup>197</sup>D. LIAKOPOULOS, *Limitation of State sovereignty in bilateral investment treaties and investment contracts and the role of investor-State arbitration*, in *International and EU Legal Matters*, 2017

<sup>198</sup>D.D. CARON, L.M. CAPLA, *The UNCITRAL arbitration rules. A commentary*, Oxford University Press, Oxford, 2013, pp. 572ss. H. HANNAN, *Cross-border insolvency: The enactment and interpretation of the UNCITRAL Model law*, ed. Springer, 2017, pp. 9ss.

<sup>199</sup>See also the Proposal for a COUNCIL DECISION on the signing, on behalf of the EU, of the United Nations Convention on transparency in treaty-based investor-State arbitration, COM/2015/021 final-2015/0013 (NLE).

<sup>200</sup>Both regulations provide for the possibility that the arbitrators, with the consent of the parties, call experts in court (Article 25.4 ICC, Article 29.1 CCS). One wonders whether the possibility of being able to participate as an expert-and not a third party-reduces the Commission's fear of being excluded from a proceeding concerning a mixed agreement but for which the ability to respond in judgment to the Member States.

party memoirs that are not parties to the bilateral agreement investment or which, although it is, have not yet formally entered the trial<sup>201</sup>. In the old formulation, the UNCITRAL Regulation in art. 21.3 it was only precluded the participation of third parties in the hearing. However, this limit applies only to hearings and no other provision of the Regulation expressly excluded the participation of third parties in the proceeding. In the case of *Methanex v. United States*<sup>202</sup> the Arbitration Tribunal has admitted the memoirs of the curiae friends, noting that in the UNCITRAL Regulation the same are not excluded and indeed, art. 15.1 UNCITRAL leaves the referee the possibility to organize the proceedings. The Court also specified that: "receipt of submissions from a person other than the disputation parties"<sup>203</sup>. UNCITRAL ad hoc arbitration, Decision on the request of third parties to participate as an amicus curiae of 15 January 2001, in *Methanex houses v. United States* par. 30. The new formulation expressly declares the possibility, for third parties, of predicting part of the proceedings. The new rules are binding and, together with those of procedure, will be applied automatically to the judgments concerning investment agreements entered into after April 1, 2014 unless-and this is the real limit-that the parties exercise the opting out. To overcome this risk, which would in fact undermine the benefits of the new UNCITRAL proceeding, it can be assumed that the EU will include in the stipulated investment agreements a clause requiring the counterparty to apply the new procedural rules thus excluding the option of opting out. As for the arbitrations administered, it is noted that the procedural rules do not contain obligations that require the arbitrators to publish the information of the proceedings or the rulings, nor do they decide on the participation of third parties. On these points the rules are particularly flawed, in the sense that they do not have, but neither do they preclude.

According to our opinion amicus interventions could be based on the WTO model<sup>204</sup>, which implies that the arbitrators would request the amicus curiae submissions. Thus, the arbitral tribunal would decide which submissions might be of interest for the case and therefore not admit unrequested amicus briefs. This system has some advantages. For example, in ICSID cases<sup>205</sup> there have been no amicus submissions, although the court has offered such a possibility through a procedural order. Applying this alternative system, the lack of

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<sup>201</sup>As a rule, recognition and enforcement are conducted before national courts, in compliance with the provisions of the 1958 New York Convention for the recognition and enforcement of foreign arbitration awards. This Convention simplifies the procedure for the execution of judgments and harmonizes the impediment circuntencies in the presence of which the national courts may refuse, the admission to arbitration awards issued in another Member State. LEBEN claims that: "(...) cette Convention a joué un rôle primordial dans la généralisation de l'arbitrage comme mode de règlement habituel de litiges du commerce international (...) mais elle était inadaptée aux litiges opposant non pas des personnes privées entre elles, mais de personnes privées et des Etats, et non pas à propos d'échanges commerciaux au sens strict du terme, mais à propos d'investissement (...)". C. LEBEN, *La théorie du contrat d'État et l'évolution du droit international des investissements*, Recueil des Cours, vol. 302, ed. Bruylant, The Hague, 2003, p. 360.

<sup>202</sup>UNCITRAL, *Methanex v. United States*, Decision on the request of third parties to participate in quality of amicus curiae of 15 January 2001. For analysis see: L. BASTIN, *Amici Curiae in investor-State arbitration: Eight recent trends*, in *Arbitration International* 30 (1), 2014, pp. 126ss. P. DUMBERRY, *The formation and identification of rules of customary international law in international investment law*, Cambridge University Press, Cambridge, 2016.

<sup>203</sup>UNCITRAL, *Methanex v. United States*, Decision on the request of third parties to participate in quality of amicus curiae, op. cit.

<sup>204</sup>J. TIJMES, *Who wants what? Final offer arbitration in the World Trade Organization*, in *European Journal of International Law*, 26 (3), 2015, pp. 588ss.

<sup>205</sup>See in particular: *Philip Morris Brands Sàrl v. Oriental Repub. of Uru.*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013).

participation of NGOs can be supplemented by a proactive positioning of the court. Besides that, the arbitrators would make much more targeted requests, avoiding requests which are redundant or too generic. Analyzing this system from the opposite perspective, its implementation could generate a dangerous situation of helplessness. The public interest<sup>206</sup> would not be taken into account if, due to a lack of information or awareness, the court did not make any or enough amicus requests. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. Although appealing, this proposal would require a major change to the system, so that success would only materialize in the medium to long term<sup>207</sup>.

With regard to the publication of rulings, the procedural regulations of the administered arbitrations do not contain specific provisions, but it is noted that this can be guaranteed at the time of recognition or execution<sup>208</sup>. In such circumstances it may in fact result in greater transparency and acceptability of the acts of arbitration, given that, with the activation of a national proceeding, the praises, becoming the object of scrutiny by national judges, are subtracted only to the availability of the arbitrators and the parties. The analysis of the rules and of the arbitration procedures administered deserves an independent study, but for what is of interest here it is sufficient to highlight the lack of clarity on some issues and, at the same time, the lack of preclusions. To bridge the limits of the arbitration procedures administered, it can therefore be assumed that the Union specifies in the international agreements stipulating those points-access to information, publication of the rulings, participation of the third-which are deemed indispensable and that the procedural rules currently in force for administered or ad hoc arbitrations do not guarantee. It is also noted that the provision of procedural clauses directly in international agreements is a solution already used. The BIT USA model provides in fact to art. 28.3 that "the tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party"<sup>209</sup>. Clauses of similar tenor can then be included in future european BITs, perhaps

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<sup>206</sup>E. DE BRABANDERE, NGOs and the public Interest: The legality and rationale of amicus curiae interventions in international economic and investment disputes, in *Chicago Journal of International Law*, 12 (1), 2011, pp. 108ss.

<sup>207</sup>E. DE BRABANDERE, NGOs and the public Interest: The legality and rationale of amicus curiae interventions in international economic and investment disputes, op. cit.

<sup>208</sup>In Article. 29 of the Model BIT USA is then contained the transparency clause based on which: "(...) the respondent shall, after receiving the following documents, promptly tran Member Statesit them to the non-disputing Party and make them available to the public:(a) the notice of intent;(b) the notice of arbitration; (c)pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) (Non-Disputing Party submissions) and (3) (Amicus Submissions) and Article 33 (Consolidation); (d) minutes or transcripts of hearings of the tribunal, where available; and (e)orders, awards, and decisions of the tribunal".

<sup>209</sup>The parties to the BIT may refer, potentially, to the provisions of any legal system with that expression: "(...) un ensemble de règles spécifiques et d'organes aptes a les appliquer, qui émerge de la formation et de l'activité d'un groupe social lui-même spécifique (...)". B. GOLDMAN, L'arbitre, les conflits de lois et la lex mercatoria, in *Actes du premier colloque sur l'arbitrage commercial international*, Paris, 1986, p. 8. The existence of a legal system therefore depends on a set of specific rules and the jurisdictional bodies that apply them, referable to an equally specific social group. The boundaries of the concept of legal system have been voluntarily left wide; it postulates an equivalence between legal system and state even if, today, this concept can also be applied to the international legal system-which regulates relations between states- and transnational. Transnational, in the sense that it will be applied exclusively to relations between individuals and private groups, overcoming state borders without the involvement of States. For the doctrine, inclined to place the lex mercatoria at the base of an autonomous, independent and separate legal system.

alongside those with others that require the publicity of information and the publication of judgments. Such forecasts would be binding on the parties and arbitrators and could be applied at least until the UNCITRAL transparency rules are applied, ie until the CCI or the CCS have similar rules. Ultimately, ad hoc arbitration conducted under UNCITRAL rules and administered arbitration are presented as valid alternatives to ICSID arbitration. The latter, although conventionally considered to be the center that offers greater guarantees to the investor and transparency of the proceedings, does not represent the solution for today or for the future. The options currently open for the Union are valid to the point that they can not be considered a "fallback", at least until the Washington Convention is open to International Organizations.

#### **10.The appeal of EU law in arbitration proceedings concerning investment: The conventional reference to Union law.**

In arbitration proceedings-as well as in national ones where the judge is examined by a transnational dispute-can be referred to more than one legal body; for example, the *lex rei sitae* deals with the creation and transfer of real rights, the national law of one of the parties is applied to assess whether there is the ability to stipulate the arbitration agreement and, finally, the *lex loci* arbitrators finds to find the conditions validity of the agreement itself in the absence of any explicit choice of the parties. Arbitration is a dispute resolution mechanism that is based on the autonomy of the parties and therefore the arbitrators must, firstly, look for the BIT or the contractual regulation inter partes if the State and the investor have identified one or more bodies of the law to be applied to resolve the dispute<sup>210</sup>. One speaks of one or more laws because, when a case presents links with more than one system, the parties, adopting the technique of *depeçage*, can decide to regulate it with a plurality of sources deriving from as many legal systems. In the absence of the express provision of the law, the arbitrators shall identify it according to the applicable rules of procedure. As a rule, in fact, any Arbitration Regulation contains a clause that indicates to the college the applicable law, or better, the criteria and the conditions for identifying it. In these cases, the process of identifying the law is divided into two phases: first the arbitrator seeks the *law-rectius*, the legal body to be applied- then the content of the law which can be effectively applied to the case<sup>211</sup>. Based on these premises, it is necessary to assess whether, and under what conditions, EU law can be applied to settle disputes before an arbitrator and whether the arbitrator is free to apply and interpret it. In the most recent arbitration proceedings, incardinated in relation to the alleged violation of a european BIT or the derived contractual regulation, the parties' exceptions on the applicable law-normally raised by the agreed States

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<sup>210</sup>Y. BANIFATEMI, The law applicable in investment Treaty arbitration, in C. YANNACA-SMALL (eds.), *Arbitration under international investment agreements: A guide to the key issues*, Oxford University Press, Oxford, 2010, pp. 191ss.

<sup>211</sup>Not infrequently, in the judgments hitherto raised before Arbitration Courts, the arbitrators have been accused for violation of both the BIT and the underlying contractual regulation; it is recalled that the questions on the contracts are legitimized in arbitration, to the extent that the BIT contains an umbrella clause whose effect is, precisely, to raise the presumed violations of the inter partes contract at the level of the treaty. In the AES case, for example, the Court found that it could not pronounce itself on the violation of the contract because, despite the Energy Charter in art. 26 foresees the umbrella clause, there are no contracting parties, including the defendant state in court, which have excluded its application in the disputes involving them. ICSID, Decision of the ad hoc Committee on the judgment for annulment of 29 June 2012, in case ARB/07/22, AES v. Hungary, par. 164.

to recall EU law and thus legitimize their conduct, in (presumed) violation of the international source-imposed on the referees to argue on the legitimacy of the reference to EU law. The multiplicity of cases in which the reference to EU law has been admitted is understood in light of the multifaceted nature of this normative body which is, at the same time, the right of an autonomous legal system, the EU law, national law of Member States and international law, as derived by the founding Treaties.

This implies that EU law can be applied directly as a right of the EU system, or indirectly as part of the international and/or national legal system. In practice, it is noted that all arbitration procedure rules allow direct or indirect referral to EU law. More specifically, art. 42.1 of the ICSID Convention distinguishes two possible situations: in the first, the parties explicitly refer to the rules of law that the arbitrator will apply to the dispute<sup>212</sup>. In the second, the same art. 42.1 recognizes that, in the absence of explicit reference to a law, the arbitration panel applies the law of the State party to the dispute, including the rules of conflict, together with the principles of international law on the matter<sup>213</sup>. Therefore, EU law is applicable in the hypothesis both of *optio legis* made by the parties and of reference to international law. In the case of *optio legis*, the practice and the jurisprudence are unanimous in considering that the expression "rules of laws"-which is found in the English formulation of the aforementioned rule-and not "laws", gives the parties the right to refer also to the rules of a non-state nature, such as the principles of law, the *lex mercatoria*<sup>214</sup> and also, as far as is relevant here, EU law<sup>215</sup>. In other words, there is no limit to the faculty to refer to non-state laws, since it is sufficient that the rules indicated are endowed with juridical nature, since they are the expression of a given legal system or of a social group. Regarding the first, art. 35.1 of the UNCITRAL rules of procedure provides that the arbitrator makes use of the rules identified by the parties as the law applicable to the dispute, since, in the absence, reference to the right that it deems appropriate<sup>216</sup>. The clause thus formulated presents a "classical" structure, providing that, in the absence of precise forecasts, the judge is free to identify the body of law to draw from the substantive discipline to resolve the case under examination<sup>217</sup>.

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<sup>212</sup>Z. DOULAS, J. PAUWELYN, J.E. VIÑUALES, *The foundations of international investment law. Bringing a theory. Into practice*, Oxford University Press, Oxford, 2014.

<sup>213</sup>C. DUGAN, D. WALLACE, N. RUBINS, *Investor-State arbitration*, Oxford University Press, Oxford, 2011. Z. DOULAS, J. PAUWELYN, J.E. VIÑUALES, *The foundations of international investment law. Bringing a theory. Into practice*, op. cit. T. BROUDE, Y. SHANY, *Multi sourced equivalent norms in international law*, Hart Publishing, Oxford & Oregon, Portland, 2011.

<sup>214</sup>S.A. ALEXANDROV, *Reservations in unilateral declarations accepting the compulsory jurisdiction of the International court of justice*, ed. Brill, Leiden, 1995, pp. 10-15.

<sup>215</sup>It seems correct the conception that the meaning of rules of law-therefore of the norms that the parties indicate as applicable to the case - must be interpreted in the widest possible meaning thinking: "(...) all'Etat hôte comme étant n système global, vivant et ouvert capable donc d'inclure, outre les dispositions d'un droit étranger éventuellement évoqué, les règles internationales applicables, quelles soient conventionnelles ou coutumières, ainsi que le droit européen primaire et secondaire en matière d'investissement pour ce qui est des Etats membres de l'Union. A. GIARDINA, *Le développement de l'arbitrage: les besoins spécifiques de l'Union européenne*, in C. KASSEDJIAN (sous la direction de), op. cit., pag. 151. As for the form, it is believed that the parties' agreement on applicable law should be expressed; the search for an implicit agreement would not be necessary, providing for the same art. 42 an alternative method to find the applicable law in the absence of *optio legis*.

<sup>216</sup>UNCITRAL Arbitration Rules of 2010, art. 35.1: "1.The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate".

<sup>217</sup>The new version of the UNCITRAL rule provides that the arbitrators can refer to the rules of law and no longer to law, as it appeared in the pre-reformulation formulation of 2010. The effects of this reformulation are



Art. 17<sup>218</sup> of the rules of procedure prepared by the International Chamber of Commerce provides that the parties can refer to the rules of law to be applied and, failing that, the arbitrators can refer to the appropriate rules of law. Likewise, art. 24<sup>219</sup> of the Rules of Procedure of the Chamber of Commerce of Stockholm refers to the choice of law made by the parties and, failing that, to the right or to the rules of law deemed appropriate - including international law. In all the aforementioned hypotheses, where there has been an express choice of the parties, EU law can be referred to either as a right directly chosen by the parties or as part of national law or international law.

This second option is possible because of the peculiar and "multifaceted" nature of EU law which, as already mentioned, is part of the national rights of the Member States that adapt to it and at the same time part of international law, finding a source in an international treaty. In other words, and more precisely, EU law can be described as "an internal ordre juridique of internationale origin"<sup>220</sup>. In the disputes so far arising on european BITs, the arbitrators did not directly apply EU law since, under no circumstances, the arbitration clause on the law applicable to the dispute referred to EU law. The dichotomy of "applicable law" and "fact" requires some clarification. It is often invoked in discussions concerning the question of whether arbitrators are obliged, *ex officio*, to know the content of the applicable law or whether the dispute should be decided solely with reference to the arguments of and legal grounds raised by the disputing parties. Some commentators frame this issue by asking whether the applicable law is a matter of law to be determined by the decision maker or rather a fact to be proven by the parties. In this approach, applicable law is either a fact or a matter of law depending on the way the tribunal determines its contents. But the dichotomy is used in another way as well. That states may not invoke provisions of domestic law to justify a breach of a treaty obligation is a recognized principle of international law. In other words, national law is only an element of fact when a state is accused of breaching its treaty obligations. Similarly, when an investor raises a claim against an EU member state, the provisions of the BIT are the applicable law as the dispute is resolved by assessing the member state's actions against the provisions of the BIT (and not against EU law). The relevant question in the present context is whether EU law can be part of the applicable law in the sense that it is applied to the merits of an investment dispute. The way in which tribunals determine the contents of the applicable law and of the law that is considered a fact is a different question, and one which will not be addressed in the following<sup>221</sup>.

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not really clear, since law and rules of law have a different extension. In practical terms, however, and for what concerns our investigation, it should continue to be possible to refer to European law, which can also be subsumed in the classification of rules of law.

<sup>218</sup>For details see: F.T. SCHWARZ, *A guide to the ICFR international arbitration rules*, Oxford University Press, Oxford, 2011, pp. 247ss.

<sup>219</sup>F.T. SCHWARZ, *A guide to the ICFR international arbitration rules*, *op. cit.*

<sup>220</sup>It is noted that in the case of *Eastern Sugar* the court affirmed that the declaration attached by the defendant - which should have helped to interpret the arbitration clause-actually: "explains in a contorted way what art. 8.6 of the BIT means". Therefore, to identify the law applicable to the dispute, the Court can go beyond the literal meaning of the arbitration clause, considering the application of international law to be appropriate not only as gap-filling therefore only when the national rule conflicts with this right but also in place of the national law referred to. Indeed: "it is only where international law is silent that the arbitral Tribunal should consider before reaching any decision how non-conflicting provisions of czech law might be relevant, and of so, could be taken into account". *CCS, Eastern Sugar v. Czech Republic*, *op. cit.*, par. 196-197.

<sup>221</sup>R. DOLZER, C. SCHREUER, *Principles of international investment law*, Oxford University Press, Oxford, 2012, pp. 290ss. Y. BANIFATEMI, *The law applicable in investment Treaty arbitration*, in K. YANNACA-SMAL (ed.), *Arbitration under international investment agreements: A guide to the key issues*, Oxford

However, it is noted that doubts have arisen about the possibility of indirect referral to EU law as part of national or international law, referred to by the parties<sup>222</sup>. With regard to the first hypothesis, EU law may be applied in so far as the parties have decided to submit the case to the national law of a State which is a member of the Union. EU law, indeed, constitutes a supranational right but, once it has entered national law due to the adaptation procedures of Member States, it becomes national law itself<sup>223</sup>. When the choice falls on the right of an internal legal system, it includes all the sources of law present in the same. EU law can therefore detect both the fundamental principles and secondary sources incorporated into national law; equally, EU law can be recalled through the mechanism of conflict rules of the national system chosen by the parties. In the latter case, the arbitrators, starting from the rules of conflict of the national law referred to, may find in the European legal system the substantive rules to be applied to the case in question. In practical terms this means that, having chosen the legal system in which to search for the applicable law, the latter could refer to secondary EU law, which should therefore be used to regulate the case, or to the conflict rules contained in the European Regulations which will identify the law to be applied to the dispute. EU law can be referred to indirectly as international law, to which the arbitration clause expressly refers<sup>224</sup>. This legal corpus originates from the founding Treaties which are international treaties, regardless of whether they have created an autonomous regional system. This means that EU law is all international law. It is international law not only primary law, therefore the founding Treaties and general principles, but also secondary law, just as it has been established since the beginning of EU. The arbitral tribunal in the *Electrabel* case considered that "all legal rules are part of a regional system of international law and therefore have an international legal character"<sup>225</sup>. From this it follows that, when an arbitration clause refers, for example, to "the law in force of the contracting party concerned, the provisions of this agreement"<sup>226</sup> could be referring to EU law<sup>227</sup>. The arbitrators acknowledged that EU law can be applied as part of the international law referred to but, as part of national law, it is only relevant as a fact<sup>228</sup>.

In the *Eureka* case, the Court justified the reference to EU law, considering that "in principle EU law appears to fall within the scope of the first two and the last bullet point (of arbitral clause). Accordingly, the Tribunal considers that in principle the EU legal doctrines, including those of supremacy, precedence, direct effect, direct applicability are part of the

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University Press, Oxford, 2010, pp. 192ss.

<sup>222</sup>ICSID, *Electrabel v. Hungary*, op. cit., par. 4118. Secondo Alland il diritto dell'Unione è "droit interne d'origine internationale". D. ALLAND, "Le juge français et le droit d'origine internationale", in Y. KERBAT, P.M. DUPUY (ed.), *Droit international et droit interne dans la jurisprudence comparée du Conseil constitutionnel et du Conseil d'Etat*, LGDG, Paris, 2001, pp. 47-59.

<sup>223</sup>CJEU, joined cases: C-415/05 P, *Kadi & Al Barakaat Int'l Foundation v. Council* of 8 November 2008, ECLI:EU:C:2008:11. I-06351. See also: CJEU, C-124/95, *Queen v. HM Treasury and Bank of England* of 14 January 1997, ECLI:EU:C:1997:8, I-00081, par. 56-61. Given the content of Article 103 of the UN Charter and the nature of Chapter VII resolutions, it is safe to say that this case law has no bearing vis-a-vis member state BITs.

<sup>224</sup>In case *Van Gend en Loos* the CJEU stated that: "the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights (...)", CJEU, 26/62, *Van Gend en Loos* of 5 February 1963, op. cit., p. 12.

<sup>225</sup>ICSID, *Electrabel v. Hungary*, op. cit., par. 4.122

<sup>226</sup>Art. 8.6 of BIT between Olanda and Czech Republic and Slovak, 1992.

<sup>227</sup>Art. 8.6 of BIT between Olanda and Czech Republic and Slovak, 1992.

<sup>228</sup>ICSID, *Elctrabel v. Hungary*, op. cit., par. 4.127 ss.

EU law that might fall to be applied by the Tribunal in this case under art. 8.6, BIT<sup>229</sup>. It is noted that in two arbitration proceedings EU law was referred to as fact. In the *Summit Generation Limited and AES-Tisza Erdma Kft. v. Republic of Hungary (AES)* case has made it clear that the agreement between the parties clearly referred, as applicable law, to the Energy Charter Treaty<sup>230</sup> as well as to the principles of international law, but recognized that EU law can be considered as fact "Community law, including Community competition law, is considered the equivalent of internal or municipal law for the purpose of the proceeding. Community law is thus merely a fact to be considered by the tribunal when determining the law applicable (...) "<sup>231</sup>.

EU law was referred only to help the referees in the qualification of the case in question. EU law thus becomes an instrument for identifying material norms suitable for framing the case in question. Ultimately, the arbitrators, starting from the arbitration clause, can conclude that they have to apply EU law. The reference to this right, if and within the limits in which it is realized, is functional to resolve the dispute, so it detects to qualify the case and regulate it. EU law must help the judge in the hermeneutic-interpretative activity, adding elements to arrive at the solution of the case. On the other hand, the reference to EU law does not imply that the arbitrators judge whether the party's conduct is contrary to it<sup>232</sup>. The application of EU law can not become an abuse. And indeed, since the subject of the examination of the arbitrators is the compatibility of a conduct with respect to the provisions of an international agreement or an investment contract, EU law, like national and international, detects if and to the extent to which it expressly recalled or, as will be seen below, if identified by the arbitrators as a right to be applied in the absence of choice of the parties. Like the other sources mentioned above, it can not be imposed only for its classical attributes, primacy and direct applicability, which are valid only in intra-european relations and, with very different intensity, in external relations<sup>233</sup>.

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<sup>229</sup>CPA, *Eureko v. The Republic Slovak*, cit. Par. 289. In the same spirit see also: *Micula & Ors v. Romania & Anor* (2017) Bus LR 1147, (2017) WLR(D) 35, (2017) EWHC 31 (Comm) (20 January 2017). *Jiangsu Shagang Group Co Ltd v. Loki Owning Company Ltd.*, (2018) EWHC 330 (Comm), parr. 13-14; *GPF GP S.à.r.l. v Republic of Poland*, (2018) EWHC 409, parr. 64-72.

<sup>230</sup>E. BONAFÉ, G. METE, *Escalated interactions between EU energy law and the Energy Charter Treaty*, in *The Journal of World Energy Law and Business*, 9 (1), 2016, pp. 176ss.

<sup>231</sup>ICSID, *AES v. Hungary*, op. cit., par. 7.3.4. It required to add to the ECT an additional condition not provided, see: *Final Award*, 21 January 2016, SCC Case No V062/2012 *Charanne v. Spain*, parr. 440-445; *Decision on Jurisdiction*, 6 June 2016, ICSID Case No ARB/13/30 *RREEF v. Spain*, par. 79ss; *Award*, 17 July 2016, SCC Case V2013/153 *Isolux v Spain*, parr. 641-260; *Award*, 27 December 2016, ICSID Case No ARB/14/3 *Blusun v. Italy*, parr. 277-291; *Award*, 4 May 2017, ICSID Case No ARB/13/3 *6 Eiser Infrastructure v. Spain*, parr. 179-207.

<sup>232</sup>In case *Eureko* the tribunal specified however that: "(...) is confined to ruling upon alleged breaches of the BIT. The Tribunal does not have jurisdiction to rule on alleged breaches of EU law as such. The manner and extent to which that clear and fixed limitation on the jurisdiction of the Tribunal may impact upon the cases presented by the parties will become clear at the merits stage (...) " CPA, *Eureko v. The Republic Slovak*, op. cit., par. 290.

<sup>233</sup>One can then hypothesize the reference of European law also through the reference to art. 31.3.c of the Vienna Convention, 1969 which provides for the systematic interpretation of the Treaties. According to this approach, from the *lex specialis*-that contained in the Treaty-we move on to the general context and, therefore, to the superordinate forecasts that can be applied to the case in question by the judges / arbitrators. From this perspective, it could be accepted that the provisions of a BIT are also interpreted in the light of EU law, since the latter is part of the legal system. See also: H. DE WAELE, *Layered global player. Legal dynamic of EU external relations*, ed. Springer, Berlin, 2011.

## 11. Application of EU law in case of absence of an explicit choice of law.

EU law may be applied by arbitrators as a source of the right deemed appropriate to the case or as part of international law if the latter can be referred to<sup>234</sup>. In this regard, we have already said that art. 42.1 of the ICSID Convention states that if the parties do not expressly refer to the applicable law, the court applies not only the law of the contracting parties but also "such rules and principle of international law as may be applicable"<sup>235</sup>. This provision defines a hierarchy between the two sources - the national one and the international one - in the sense that the second one is applied only after the relevant national law has been identified<sup>236</sup>. Conversely, if the dispute concerns a breach of contract, art. 42 identifies, as applicable, the *lex contractus* - since these are inter-individual legal relationships-and the rules of private international law<sup>237</sup>. Having said that, it is interesting to understand the limits within which international law-and therefore also the EU law to be recalled to regulate this second type of relationship between the parties, should they not expressly refer to the applicable law<sup>238</sup>. In this regard, it is noted that a "both corrective" and "integrative" role is recognized in international law<sup>239</sup>. In the first case, international law operates only after the applicable law has been identified by the parties or by the courts-in this sense it is possible to find an analogy with the limit of public order<sup>240</sup>. With the "corrective" function of international law, it is intended, in fact, the possibility of curbing the application of national law, if "the conduct of the host State is formally correct in light of the applicable contractual law, but is in contrast with certain standards of protection investments, contained in

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<sup>234</sup>If the dispute concerns a treaty claim, international law applies its own force and without the art. 42.1 performs the recall function: for example, the VCLT must necessarily be applied to solve problems, perhaps interpretative, of the BIT between the parties. S.R. CUENDET, *Les investissements intracommunautaires entre droit communautaire et Accord internationaux sur l'investissement: concilier l'inconciliable?*, in *Revue Générale de Droit International Privé*, 115 (4), 2011, pp. 854ss.

<sup>235</sup>According to english formulation: "and such rules of (...)" in french: "ansi que les principe de droit international (...)". It is not clear whether the French translation reduces the scope of applicability of international law. However, as noted "(...) au niveau de la pratique per les commentateurs et par la jurisprudence des Tribunaux CIRDI semblent d'accord pour affirmer que tant les principes généraux que le droit conventionnel doivent être respectés et appliquées par le Tribunaux CIRDI". A. GIARDINA, *Le développement de l'arbitrage: les besoins spécifiques de l'Union européenne*, in C. KASSEDJIAN, *op. cit.*, p. 151.

<sup>236</sup>See the case: Ioan Micula: "Pursuant to art. 42.2 of the ICSID Convention the Tribunal will certainly apply residually international law if the other applicable rules are silent or obscure or are eventually determined not to apply *ratione temporis*". Tribunal ICSID, *Decision on jurisdiction and admissibility*, in case ARB/05/20, Ioan Micula, Viorel Micula et al. v. Romania.

<sup>237</sup>Article. 42 sometimes has the function of a norm of conflict, and this happens only when there are relations of a private nature. Otherwise: "The art. 42 can not be considered a rule of private international law, primarily referring to the national law of the host state. In fact, the privatistic nature of legal situations constitutes (...) the foundation and the limit of international private law. When the controversy concerns situations (...) originating in international law - such as the violation of the treatment standards laid down in the treaty-there is no room for a rule to rule intro "The reference:" to the right international alongside the *lex contractus* has the function of ensuring a certain stability of the regulatory framework to which the agreement is subject, which otherwise could be changed unilaterally to the State party to the detriment of the investor (...)".

<sup>238</sup>C. SCHREUER, *Investment Disputes*, in *Max Planck Encyclopedia of Public International Law*, 2009, pp. 6ss.

<sup>239</sup>H. DE WAELE, *Layered global player. Legal dynamic of EU external relations*, *op. cit.*

<sup>240</sup>See in particular: E. LOUIN, *El orden público y el arbitraje*, Editorial Universidad del Rosario, Bogotá, 2017.

international, customary or contractual norms"<sup>241</sup>. That function does not imply a correction, in the technical sense of the wording, of the applicable national law, but the non-application of the national provisions which the court is required to apply but which are incompatible with international law<sup>242</sup>. From this it follows the replacement of national rules with international, conventional and customary rules, within the limits, obviously, where the former are in contrast with the latter.

On the other hand, the term "integrative" refers to when international law intervenes in the presence of gaps in the applicable national law<sup>243</sup>. The integrative function reflects the fact that the areas of operation of the two sets of norms- national and international-are distinct, since the first rule inter-individual relations while the second relations between States<sup>244</sup>. Precisely for this reason, international law is applied after the search for the national law applicable to the specific case has taken place. In the light of the foregoing, EU law can be applied as a conventional international right. In this perspective, EU law is applied through mechanisms to fill the gaps in national law or, where appropriate, to correct it. In practical terms and assuming a hierarchy of sources from which to draw in the absence of the parties' express choice, the arbitrators called to settle a dispute over a contractual regulation must first seek the applicable national law, and then integrate it, or correct it, with international law that is EU law.

With regard to arbitration systems for the resolution of disputes other than ICESID, it should be noted that the clauses on the applicable law contained in the UNCITRAL procedure rules, as well as the ICC and CCS administered arbitrations, do not refer to international law<sup>245</sup>.

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<sup>241</sup>For an example of substitution of national rules in contrast with the national referral: Tribunal ICSID, award of 17 February 2000, in case ARB/96/1, *Compania del desarrollo de Santa Elena v. Costa Rica*. See also: M. SZPUANR, Referrals of preliminary questions by arbitral Tribunals to the ECJ, in F. FERRARI (ed.), *The impact of EU law on international commercial arbitration*, in *Juris* 2017, pp. 85ss.

<sup>242</sup>The ICSID system does not allow non-liquid rulings. From this it follows that the arbitrators, in the presence of gaps in the national law referred to, must find the norm to be applied in international law. Obviously: "the arbitrators should not reach the conclusion that there are gaps in applicable law too swiftly. It is only for those particular parts of the dispute where a true lacuna exists that a Tribunal would be authorized to apply international law". G.R. DELAUME, *The pyramids stand-the pharaos can rest in peace*, in *ICSID Review*, 8, 1993.

<sup>243</sup>In case LETCO the Tribunal ICSID recognized that: "the law of the Contracting State is recognized as paramount within its own territory, but it is nevertheless subject to control by international law". ICSID, ARB/83/2, *Liberian Eastern Timber Corporation v. Republic of Liberia*, final award (31 March 1986), par. 658.

<sup>244</sup>E. GAILLARD, Y. BANIFATEMI, *The meaning of "and" in Article 42(1), Second sentence, of the Washington Convention: The role of international law in the ICSID choice of law process*, in *ICSID Review-Foreign Investment Law Journal*, 18, 2003, pp. 392ss.

<sup>245</sup>The European jurisprudence has always recognized that the EU respects the principles of international law. In a passage from the Poulson ruling we read that: "the position of the Community in relation to the law of the European Community must respect international law in the exercise of its power and (...)consequently, the relevant Community rule must be interpreted, and its scope of the relevant rule of the international law of the sea (law applied in this case). CJEU, C-286/90, *Anklagemindigheden v. Poulsen and Diva Navigation of 24 November 1992*, ECLI:EU:C:1992:453, I-06019. In the *Räcke* case, then, the international custom is applied, indirectly, as an instrument to interpret and legitimize a European principle: "the Community had to respect international law in the exercise of its powers and was required to comply with the rules of customary international law when adopting a regulation suspending the trade concession granted by an agreement. It followed that the customary international rules concerning the termination and the suspension of Treaty relations by reason of a fundamental change of circumstances were binding upon the Community institutions and formed part of the Community legal order (...)". CJEU, C-162/96, *Räcke c. Hauptzollamt Mainz of 16 June 1998*, ECLI:EU:C:1998:293, p. I-03655. See in argument. P.C. MÜLLER-GRAFF, O. NESTAD, *The rising complexity of European law*, BWN Berliner Wissenschafts Verlag, Berlin, 2014, pp. 105ss.

Therefore, in the absence of a specific reference to international law contained in the BITs or in the contractual regulation, EU law, as international law, can be called only if the rules of the former are considered relevant to resolve the case<sup>246</sup>. It is noted that when EU law is referred to as part of international law, it is applied to the extent that it does not conflict with the principles of international law and the rules that govern the relationship between conventional international sources and between conventional and customary sources. EU law must therefore respect the principles of international law and, at the same time, can not prevail over a conventional international source, if the latter has been signed after the first (lex posterior posterior derogation priori principle). This limitation is justified in the light of the fact that the European legal system when it is referred to in external relations is subject to all the rules which apply to the international legal system, of which it is a part.

In *Eureka* case, the Court ruled that, taking into account that its jurisdiction is rooted in BIT, the consequences of the application of EU law must be assessed "within the framework of the rules of the international law and not in disregard of those rules"<sup>247</sup>. On the basis of all the foregoing, it can be concluded by claiming that EU law is one of the rights that the arbitrators can identify as applicable to the case in question. For the sake of completeness, however, it should be noted that the choice to apply it as part of national law or as part of international law produces different political consequences. The first is the perspective preferred by the European Institutions, as it confirms the primacy of EU law on the rights of Member States, from a federalist point of view which places the Union at the top. On the other hand, the prospect of applying EU law as international law finds the consensus of Member States, since it respects the autonomy of each of them to define their external relations with third countries. The judgments incardinated before courts of arbitration have up to now had rulings only on jurisdiction; the problem of the applicable law has therefore had a rather marginal role, as it is an issue that is relevant in merit phase<sup>248</sup>.

## **12. Prevalence of international obligations in the European perspective. Choice required or optional?**

The double perspective is useful, since arbitration disputes can arise both from agreements signed in mixed form, from Union and Member States, and from agreements of which only Member States is a member. In order to resolve the conflict between European and international sources, it is therefore essential to evaluate whether, and to what extent, the Union and Member States are bound to respect international obligations and which rank they assume in the relationship between the sources of the two laws on recalled. As for the perspective of the Union, the relationship between international and EU law can be qualified

<sup>246</sup>CPA, *Eureka v. The Republic Slovak*, op. cit., par. 220ss.

<sup>247</sup>CJEU: C-41/74, *Van Duyn v. Home Office* of 4 December 1974, ECLI:EU:C:1974:133, I-01337; joined cases C-89,104,114,116,117 and 125 129/85, *Ahlström Osakaytiö and others v. Commission of the European Communities* of 27 September 1988, ECLI:EU:C:1988:447, I-05193; T-115/94, *Opel Austria v. Council* of 22 January 1997, ECLI:EU:C:1998:3, I-00039. For details see: R. BIEBER, F. MAIANI, *Précis de droit européen*, ed. Stämpfli, Berne, 2011.

<sup>248</sup>"the case in this area is very much the counter part of the case on the direct effect and supremacy of the Treaties and of internal legislation, the defining features of European Constitutional Member States". P. EECKHOUT, *EU external relations Law*, Oxford University Press, Oxford, 2011, pp. 435ss. A. VON BOGDANDY, M. KOTTMAN, C. ANTPHÖLER, J. DICKCHEN, D. HENTREI, M. SMARKOU, *Reverse solange- protecting the essence of fundamental rights against EU Member States*, in *Common Market Law Review*, 49, 2012, pp. 490ss.

on a par with that between the EU and Member States, in the light of the theory of limits and counter-limits<sup>249</sup>. The European Institutions are bound both to the international agreements signed by the Union and to customary international law and to the principles of international law, insofar as such sources do not conflict with European fundamental rights<sup>250</sup>.

As regards the international treaties signed by the Union, the CJEU jurisprudence has always recognized that the Union is interpreted in accordance with Finnish and therefore EU law. The CJEU instead recognized the incompatibility between the provisions of the two regulatory sources—the BIT and the law of the Union—arguing that the first could not be interpreted also in the light of EU law. The CJEU maintains that BIT's forecasts must be interpreted in the light of the VCLT and be bound by international patent law to which it belongs<sup>251</sup>. International agreements are part of the European internal legal order and, in the order of sources within this system, take the same rank as secondary legislation. Obviously, this is done as long as the formal conditions are respected and, therefore, the Union—like the State law (national law)—is bound to the international treaty on the condition that it has given valid consent and that it has entered into within its own limits. The jurisprudence then acknowledged that, under certain conditions, the international agreements signed by the Union have direct effect. More specifically, if the treaties "establish a clear and precise obligation that is not subordinate to execution or effects, to the intervention of any further act"<sup>252</sup>, the individual can assert the rights that derive from him by the international agreement before any national court, or may challenge the European legislative act which is not in conformity with the international source. As in the relationship between the EU and Member States, the direct applicability of international law within the EU is conditioned by the character of the rules contained in international agreements that must be precise, clear and unconditional. The control over the characteristics of the obligations deriving from an international agreement is delegated to CJEU<sup>253</sup>.

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<sup>249</sup>CJEU, C-118/07, *European Commission v. Finland*, op. cit., par. 39ss. See, P. KOUTRAKOS, *EU international relations law*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 337ss.

<sup>250</sup>CJEU, C-366/10, *Air Transport Association of America and others of 21 December 2011*, ECLI:EU:C:2011:864, I-13755.

<sup>251</sup>CJEU, C-104/81, *Hauptzollamt Mainz v. C.A. Kupferberger & Cie KG of 26 October 1982*, ECLI:EU:C:1982:362, I-03641; the Advocate General Van Gerven in his opinion to the *Banks* case clarifies that: "a rule has direct effect when it is sufficiently clear to complete that it can be directly applied by a court", C-128/92, *Banks v. British Coal* of 13 April 1994, ECLI:EU:C:1994:860, I-01209. In the same spirit the opinion of Prechal: "direct effect is the obligation of a court or another authority to apply the relevant provision of Community Law, either as a norm which governs the case or as a standard for legal review", in S. PRECHAL, *Directives in EC Law*, Oxford University Press, Oxford, 2005, pp. 241ss. C. BLUMANN, L. DUBOIS, *Droit institutionnel de l'Union européenne*, LexisNexis, Paris, 2013, pp. 478ss. C. BOUTAYEB, *Droit institutionnel de l'Union européenne: Institutions, Ordre juridique et Contentieux*, LGDJ, Paris, 2014, pp. 119-125.

<sup>252</sup>C. BOUTAYEB, *Droit institutionnel de l'Union européenne: Institutions, Ordre juridique et Contentieux*, op. cit.

<sup>253</sup>However, it is noted that in some cases the European court has denied the direct effect of international agreements on the grounds that it is mainly political. In this regard, it is noted that the Court excluded that the provisions contained in the WTO Agreement and in the Montego Bay Convention have direct effect; in both cases, denying the direct applicability of the rules contained therein, the ECJ has chosen to protect itself from international law, subjecting the application of the international source to the intervention of the European Legislator and thus restraining the "uncontrolled" entry of the international law in the European system. From the jurisprudence see: CJEU, C-68/89, *Nikajima all precision Co. Ltd v. Council of European Communities* of 7 May 1991, ECLI:EU:C:1991:433 I-2069; C-149/96, *Portugal v. Council* of 23 November 1999, ECLI:EU:C:574, I-08395; C-280/93, *Germany v. Council of the EU* of 5 October 1994, ECLI:EU:C:1994:367, I-04973, par. 110-111; C-70/87, *Fediol v. Commission* of 22 June 1989, ECLI:EU:C:1989:254, I-01781. C-

With regard to counter-limits, it is noted that international law does not apply unconditionally. EU agrees to bind itself to international law by giving up part of its sovereignty within the limits, however, of the respect of fundamental European principles that can not be violated by the international juridical corpus. In *Kadi* case<sup>254</sup>, the CJEU considered the provisions of Regulation no. 881/2002<sup>255</sup>, implementing Resolutions n. 1267 and 1333 of the United Nations Security Council. The CJEU reached this conclusion on the premise that "the U.N. system may not be counted on adequately safeguarding fundamental rights as the Courts conceive them"<sup>256</sup>. The integration of international law into the European system can therefore be enshrined in the concept of Unionisation: international law accesses the EU law without conditions, provided that these are *jus cogens* standards and within the limits set by the EU constitutional set of values in all other cases<sup>257</sup>.

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366/10, *Air Transport Association of America (ATAA) and others v. Secretary of State for Energy and Climate Change* of 21 December 2011, ECLI:EU:C:2011:864, I-13755, par. 49. For details see: S. BOGOJEVIĆ, *Legalising environmental leadership: A comment on the CJEU's ruling in C-366/10 on the inclusion of aviation in the EU emissions trading scheme*, in *Journal of Environmental Law*, 24 (2), 2012, pp. 346ss. In particular see in argument: "if the European legal order unilaterally introduced direct applicability, it would entail reverse discrimination, that is discrimination against domestic producers", according to: A. VON BOGDANDY, *Pluralism, direct effect and the ultimate say: on the relationship between international and domestic constitutional law*, in *International Journal of Constitutional Law*, 6 (3/4), 2008, pp. 398ss. per alii, "giving direct effect to an international agreement may involve submitting to the case law of an international court or tribunal". For the agreement WTO see: CJEU, joined cases C-21/72 and 24/72, *International Fruit Company n.v. and others v. Produktschap voor Groenten en Fruit* of 12 December 1972, ECLI:EU:C:1972:115 I-01219; C-308/06, *The Queen on the application of independent tanker (Intertanko) and others c. Secretary of State for Transport* of 3 June 2008, ECLI:EU:C:2008:312, I-04057, par. 65: "it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and confer upon them rights or freedom capable of being relied upon against States (...) the absence of individual rights and obligations, together with the nature and the broad logic of UNCLOS prevents the Court from being able to assess the validity of a Community measure in the light of that Convention". For details see: P. KOUTRAKOS, *EU international relations law*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 337ss. N. FOSTER, *EU law directions*, Oxford University Press, Oxford, 2016. A. THIES, *International trade disputes and European Union liability*, Cambridge University Press, Cambridge, 2013. D.A.O. EDWARD, R. LANE, *Edward and Lane on EU law*, Edward Elgar Publishers, Cheltenham, 2013.

<sup>254</sup>CJEU, joined cases: C-415/05 P, *Kadi & Al Barakaat Int'l Foundation v. Council* of 8 November 2008, op. cit.

<sup>255</sup>M. FEINBERG, *Sovereignty in the age of global terrorism. The role of International Organisations*, Brill/Nijhoff, Leiden/Boston, 2016.

<sup>256</sup>joined cases: C-415/05 P, *Kadi & Al Barakaat Int'l Foundation v. Council* of 8 November 2008, ECLI:EU:C:2008:461, I-6351. For details see, R. UERPMANN-WITZACK, *Rechtsfragen und Rechtsfolgendes Beitritts der Europäischen Union zur EMRK*, in *Europarecht*, 2012, pp. 167ss. C. NOWAK, *Europarecht nach Lissabon*, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, *EU law*, Cambridge University Press, Cambridge, 2014. J. TILLOTSON, N. FOSTER, *Text, cases and materials on EU law*, Gavel Publishing, New York, 2013. M. HORSPOOL, M. HUMPHREYS, *EU law*, Oxford University Press, Oxford, 2012, pp. 552ss. SATZGER, *International and European criminal law*, Hart Publishing, Oxford & Oregon, Portland, 2017. T. OPPERMANN, C.D. CLASSEN, M. NETTESHEIM, *Europarecht*, C.H. Beck, München, 2016.

<sup>257</sup>CJEU, C-366/10, *ATA v. Secretary of State for Energy and climate change* of 21 December 2011, ECLI:EU:C:2011:864, I-13755, "(...) it follows that the validity of a Union act can be undermined by its incompatibility with those rules of international law. If that invalidity is invoked before a national court, the Court checks—as requested by the referring court in its first question — whether certain conditions are met in the case before it, in order to determine whether, under the 'art. 267 TFEU, it is possible to examine the validity of the contested Union law act in the light of the rules of international law relied on "parr. 50 to 51. R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of EU Law*, Oxford University Press, Oxford, 2018. C. BARNARD, S. PEERS, *EU law*, Oxford University Press, Oxford, 2017, pp. 788ss. C. TIETJE, *The status of international in the European legal order: the case of international Treaties and non-binding international*



The CJEU reserves the right to exercise direct control over respect for fundamental rights by the EU Institutions or indirectly, through the referral system, which allows national courts to submit any questions concerning the compatibility of international law with EU law<sup>258</sup>. The only limit, such as to justify the non-application of an international standard, consists in the exception of European public order, or in the existence of a European standard of application necessary. In a consistent sense, the arbitration boards were also expressed in two recent cases involving European BITs. The acceptance of the exceptions relating to public policy prevented the arbitrators from ruling on the conflict between the two legal systems and, in particular, on the obligation of Member State to make EU law or international obligations prevail; question, the latter, which is strictly internal to the relations between EU and Member States<sup>259</sup>. In particular, in the appeal judgment of AES award-introduced by the unsuccessful party to the outcome of the arbitral proceedings instituted before an ICSID tribunal-the plaintiff claimed that the question of legality under Hungarian and EU law was a significant issue in the original proceedings, having been raised at the hearing and having received substantial attention in their written submissions. According to AES, the evidential the ad hoc Committee did not accept the appellant's objection and denied the reference to EU law, specifying that, even if this had been applied, the outcome of the negative dispute for the actress-company would not have changed. More specifically, the ad hoc Committee has decided that "the question of legality under Hungarian and EU law was a significant issue in the original proceedings, having been raised at the hearing and having received substantial attention in their written submissions. According to AES, the evidential weight that such a finding would have had renders the issue outcome-determinative"<sup>260</sup>. The ad hoc Committee did not accept the appellant's objection and denied the reference to EU law, specifying that, even if this had been applied, the outcome of the negative dispute for the actress-company would not have changed. More specifically, the ad hoc Committee has decided that "(...) Hungary been motivated to reintroduce price regulation with a view to

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instrument, in J. WOUTERS, A. NOLLKAEMPER, E. DE WET (eds.), *The Europeanization of international law: The status of international law in the EU and its Member States*, Cambridge University Press, Cambridge, 2008.

<sup>258</sup>It is noted that the opening that EU law shows towards international law also has political implications, as it reflects the increasingly active role of the Union on the international scene. It seems that one is happening, if it can be defined as "restructuring" of the relationship between international and European law. Rather than focusing on the direct or less direct effect of international law on the European one, it seems more important to question the conditions under which a provision outside a given system confers rights, or intends to do so, to individuals. Focusing on rights makes it possible to better assess what remedies can be in the event of a conflict between the internal EU law and a law that originates in a foreign system-ubi ius, ibi remedium. The rights of individuals are taking an increasingly central role in the European dimension. This is confirmed by some recent rulings which, adopting the criterion of balancing rights, opt for a solution to the dispute which is more inclined to protect individual rights. See from the CJEU: C-260/89, ERT of 18 June 1981, ECLI:EU:C:1981:254, I-02925; C-112/00, Schimderberger of 12 June 2003, ECLI:EU:C:2003:333, I-05659; C-36/02, Omega Spielhallen of 14 October 2004, ECLI:EU:C:2004:614, I-09609 In the event of conflicts between two forecasts, it no longer seeks a balance between fundamental rights and economic freedoms-important in the cases in question. On the contrary, on the basis of the very foundations of the Community legal order concept, the Court unconditionally defends fundamental values, regardless of potential conflicts that may result from freedom and economic rights. On the other hand, as correctly observed: "no mature constitutional order is willing to accept such international law pre-eminence, in the absence of equivalent standards at the international level", according to P. EECKHOUT, *EU external relations law*, op. cit., pp. 43ss. P. CRAIG, G. DE BÚRCA, *EU law. Text, cases and materials*, Oxford University Press, Oxford, 2011.

<sup>259</sup>ICSID, *AES v. Hungary*, op. cit., par. 7.6.7.-7.6.9; ICSID, *EDF v. Hungary*, op. cit..

<sup>260</sup>ICSID, *Decision of the ad hoc Committee on the judgment in annulment of 29 June 2012*, in *causa ARB/07/22, AES v. Hungary*, par. 164.

addressing the EC's state aid concerns,<sup>261</sup> there is no doubt that this would have constituted a rational public policy measure (...) "<sup>262</sup>.

In *EDF* case<sup>263</sup>, the arbitrators noted the existence of a public interest capable of legitimizing the introduction of the Member States measure and concluded that "GEO (the measure introduced by the defendant State) although possibly aiming as well toward a gradual alignment with the EU system, was certainly prompted by the need to fight corruption, as indicated by the Substations Note and as confirmed by the foregoing circumstances. GEO104 was therefore a measure falling within the police power of the State, taken in the public interest (...) "<sup>264</sup>.

By transferring the reasoning on the level of the investment agreements of which the Union is also a member, the conduct assumed by a Member State in violation of an international obligation, but respecting a European constraint, can be justified only in the presence of a forecast of public order or a necessary enforcement rule, which constitute conditions impeding the recognition of the binding nature of an external source. In light of this last consideration, the solution adopted in *AES* and *Electrabel* disputes in which the arbitrators have prevailed over the rules of the Energy Charter Treaty over the European ones<sup>265</sup>. This is because, in those cases, the conflict did not concern the violation of a European public order standard or of necessary application nor could the prevalence of EU obligations be sustained as the *lex specialis*-criterion admitted by international law to establish an order of sources below the *jus cogens*. The arbitrators exclude the primary application of EU law, noting that the Energy Charter Treaty<sup>266</sup> contains art. 16 a provision expressly indicating the criteria for

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<sup>261</sup>T. KENDE, *Arbitral awards classified as State Aid under EU Law*, 1 in *Elite Law Journal*, 1, 2015, pp. 38ss.

<sup>262</sup>In case *AES* the arbitrators were asked about the relationship between European obligations and obligations deriving from the Charter; to resolve the controversies, the colleges therefore had to assess whether there was any incompatibility between the two sources and, if so, which of the two to prevail. In both judgments, the defendant states sought to demonstrate the legitimacy of their conduct in the light of European law. More specifically, Member States have pointed out that if they acted in accordance with the provisions of the Charter, they would violate European law, thus assuming that the former are in conflict with the latter. The Member States, therefore, not only detect the conflict between the forecasts of the two sources but resolve it in the light of the primacy of European law.

<sup>263</sup>ICSID, Award of 8 October 2009, in case ARB/05/13, *EDF (Services) Limited v. Romania*.

<sup>264</sup>ICSID, Award of 8 October 2009, in case ARB/05/13, *EDF (Services) Limited v. Romania*, par. 292.

<sup>265</sup>The arbitral College deny the confiscation and for it the pre-eminence of the European obligations on those of the Charter. To arrive at this conclusion, the referees perform an argument that develops on two floors. First, they state that the inter partes relationship is governed by the provisions of the Charter, secondly, they recognize that any conflicts between sources are resolved as prescribed in the conflict rule contained in the Charter without having to operate, therefore, any conciliation between the sources. In the *AES* judgment, for example, the College recognizes the primacy of the Charter and excludes the need to assess the conduct of the respondent State in the light of EU law provided that the measures introduced by the State are to be considered and taken into account as a relevant fact". ICSID, *AES v. Hungary*, par. 7.6.12. In the *Electrabel* case, the Court found that the only possible conflict between sources that can be found concerns the absence, in this second, of the arbitration clause. However, becoming part of the Charter, the EU has accepted the possibility of being able to be brought before an arbitral court in a dispute against both a foreign and European investor. Since there is no disconnect clause in the Charter and, on the contrary, it is envisaged that in case of conflict with the provisions of an international agreement the Charter's forecasts prevail if more favorable to the investor, then there is no conflict between the provisions of the two sources of law and there is no need to harmonize the arbitration clause of the Charter with European law. The conduct of the Member State, although bound by a European obligation, must therefore be interpreted in the light of the provisions of the Energy Charter and, therefore, can be scrutinized by an arbitration panel because "there is in this case no true conflict between the provisions of the ECT and the mandatory public policy EU competition law". ICSID, *AES v. Hungary*, op. cit., par. 7.2.5.

<sup>266</sup>K. HOBÉR, *Investment arbitration and the Energy Charter Treaty*, in *Journal of International Dispute*

effect<sup>267</sup> of which, in the event of a conflict between sources, the one prevailing must be identified<sup>268</sup>. From the aforementioned provision, EU law could not have prevailed, given that the protection afforded by the latter to the investor is less extensive than the one prepared by international source-rectius the Energy Charter Treaty.

### **13.Competition of obligations between international and EU law. The composition by the referees.**

In the absence of a certain criterion for resolving *ex ante* antinomies, and therefore at the level of relationships between systems, it is believed that the resolution of conflicts must be delegated to the arbitrators. It is hypothesized that they can focus on the antinomy between the individual forecasts, adopting the interpretative tools at their disposal. In this regard, two options can be proposed. On the one hand, if possible, the presumed antinomy could be composed by finding a balance between the forecasts of the sources; on the other hand, in the case of conflicts that are not otherwise modular, the arbitrator could identify the solution, legitimizing the conduct of the respondent State in the light of the European public order or of a necessary implementing rule. As for the first option, one wonders about the ways in which the arbitrators can resolve conflicts between the sources that are applied in the trial. In this regard, it is noted that in the arbitration judgments in which the relationship between two juridical bodies emerged, before deciding on the primacy of one source over the other, an attempt was made to adopt a solution of conciliation or harmonic interpretation of the two sources. In *ADC Affiliate case*<sup>269</sup>, for example, the panel found that the measure introduced by the defendant State went beyond the provisions of Directive 96/97<sup>270</sup>, which provided that air traffic control and airport operations were managed by two separate operators. The respondent State had in fact introduced a provision that implied the expropriation of a project of two Cypriot investors for the management of the restructuring and control operations of the Budapest airport. However, the arbitrator found that in order to align with the provisions of EU law, it would have been sufficient to deprive the investor of only one of the two powers mentioned above and therefore condemned the respondent State by having the latter unjustifiably violated the international agreement. This argument dissolves the

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Settlement, 1 (1), 2010, pp. 154ss.

<sup>267</sup>Lauder (Ronald S) v. Czech Republic (3 September 2001), 14(3) World Trade & Arbitration Materials 35 (2003); CME Republic BV v. Czech Republic (13 September 2001), 14(3) World Trade & Arbitration Materials. See for more detail, J. D'AGOSTINO, O. JONES, Energy Charter Treaty-A step towards consistency in international investment arbitration?, in *Journal of Energy & Natural Resources Law* 25 (3), 2007, pp. 226ss. M. SATTOROVA, Investor rights under EU law and international investment law, in *The Journal of World Instrument & Trade*, 17 (6), 2016, pp. 897ss.

<sup>268</sup>From the European perspective, the Union, not being part of the international agreement-even if it did not have the transfer of jurisdiction over the subject matter of the Agreement-can adopt legislative measures that contrast the obligations assumed by the Member States. The latter, if they do not comply with it, are at risk of facing infringement or cancellation proceedings, which can go as far as the contentious phase before the Court of Justice. The Member States can not assert the international bond because, as will soon be said, an international treaty enters the national legal system and is equivalent to domestic law. As such, it must comply with European law. For international law, however, a legislative reform within a state can not affect the international agreement to which it belongs (art. 27 VCLT, 1969); the conduct of the State which conforms to an internal constraint may therefore be in violation of the international text unless it can be justified in the light of national or European public order or due to compliance with the necessary application rules.

<sup>269</sup>ICSID, ARB/03/16, *ADC Affiliate Ltd & ADC-ADMC Management Ltd v. Hungary* of 2 October 2006.

<sup>270</sup>In particular see: P.C. MÜLLER-GRAFF, E. SELVIG, *Regulation strategies in the European economic area*, BWV Berliner Wissenschafts Verlag, Berlin, 2011, pp. 98ss.

conflict between the sources of the two systems. The conduct of the State is, in fact, considered in violation of the investment protection clauses contained in BIT and EU law can not be called to justify it because the obligations that it derives from have not been correctly implemented<sup>271</sup>. Given that the respondent State had violated both international and european obligations, the arbitrator was able to avoid ruling on the alleged conflict between sources. In the *Saluka* case<sup>272</sup>, once again, the arbitration panel has refrained from ruling on the conflict between the legal systems, rejecting the plaintiff's request-aimed at ascertaining the violation of its legitimate expectations-claiming that "had no basis for expecting that there would be no future change in the Government's policy towards the banking sector's bad loan problem or in the Government's willingness to adhere during the pre-accession period to the rules on State aid in the Europe Agreement"<sup>273</sup>.

The arbitrator then provides a restrictive interpretation of legitimate expectations, excluding that the latter can make the internal legal system of a State unmodifiable. Thus arguing, the arbitrator was able to recognize the legitimacy of the measure introduced by the respondent State as a sovereign act, without having to rule on the existence, or not, of a european obligation from which the legislative amendment would have drawn legitimacy. In the aforementioned cases, the arbitrators avoided ruling on the conflict between the obligations of EU and international law, limiting themselves to finding, on a case-by-case basis, a compromise between the forecasts and thus favoring harmonious coexistence. This technique, in fact, does not reconcile but rather circumvents the risk of conflicts and can only be used when it is possible to find a compromise solution or to judge the violation regardless of the source of the violated obligations.

#### **14.Prevalence of EU law: The case of public order exception.**

The primacy is easy to define when an international agreement is brought to the arbitrator's scrutiny and the EU is also part of it; in these cases, in fact, the primacy of the international source can be detected because it also binds the Union<sup>274</sup>. A more complex question arises when the arbitrator must judge the relationship between the two systems in the light of an international agreement to which the Union is not party. In these circumstances it is to be excluded that the referee can refer to the concept of the primacy and the direct effect to justify the prevalence of the european obligation over the international one. These principles,

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<sup>271</sup>"The tribunal does not accept that compliance with EU Law mandated the steps actually taken by the Respondents the subject matter of this arbitration". ICSID, *ADC v. Hungary*, op. cit., par. 272.

<sup>272</sup>UNCITRAL, Ad hoc Arbitration, *Saluka v. Czech Republic*, partial judgment on jurisdiction and arbitrability (March 27, 2006).

<sup>273</sup>UNCITRAL, Arbitral ad hoc, Partial decision on jurisdiction and arbitrability of the 27 March 2006, in case *Saluka v. Czech Republic*, par. 351

<sup>274</sup>It is noted, for the sake of completeness, that if the BITs that bind the States Parties to the disputes contain the national treatment clause to be guaranteed also in the post-establishment phase, then it is more difficult to detect the existence of an infringement of the agreement or an expropriative case. The effects of the change in the internal legislative framework would, in fact, be mitigated by the provision of national treatment which should continue to guarantee the investor. If, therefore, the state regulatory framework has changed, but the BIT includes the national treatment clause, the Arbitral Tribunal should not follow up on the plaintiff's questions. This is even more true if we consider that the European system, which also provides hypotheses of extra-contractual responsibility, has adopted a restrictive concept of property rights and economic interests such that the non-contractual liability of one has never been declared. State for having modified its internal legislative framework. See, T. EILMANSBERGER, *Bilateral Investment Treaties and EU Law*, in *Common Market Law review*, 46, 2009, pp. 384ss.

it has already been anticipated, bind only Member States but can not be used to judge the violation by a Member State of an international source. The tendency of the referees seems to go-correctly in the opinion of the writer-in this direction. The court in *Eureka* case has established the prevalence of international law over the european one by establishing that "EU may represent a 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>275</sup>. The College seems to resume the position of CJEU for which Member States can not justify their violations of EU law by invoking provisions, including constitutional, of their legal systems.

The only hypothesis in which the arbitrators can make EU law prevail over the international one is contingent if it is possible to justify Member States' conduct in the light of european public order. It is therefore necessary to understand whether or not the arbitrators can overcome the antinomy between legal sources in the light of european public order and thus make praises that are recognized and executed by the national courts of each Member States. This conclusion is reached by making a Member State between national and arbitral jurisprudence. In practice, the national courts of Member States may find themselves in a position to enforce european rules, which are of a public nature, even if the parties have chosen to regulate the relationship in the light of a right of a non-member state. In this sense, the *Eco Swiss* case was resolved in which the CJEU, referred to by the Dutch court during the preliminary ruling, was asked to assess whether the aforementioned judge had the power to annul an award in which the arbitrators had apply european competition law<sup>276</sup>. The CJEU replied in the affirmative, specifying that these rules were part of the concept of european public policy, whose non-application could have led to the annulment of the ruling. In practice, even the national courts involved in the recognition or annulment of an award have found that, to assess the alleged existence of a violation of the public order, rather than looking at the type of norm evaluating whether the same is or no part of the public order-the degree of violation of the same must be considered. It is a "mitigative" approach<sup>277</sup> precisely because it accepts the exception of european public order, and legitimizes it for the violation of an international bond, only if compliance with this second would have led to a serious violation of the first. This approach requires the judge first to assess whether there has been a violation of a rule of public order and, secondly, if he believes there has been, requires him to assess its extent. The annulment of the award is, before the non-execution, a consequence of this double reasoning; in other words, the award must have violated the law of public order in a manifest and effective manner, cumulative and not alternative conditions<sup>278</sup>.

The CJEU has instead preferred an approach aimed at an "accommodating conciliation" that takes into consideration not so much the violated norm, as the whole juridical corpus from which it comes. On the basis of this approach, the violation of the public order subsists if the award conflicts with the entire legal system in which it must be applied. This approach achieves even more stringent results than the mitigation one, as it increasingly recognizes violations of european public order. In the case of *Renault*, for example, the CJEU, referred

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<sup>275</sup>For example, the French Court of Appeal refrained from declaring the award for violating the European public order as null, since the violation did not concern a "manifest disregard of that body of law". Cour d'Appel, Paris, sentence of 18 November 2004, in case n. 02/19606, Thales air defence BV v. GIE Euromissile.

<sup>276</sup>M. LÓPEZ-GALDOS, Arbitration and competition law. Integrating Europe through arbitration, in *Journal of European Competition Law & Practice*, 7 (6), 2016, pp. 384ss.

<sup>277</sup>M. LÓPEZ-GALDOS, Arbitration and competition law. Integrating Europe through arbitration, op. cit.

<sup>278</sup>French Court of Appeal, sentence of 1<sup>st</sup> June 2004, Sté SNF SAS v. Sté Cytec Industries BVCytec.

to on the basis of art. 267 TFEU<sup>279</sup> by the French judge-engaged in the judgment of recognition of an award-did not exclude the execution of a sentence only because it was contrary to the fundamental European principles of the free movement of goods and persons<sup>280</sup>. On the contrary, the CJEU has specified that the defense of the public order can be asserted in the recognition and execution of the award when "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>281</sup>. By adopting a "conciliatory-accommodating" approach, the CJEU did not admit the public order exception tout court, as a last resort to avoid the execution of the award. On the contrary, he clarified that this exception can be raised only if the degree of violation is particularly intense. In essence, this exception must therefore be accepted only if a violation

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<sup>279</sup>The CJEU's judgment in this case is contrary to the opinion given by Advocate General Wathelet on 19 September 2017 who considered, that: "(...) articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the EU and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal (...)". The CJEU, relying on the need to ensure "full effectiveness of EU law" could have gone as far as outlawing arbitration clauses in intra-EU BITs providing for ICSID arbitration or permitting the choice of a seat of arbitration outside the EU, but certainly not the specific arbitration mechanisms implemented in the Achmea proceedings that afforded all the protections normally required by EU law. The reasons put forward and the legal basis chosen by the CJEU did not justify the systematic prohibition of arbitration clauses in intra-European BITs, but at most their unenforceability in particular circumstances only. See in argument: I. MÍCHOU, P. PINSOLLE, Arbitrage: l'arrêt Achmea, la fin des traités d'investissements intra-UE?, in Dalloz, 7 mars 2018. B. HESS, The fate of investment dispute resolution after the Achmea decision of the European Court of Justice, in MPILux Research Papers 2018. C.I. NAGY CAROLA GLINSKI, Achmea and its Implications for Investor Dispute Settlement, 21(1) in Zeitschrift für Europarecht Studien, 21 (1), 2018, pp. 48ss, according to the author: "(...) the ruling can only be understood in such a way that every dispute settlement mechanism in an area which is already covered by EU law bears at least the hypothetical risk of an interpretation or application of EU law and is incompatible with the autonomy of EU law-which is particularly true for intra-EU economic relations (...)".

<sup>280</sup>In case 186/87, Ian William Cowan v. Trésor public of 2 February 1989, ECLI:EU:C:1989:47, I-00195 the CJEU established that: "(...) Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materializes (...)". In case C-376/03, D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen of 5 July 2005, ECLI:EU:C:2005:424, I-05821, the CJEU held-in the context of free movement of capital-that double taxation treaties are not discriminatory, albeit they confer benefits on the residents of specific Member States with the exclusion of others. For details see also: M. WIBERG, The EU services directive. Law or simply policy, ed. Springer, 2014, pp. 189ss.

<sup>281</sup>CJEU, C-38/98, Régie nationale des usines Renault SA v. Mexicar SpA and Orazio Formento of 11 May 2000, ECLI:EU:C:2000:225, I-2973. The CJEU notes that the enforcement of a civil judgment ruling on damages, even if erroneous, can not be regarded as infringing the public order: "(...) any error of law, such as the one at issue in the main proceedings, does not constitute a manifest violation of a rule of fundamental right (...)", par. 34. Having failed to recognize a manifest infringement, the Court of First Instance denies that Article 27 of Reg. 44/2001, and the exception of public order contained therein. The positions of the US jurisprudence are very close to those expressed by the CJEU. It is noted that in the Mitsubishi case the Supreme Court: "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. Mitsubishi Motors Corporations c. Soler Chrysler-Plymouth, Inc, 473, U.S. 614, 1985.

of the legal system has been integrated and can not be accepted only for the alleged infringement in the abstract<sup>282</sup>.

The tendency of national judges to carry out a check on the correct application of EU law is understood in light of the fact that, the jurisdictional system, as an organ of Member States, is bound by the provisions of art. 4.3 TEU as well as 351 TFEU<sup>283</sup>. The first rule establishes the duty of loyal cooperation between Member States and the EU; the second one recognizes in the first paragraph the right for Member States to maintain the international agreements in force by the same undersigned and at the second one imposes, according to them, the duty to align the provisions contained in the agreements signed by them with EU law. From this it follows that when a national court finds itself having to recognize and/or execute an arbitration award that is contrary to EU law, it has the tools to overcome the conflict between the obligation to respect the international validity of the arbitration ruling and the Union law. More precisely, even if the provisions referred to in articles 4.3 et 351 TFEU<sup>284</sup> are not qualified as *jus cogens* for the national courts and possibly for the CJEU itself, the aforementioned conflict should be resolved in favor of EU law-*rectius* law to protect the european public order-thus denying the recognition of the award<sup>285</sup>.

On the other hand, "it would be surprising if Member States courts would not examine such awards with regard to their conformity with EU Law and, consequently, a decision by such a CJEU may affect the practical opportunities for a prevailing party to enforce di award"<sup>286</sup>. In light of the foregoing, it is also appropriate to consider whether it is reasonable to expect that the arbitrators in the stage of merit try to resolve the antinomies between european and international obligations by referring to the concept of public order<sup>287</sup>. In other words,

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<sup>282</sup>The CJEU has specified its position in the *Mostaza Clara* case when it was adjudicated to decide whether the National Court could determine whether the contested award was contrary to European public policy, although in the arbitration proceedings this exception had not been raised. On this point, the CJEU held that: "(...) the need for effectiveness of the arbitration proceeding justifies the fact that the control of arbitration awards is of a limited nature, and that the annulment of an award can be obtained only in exceptional cases (...)", par. 34, case: C-168/05, *Mostaza Claro* of 26 October 2006, ECLI:EU:C:2006:675, I-10421. In its argument the CJEU confirms that the exception of European public order can not be abused, with the risk of reducing the effectiveness of the praises; however, this exception can be accepted when the appeals courts would accept it in order to avoid a violation of the national and European public order. In other words, the exception of public order also takes *ex officio*, when it concerns a violation of the legal system in which the award must be recognized. Inevitably, both the national public order and the European public order fall under the orders of a Member States. On this point, in the case of *Eco Swiss*, the CJEU ruled that: "(...) it should also be noted that the need for effectiveness of the arbitration procedure justifies the fact that the control of arbitral awards is of a limited nature and that an arbitration award can be declared void or the recognition is denied only in exceptional cases (...)", case: C-126/97, *Eco Swiss* of 1<sup>st</sup> June 1999, ECLI:EU:C:1999:269, I-3055, par. 35.

<sup>283</sup>See, A. KACZOROWSKA-IRELAND, *EU Law*, Routledge, London & New York, 2016. F. MARTUCCI, *Droit de l'Union européenne*, LGDG, Paris, 2017. M. POIARES MADURO, M. WIND, *The transformation of Europe: Twenty-five years on*, Cambridge University Press, Cambridge, 2017, pp. 321ss. R. SCHÜTZE, *EU law*, Cambridge University Press, Cambridge, 2015, pp. 382.

<sup>284</sup>R. SCHÜTZE, *EU law*, *op. cit.*

<sup>285</sup>M. BURGSTALLER, *European law challenges to investment arbitration*, in M. WAIBEL and others (eds.), *The backlash against investment Arbitration*, in Wolters Kluwer Law and Business, The Hague, 2010, pp. 473ss.

<sup>286</sup>T. EILMANSBERGER, *Bilateral investment treaties and EU law*, in *Common Market Law Review*, 46, 2009, pp. 384ss.

<sup>287</sup>The national public order includes the fundamental principles of a given legal system, the international public order-which in recent times has had an ever-increasing recognition - includes principles common to the nations of related civilizations and intended to protect fundamental human rights . International public order can also influence the individual state systems since the judge, addressed by the law of conflict to apply the

considering that the violation of public order is a reason for many judgments of the appeal, it is hypothesized that the referees anticipate the reasoning on public order, thus avoiding adopting an award that can then be passed on cancellation upon recognition or execution. From an arbitration perspective, therefore, arbitrators can judge the conduct of the defendant state in court, also assessing it in light of the national and European public order, as well as the necessary enforcement rules present in the two legal systems<sup>288</sup>.

In particular, it is believed that the referee could, by adopting the CJEU approach, operate an "accommodating conciliation"<sup>289</sup>. In practical terms, the arbitrator could assess whether the Member States, not adopting legislation that is in conformity with EU law but contrary to international obligations, would have caused a serious and flagrant violation of the European legal system. If at the end of the reasoning the arbitrator arrives at an affirmative answer, then he could decide in the sense of not condemning the conduct of the member state as assumed in respect of the European public order, which prevails over any international constraint. In the opposite hypothesis, when the conduct of the State does not appear justifiable in light of the European public order, the arbitrator will find himself condemning Member States if he finds that his behavior is in violation of the BIT; as we have seen, EU law can not prevail over international law.

Ultimately, it is possible to hypothesize three lines of reasoning of the arbitrators, according to the type of BITs subject of the dispute. In the case of intra-EU BITs, referees have two possibilities: in one sense, they can resolve conflicts by seeking a harmonic interpretation of the forecasts in the other, if the conflict is not modular, they can make European obligations prevail if they are justified by the light public order. In any case, they must reject the exceptions regarding the pre-eminence of EU law, a prerogative that only applies to internal

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law of a state, not only seeks the basic principles of the same, but also those rules that have become part of the law of the order referred to, as a consequence of its compliance with the precepts of international law. The doctrine is not uniform in defining which norms are in international public order. According to the classical current, the notion of international public order derives its contents solely from national legal systems. There are some who, while admitting the national "soul" of the concept of international public order, believes that its content can be determined not only with principles of a national nature, but also of an international or even transnational nature. This theory seems to have a great following, also because an evolution in this sense of the concept of international public order could "conduire à une convergence entre la notion d'ordre public employée par les juridictions nationales et celle employée par les arbitres". In this sense, one could reach a conception of international public order that is the same, if applied in arbitration or in case of recognition of the award in a national judgment. L.G. RADICATI DI BROZOLO, *Arbitrage commercial international et lois de police*, Académie de l'Haye, Recueil de cours, vol. 312, ed. Brill, The Hague, 2005, pp. 266ss.

<sup>288</sup>As regards European public policy, this includes all the fundamental principles of the Union, the four freedoms of the internal market as well as other matters from time to time subsumed in this category by the jurisprudence of the CJEU. In the case of *Eco Swiss China*, the CJEU has declared a progressive tendency towards "communitarization of public order, which should find further moments of development also through the jurisprudence of the ECtHR". The necessary application rules have been variously defined. According to the traditional approach: "with the exception of the necessary application rules are identified those substantially functional substantive rules aimed at safeguarding the political, social and economic organization of the State of the forum (...) it is self-limited rules as their field of application is established, unilaterally, by the state order of which they are expressed (...)". According to Audit: "(...) on parle de lois de police pour désigner le mécanisme Member States d'application d'une règle interne à une situation internationale en fonction de sa volonté et indépendamment de sa désignation par une règle de conflit". B. AUDIT *Droit International privé*, LGDG, Paris, 2008, pp. 97. The necessary rules of application can have both a state and a supranational origin (Buxelles Convention 1974, The Hague Convention, 1978) and be linked to third-type sources (European Court of Justice, UN).

<sup>289</sup>C. BOUTAYEB, *Droit institutionnel de l'Union européenne: Institutions, Ordre juridique et Contentieux*, op. cit.



relations between EU and Member States. It is also believed that the arbitrators are in a position to deny the existence of the conflict if they find that the conduct of the State is not detrimental to the legitimate expectations of investors<sup>290</sup>. It can therefore be assumed that, if the BITs contain the national treatment clause, then the violation of an international source clause subsists only if the legitimate expectation is proven to violate. The national treatment clause, in fact, mitigates the consequences that derive from the change in the legislative framework, placing the foreign investor on the same level as the national ones—even in the case of new national forecasts<sup>291</sup>. In such circumstances, the arbitrator can recognize that the State has acted *ex lege*—therefore in compliance with European obligations—without frustrating the legitimate expectations of the investor.

For non-EU BITs, conflicts, as far as this is possible, can be resolved by adopting a harmonious interpretation of the forecasts. In any case, it is noted that for such agreements rather than questioning the conduct of Member States, now deprived of power in the field of foreign direct investment<sup>292</sup>, it is appropriate to focus on the role of EU. The latter, even if it is not part of these agreements, has acquired exclusive jurisdiction over the matter and therefore it could be assumed that the Union is bound to respect the obligations deriving from the non-EU BITs. The latter should, therefore, avoid adopting regulatory provisions that result in the processing by the Member States of measures that conflict with the obligations contained in international agreements. Obviously, it would not be a legal constraint, more than a soft law obligation, justified by the need to preserve relations with third countries and to guarantee, to foreign investors, the consistency and reliability of the European legal regime in the matter of investments. As correctly noted, "once the EU subjects itself directly, as a participant, to that regime, it will have a heightened difficulty in insisting that its internal norms—even those of a public policy nature—take precedence over its investment treaty"<sup>293</sup>.

As regards the agreements that the Union will sign with third countries, the inclusion of protection clauses should be avoided which, by protecting the European legal system from external influences, effectively reduce the participation of the Union on the international scene. It should therefore be excluded the inclusion of appropriate clauses to preclude the referral to the arbitration mechanism or the application of some rules of the agreement, if these come into conflict with EU law<sup>294</sup>. The Union, indeed, by establishing relations with

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<sup>290</sup>P. STRIK, *Shaping the single European market in the field of foreign direct investment*, Hart Publishing, Oxford & Oregon, Portland, 2014, pp. 258ss.

<sup>291</sup>Against, ICSID, award of 12 May 2005, in case ARB/01/8, *CME Gas TranMember Statesission Company v. Argentina*: "(...) there can be no doubt (...) that a stable legal and business environment is an essential element of a fair and equitable treatment (the same Tribunal considered the fair and equitable treatment standard) as "an objective requirement and therefore unrelated to the reasons for the challenged measures", par. 274-280.

<sup>292</sup>H. BASHMILL, *Foreign investment disputes settlement under ICSID and the protection of FDI*, in *Journal of Internet Banking & Commerce*, 21, 2016, pp. 148ss

<sup>293</sup>"(...)L'Union Européenne est fréquemment tentée de se soustraire au jeu d'un accord multilatéral qu'elle conclut pour lui préférer, à l'intérieur de son ordre juridique, l'application de ses propres règles, droit qui n'est pas reconnu en revanche à ses partenaires conventionnels (ce mécanisme de « la clause de déconnexion (...) )". J.S. BERGE, M. FORTEAU, *Interactions du droit international européen. Contribution de l'Union européenne au développement du droit international général. Combinaison et hiérarchisation du droit national et hiérarchisation du droit national européen*, in *Journal du droit international*, in *Clunet*, 3, 2010, pp. 6ss.

<sup>294</sup>In the *Dorsch* case, the ECJ specified that "the Court shall take into account a set of elements such as the legal origin of the body, its permanent nature, the obligatory nature of its jurisdiction, the contradictory nature of the proceedings, the fact that the body applies legal rules and is independent (...)". CJEU, C-54/96, *Dorsch* Consult of 17 September 1997, ECLI:EU:C:1997:413, I-04961, par. 23. The CJEU has therefore ruled that

third countries, must necessarily give away part of its sovereignty and, therefore, must bind itself to international forecasts without allowing itself the possibility of referring to internal rules.

### **15. The case of reference for a preliminary ruling as a guarantee for the uniform application of EU law: A foreclosure for referees.**

It is noted that any reference to EU law by foreign jurisdictional bodies might imply the non-uniform application and interpretation of EU law which, in the current system, constitutes the exclusive prerogative of the CJEU.

One wonders, therefore, the existence of suitable facilities to ensure, in the event that the arbitrator directly or indirectly invokes EU law, that the latter is applied in accordance with EU internal practice. The question is aimed at finding instruments, or mechanisms, that can direct the arbitrator in the correct interpretation of EU law or correct the rulings in which the latter has been applied in a way that is different from European jurisprudential practice or from the provisions of the founding Treaties. On the merit, three mechanisms potentially able to reach the predicted result can be identified; they can intervene *ex ante* or *ex post*, depending on whether they are activated during or after the arbitration proceedings. In particular, this refers to the reference to the CJEU referred to in art. 267 TFEU<sup>295</sup>, the participation of the EC as *amicus curiae* or the appeal of the award before national courts of a Member State—the latter will be the subject of the following paragraphs. An arbitral tribunal is not to be considered a "court" according to TFEU art. 267 (2)<sup>296</sup>. This position

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the commercial arbitration courts can operate the postponement referred to in art. 267 TFEU, since they do not have characteristics that coincide with those identified by the aforementioned ruling—which will then be reaffirmed by the consistent jurisprudence of the CJEU according to the sentence *Eco Swiss*. In case: C-102/81, *Nordsee v. Reederei Mond* of 23 March 1982, ECLI:EU:C:1982:107, I-01095. The commercial arbitration, in fact, originates in a contract and is aimed at resolving a dispute arising on the same; the involvement of the public authority is absent and the parties do not have an obligation—either in law or in fact—to refer the matter to the arbitrators, if not once they have agreed to insert the arbitration clause. It is considered that the tendency of the CJEU to exclude the postponement by courts of commercial arbitration is justified, in addition to the absence of the criteria mentioned above, also in light of the fact that, while excluding the postponement, the protection of the right Union is simply "delayed" in the sense that it can be guaranteed at the appeal stage. In this regard, the *Eco Swiss* judgment states that: "the arbitrators, unlike a national court, can not ask the CJEU to give preliminary rulings on matters relating to the interpretation of EU law. Now, the European legal order has manifestly an interest, in order to avoid future divergences of interpretation, to ensure a uniform interpretation of all the provisions of EU law, regardless of the conditions in which they will be applied (...) EU requires that questions concerning the interpretation of the prohibition set forth in art. 85, n. 1 of the Treaty can be examined by the national courts called to rule on the validity of an arbitration award and may be the subject, if necessary, of a reference for a preliminary ruling before the CJEU (...)", sentence: *Eco Swiss*, *op. cit.*, par. 40. See also: CJEU, C-377/13 *Ascendi Beiral Litoral* of 12 June 2014, ECLI:EU:C:2014:1754, published in the electronic Reports of the cases, par. 97-98. The *Ascendi Beiral Litoral* cases—which decided that tribunals in legally mandatory arbitration have the possibility of referring issues of EU law interpretation to the CJEU for a preliminary ruling—cannot be transposed to investment arbitration tribunals. For details see, R. CARANTA, G. EDELSTRAM, M. TRYBUS, *EU public contract law: Public procurement and beyond*, ed. Bruylant, Bruxelles, 2013.

<sup>295</sup>R. SCHÜTZE, *EU law*, *op. cit.*

<sup>296</sup>For more details and analysis see: F. NICOLA, B. DAVIES, *European Union law stories*, Cambridge University Press, Cambridge, 2017. J. USHERWOOD, S. PINDER, *The European Union. A very short introduction*, Oxford University Press, Oxford, 2018. J.L. DA CRUZ VILAÇA, *European Union law and*

was repeated in the Eco Swiss ruling from 1999<sup>297</sup> and again in the preliminary ruling *Guy Denuit and Betty Cordenier v. Transorient-Mosaique Voyages and Culture SA* from 2005<sup>298</sup>. Given this, it is now necessary to assess whether, in practice, these systems can operate and which, among all, is the one that most guarantees the aforementioned purpose, that is to guarantee the uniform and correct application of the EU law. Regarding the referral to CJEU, it is noted that, in general, this is the mechanism that, more than any other, guarantees the uniform and consistent application of EU law by the national courts of Member States. In the specific case of arbitration in relation to investments, it is questioned whether the arbitration investment courts can make the reference referred to in art. 267 TFEU, considering that this duty-faculty was excluded for the commercial arbitration courts. This is supposed, in light of the fact that the arbitration in the matter of investments-unlike commercial arbitration-has such peculiarities that could make it one of the jurisdictions for which the reference for a preliminary ruling as per art. 267 TFEU<sup>299</sup>.

More specifically, in the arbitrations now under discussion, questions relating to public law are raised-often, in fact, the conduct of a Member State is the subject of the dispute. These arbitrations, then, have their source in an international agreement concluded between two states and, also for this reason, the involvement of public authorities is clear. However, it does not appear that the public and non-private character, vice versa typical of commercial arbitrations, is sufficient to suggest that the arbitration boards in the field of investment are recognized powers, excluded from those that regulate a dispute in commercial matters. In favor of this conclusion, the jurisprudential interpretation of art. 267 TFEU<sup>300</sup> and, in particular, the concept of "court of a Member State" referred to by that provision. On the concept of belonging to a state legal system, the CJEU has established a series of conditions in the presence of which a court belongs to the national legal system.

In the *Parfums Dior case*, for example, the CJEU denied that the Board of Appeal could be considered a jurisdiction, pursuant to art. 267 TFEU. Although the CJEU acknowledged that the appeal body would have all the requirements identified by the European jurisprudence for the bodies referred to in art. 267 TFEU, however, noted that this College can not be considered as a court or a court of a State because "if it is true that the Chamber of Appeal was created by all Member States as well as the Union, it still constitutes a body of an international organization which, despite the functional links it has with the Union, remains formally distinct from the latter and from Member States"<sup>301</sup>. It would seem, therefore, that

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integration. Twenty years of judicial application of European Union law, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, Principles of European Union law, including Brexit, West Academic, Minnesota, 2017, pp. 278ss. R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, C.H. Beck, München, 2016. M. DECHEVA, Recht der europäischen Union, ed. Nomos, Baden-Baden, 2018.

<sup>297</sup>C-102/81, Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co KG of 23 March 1982, ECLI:EU:C:1982:107, I-1095. C-393/92, Gemeente Almelo et al. v. NV Energiebedrijf Ijsselmij of 27 April 1994, ECLI:EU:C:1994:171, I-1277, "(...) 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 judgement having regard to fairness, observe the rules of Community law, in particular those relating to competition law (...)"

<sup>298</sup>CJEU, C-125/04, *Guy Denuit and Betty Cordenier v. Transorient-Mosaique Voyages and Culture SA* of 27 January 2005, ECLI:EU:C:2005:69, I-00923, par. 16. R.WHISH, D. BAILY, Competition law, Oxford University Press, Oxford, 2012.

<sup>299</sup>J.USHERWOOD, S. PINDER, The EU. A very short introduction, op. cit.

<sup>300</sup>A. KACZOROWSKA-IRELAND, EU Law, op. cit.

<sup>301</sup>The CJEU has recognized the possibility for the Benelux Court to make the reference for a preliminary

the jurisdictional body belongs to a national system if it originates in the same-so it is foreseen and regulated in the national regulatory sources-and it respects the procedural and substantive rules. In other rulings, the CJEU has admitted the postponement by external courts constituted by an international agreement, in so far as they safeguard the uniformity of EU law and do not violate "the autonomy of the legal system of the Union"<sup>302</sup>. These are the cases, for example, of the Court of Benelux and the EFTA Court, to which the CJEU has recognized the status of Courts of a Member State<sup>303</sup>.

In these cases, the CJEU extended the operation of the referral mechanism, adopting a teleological interpretation of art. 267 TFEU<sup>304</sup>; irrespective of the source of the court, be it national or international, the latter can appeal to the CJEU because, even indirectly, it guarantees the correct and uniform application of EU law. From these assumptions, it follows that an arbitration court in the field of investments can not make the referral not being a jurisdictional body of a Member States or work to ensure the uniform application of EU law. The investment arbitration, in fact, respects autonomous rules from those of the national systems, different according to the procedure that is applied. In no case, such courts are subject to the control of the jurisdictional systems in which they act-if not after the enactment of the award through the appeal procedures-and the arbitrators are chosen with mechanisms and procedural rules other than those provided for the courts national. Moreover, the investment arbitrations concern disputes arising on an international agreement and, therefore, are not constituted with the sole purpose of ensuring between the parties the correct interpretation of EU law<sup>305</sup>. Consequently, it is hypothesized that even if the CJEU

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ruling because it has powers that are more similar to those of a national court of last instance, rather than a court external to the European system. Indeed, the Court of Benelux was established with the task of ensuring the uniformity of the interpretation of the common legal rules between the three Benelux States, in an interim proceeding to the main ones raised before the national courts of these three States: "To allow a court such as the Court of the Benelux, when it has to interpret rules of Community law in the exercise of its functions, to avail itself of the procedure provided for by art. Article 177 of the Treaty thus responds to the objective of that provision, which is to safeguard the uniform interpretation of EU law (...)", C-337/95 Sentenza del 4 novembre 1997, in causa 337/95, Parfums Dior v. Evora of 4 November 1997, ECLI:EU:C:1997:517, I-6013, par. 23.

<sup>302</sup>Against, S. HINDELANG, *Circumventing primacy of EU Law and the ECJ's Judicial Monopoly by resorting to dispute resolution mechanisms provided for in Inter-se Treaties?*, op. cit., pp. 180ss.

<sup>303</sup>F.A. MANN, *The consequences of an international wrong in international and national law*, in *British Yearbook of International Law*, 48, 1976-1977.

<sup>304</sup>See for analysis: C. NOWAK, *Europarecht nach Lissabon*, ed. Nomos, Baden-Baden, 2011. D. CHALMERS, G. DAVIES, G. MONTI, *European Union law*, Cambridge University Press, Cambridge, 2014. J. TILLOTSON, N. FOSTER, *Text, cases and materials on European Union law*, Gavedish Publishing, New York, 2013. M. HORSPOOL, M. HUMPHREYS, *European Union law*, Oxford University Press, Oxford, 2012, pp. 552ss. T. OPPERMANN, C.D. CLASSEN, M. NETTESHEIM, *Europarecht*, C.H. Beck, München, 2016.

<sup>305</sup>In general, it is noted that the intervention of third parties is variously accepted in the mechanisms of Member States dispute resolution: the art. 10.2 of the agreement on the rules and procedures governing the settlement of WTO disputes admits the participation of members as *amicus curiae*, art. 36.2 of the European Convention on Human Rights establishes that: "The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not The Statute of the International Court of Justice provides instead a limited third intervention in Article 63.2 of the Court, the norm admits only the intervention of interpretation of a part of the Treaty object of the controversy of which part. According to Lagrange: "(...) on observe une sensible dévaluation de la qualité de l'intervenant, pratiquement ravalé au rang de simple *amicus curiae* qui s'offrirait simplement d'épargner à la Cour, seule garante de l'intégrité de la fonction juridictionnelle, le soin de collecter des informations utiles à cet égard (...)". E. LAGRANGE, *Le Tiers à l'instance devant les juridictions internationales à vocation universelle*, E. RUIZ-FABRI, J.M. SOREL (a cura di), *Le tiers à l'instance devant juridictions internationales*, ed. Pedone, Paris, 2005, p.14. In reality, the role of friends *curiae* goes well beyond

has not yet expressly excluded the power of the arbitration investment courts to make the reference for a preliminary ruling pursuant to art. 267 TFEU there are no conditions for admitting it. Furthermore, it is noted that the recognition of the power of referral, in addition to being contrary to EU law and consistent European jurisprudence, would risk distorting the arbitral proceedings. The postponement implies, in fact, the suspension of the judgment of the judge/referee in question and binds him to the decision of the judge *ad quem*. The arbitration proceeding, on the other hand, is by its nature fast and not very procedural; moreover, the arbitrators are autonomous and third parties with respect to any legal system, not having their own jurisdictional forum<sup>306</sup>. Such guarantees would not apply if the latter were conditioned to comply with the rulings issued by a third judge. It must then be considered that, even if the primary EU law were amended to include the arbitral courts among those referred to in art. 267 TFEU, it is very likely that third countries would not agree to be bound by an international agreement in which a system of dispute resolution is envisaged including the referral to CJEU<sup>307</sup>. Finally, and to conclude, the arbitration practice has so far shown that the issues of EU law that may arise in litigation on an investment BIT do not imply knowledge of the arbitrator on fundamental principles of EU law or require him to give a binding and definitive interpretation of alleged violations of Union law. In all cases, in fact, the referees have ruled out that they must interpret the conduct of the respondent State in the light of EU law; the primacy and direct effect of EU law on Member States have not yet been called into question. Ultimately, therefore, it does not seem necessary, nor correct, to try to insert the arbitration investment courts among those referred to in art. 267 TFEU<sup>308</sup>.

## 16. Participation of European Commission in the role of *amicus curiae*.

The question is under what conditions, the participation of the EC in representing the Union can be justified in the arbitrations that touch even European interests; secondly, in light of the practice, it is necessary to evaluate to what extent the interventions of the executive can produce useful effects for the procedure<sup>309</sup>. With reference to the first question, it is noted

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that of simple collectors of information, dealing rather with interveners who can propose qualifications and interpretations of the case in point of judgment, making available to the referee their skills.

<sup>306</sup>E. LEVINE, *Amicus curiae in international investment arbitration: The implications of an increase in third-party participation*, in *Berkely Journal of International Law*, 19, 2011.

<sup>307</sup>A. KACZOROWSKA-IRELAND, *EU Law, op. cit.*

<sup>308</sup>R. SCHÜTZE, T. TRIDIMAS, *Oxford principles of European Union Law*, Oxford University Press, Oxford, 2018. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017, pp. 788ss. C. TIETJE, *The status of international in the European legal order: the case of international Treaties and non-binding international instrument*, in J. WOUTERS, A. NOLLKAEMPER, E. DE WET (eds.), *The Europeanization of international law: The status of international law in the EU and its Member States*, Cambridge University Press, Cambridge, 2008.

<sup>309</sup>The participation of *amicus curiae*, is not common practice, since these judgments are based on an arbitration agreement that involves only the parties that have signed it and that, for the effect, are the only ones to be able to take part in the proceeding. Unlike commercial arbitration, that of investment, involving a private party and a state, inevitably affects the public interests of the latter. In the specific case of proceedings arising from a European BIT, European public interests may also be relevant. Given this, it seems reasonable to assume the participation of the executive with the function of overseeing the procedure and the protection of European interests by the referees. The Commission is, in fact, the institution that can guarantee the superior interests of the Union, which may emerge during the arbitration proceedings, given that, by express provision of the founding Treaties, it has the task of "supervising the application of the Treaties". Article 17 TEU. On participation as an *amicus curiae* of the Union. See. S. MENETREY, *La Participation "amicale" de la*

that the participation of the EC depends on the procedural rules applied to the proceedings, in particular those governing the admission of the *amicus curiae*<sup>310</sup>. In ICSID<sup>311</sup> arbitrations, the reform of the rules of procedure introduced in 2006 codified the practice of participation of the *curiae* friends and art. 37.2 has provided that, subject to the conditions listed therein, third parties may take part in the proceedings by producing statements relating to a specific matter which is inserted in the context of the litigation. In particular, the third condition referred to in the aforementioned provision establishes that the college admits an *amicus curiae* if "the non-disputing party has a significant interest in the proceeding"<sup>312</sup>. This requirement could be the one that, in concrete terms, would allow to legitimize the intervention of the EC, which, in fact, boasts a relevant interest in all the proceedings in which a problem of EU law arises<sup>313</sup>. Coming to the rules of procedure of the arbitration administered, they provide for the participation of third parties only if they are parties to the agreement subject to the proceeding. In these cases, therefore, the possible participation of the EC can be admitted if the Union is part of the agreement under examination of the arbitrators. By way of example, in the ad hoc arbitrations conducted in compliance with the UNCITRAL rules, the old provision pursuant to art. 17.5-which admits the participation of third parties as *amicus curiae*, only if part of the Agreements subject to the dispute-will soon be replaced by the provision introduced by the new rules of transparency which admit the *amicus curiae*, without this limit<sup>314</sup>.

In light of the procedural rules, it seems that there are no procedural preclusions to the participation of the EC in the role of *amicus curiae*. This is also confirmed by recent arbitration practice. In the *Eureka* case, the EC was invited by the Court to intervene to present its position on the extinction of the BITs inter partes<sup>315</sup>. In the *Electrabel* case, the EC was authorized to present its observations on the applicability of EU law in an arbitration based on the Energy Charter Treaty. Furthermore, in the *AES* case, the EC it was able to

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Commission Européenne dans les arbitrages liés aux investissements intracommunautaires, in *Journal du droit International*, 137 (7), 2010.

<sup>310</sup>Art. 37.2 Rules of procedure ICSID: "(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding".

<sup>311</sup>*Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case ARB/10/25; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case ARB/10/15, Procedural Order No. 2, 26 June 2012.

<sup>312</sup>S. MENETREY, *La Participation "amicale" de la Commission Européenne dans les arbitrages liés aux investissements intracommunautaires*, op. cit.

<sup>313</sup>CPA, *Eureka v. The Republic Slovak*, op. cit., par. 175-196.

<sup>314</sup>Art. 17.5 UNCITRAL: "The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration".

<sup>315</sup>ICSID, *Electrabel v. Hungary*, op. cit., par. 1.6: "neither the Commission of the European Communities nor the EU are named or disputing parties to the arbitration proceedings. At its request and upon the invitation of the Tribunal, the European Communities made writtem representations to the Tribunal as a non-disputing party under art. 37.2 ICSID".

intervene to present its conclusions regarding the legitimacy of the concessions-rectius State aid<sup>316</sup>-recognized by the respondent State to the foreign investor in energy sales contracts<sup>317</sup>. Regarding the effects of the interventions of the curiae friends, it is maintained that even if the Courts are not obliged neither to accept nor to resume the observations of the third parties in their decisions, nevertheless they can be considered as effective tools to raise points and issues of rights that would otherwise be omitted or misinterpreted<sup>318</sup>. The intervention of a third party, be it an institution or a local body - as happens in the federal States-allows in fact to raise issues and aspects of the affair that the parties may not have an interest in introducing<sup>319</sup>. As an example, in the *AES* case it was the EC as amicus curiae, to raise the question of the alleged illicitity with respect to the EU law of the contract being the subject of the dispute. That question could not have been raised by the investor, who would have introduced an issue unfavorable to him, or by the respondent State which would have risked triggering the infringement procedure within the Union. In the pleadings filed, the EC has explained the reasons why the contracts between the parties-stipulated in the form of public private partnerships<sup>320</sup>-would be contrary to the provisions set forth in articles 101 and 102 TFEU<sup>321</sup> in the part in which they recognize economic benefits to the investor<sup>322</sup>. The EC, highlighting the unlawfulness of the relationship, has brought out the distortive consequences that could have arisen from its maintenance in force, contrary to the European

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<sup>316</sup>European Commission decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania.

<sup>317</sup>ICSID, *AES v. Hungary*, op. cit., par. 3.18.

<sup>318</sup>A.K. BJORKLUND, The participation of sub-national government units as amici curiae in international investment disputes, in C. BROWN, K. MILES (eds.), *Evolution in investment treaty law and arbitration*, Cambridge University Press, Cambridge, 2011, pp. 299ss.

<sup>319</sup>As regards the value of the memoirs presented by the Curiae friends in the proceedings, it is noted that in the *Eureko* case the Court ruled that the Commission's memoirs have the same value as those presented by the parties, in fact: "(...) the Tribunal has considered carefully the submissions made by the parties, as well as the observations of the [...] and of the European Commission, all of which were helpful and for all of which the Tribunal thanks their respective authors. All of the points made in those submissions have been taken into account by the Tribunal even though it is not necessary to address and decide in turn each and every one of these observations and submissions." *CPA, Eureko v. The Republic of Slovakia*, op. cit., par. 217. In the case of *AES*, the pleadings filed by the Commission are not included in the procedural documents, however: "(...) the Tribunal also acknowledges the efforts made by the European Commission to explain its own position to the Tribunal and has duly considered the points developed in its amicus curiae brief in its deliberations". ICSID, *Aes v. Hungary*, op. cit., par. 8.2.

<sup>320</sup>L.E. PETERSON, European Commission seeks to intervene as amicus curiae in ICSID arbitrations to argue that long-term power purchase agreements between Hungary and foreign investors are contrary to European Community Law, in *Investment Arbitration Reporter*, 17 September 2008, pp. 14ss.

<sup>321</sup>C-567/14, *Genentech Inc. v. Hoechst GmbH*, formerly *Hoechst AG and Sanofi-Aventis Deutschland GmbH* of 7 July 2016, ECLI:EU:C:2016:526, not yet published, par. 66. In particular the CJEU asked whether Article 101 TFEU should be interpreted "as precluding effect being given, where patents are revoked, to a licence agreement which requires the silence of the CJEU on the compatibility of the minimalist standard of review applied by some domestic was received with a sign of relief from the part of the arbitration community holding minimalist views

<sup>322</sup>It is noted that the Commission could have raised the issue of illegality elsewhere, thereby activating an internal infringement procedure against Hungary, the defendant State. However, the infringement procedure takes some time and before reaching a conclusion the decision of the Arbitration Committee could be issued, possibly contrary to EU law. Since this was an ICSID proceeding, the award should have been automatically recognized and since the ICSID rules do not provide for the exception of the public interest as an impediment to enforcement, a Member State might have been able to carry out on its territory a lodopararily contrary to European law. Hence the importance of having the Commission intervene directly in the arbitral proceedings.

competition law<sup>323</sup>.

EC's intervention seems therefore justified in the light of a higher interest, which is independent of the specific case and which concerns the inadmissibility, for EU law, of the maintenance in force of agreements contrary to it. Obviously, the position of EC does not change the referee's perspective, which is always oriented to qualify a conduct in the light of the source that regulates the relationship. However, it is believed that the intervention of a third party, in this case EC, can be useful for framing the case in its broad context which, in the case of arbitrations concerning european BITs, involves three systems, international, european and national. The jurisprudential practice shows the tendency to admit the participation of EC in the role of *amicus curiae*; if this continues to be, the presence of EC could make up for the foreclosure of the arbitral courts to make the reference to CJEU.

In this regard, it is also hypothesized that, should both solutions-referral and participation be admitted as *amicus curiae*-this second option would be the preferred option, since it produces the same results, therefore the uniform application of EU law, but preserves the typical characteristics of the arbitration procedure. The participation of an *amicus curiae*, in fact, does not impose the suspension of the judgment, lengthening the timing and complicating the procedure. The involvement of friends *curiae* is simpler and more direct and leaves the arbitrator the autonomy to decide the dispute, without being bound by the pronouncement of another judge. On the other hand, the mechanism of the preliminary ruling works very well and is justified in an integrated system, such as the european one, which is based, *inter alia*, on the principle of loyal collaboration between States and Institutions-and on the mutual recognition of judged. In other words, this tool works in a system that also supports thanks to a juridical corpus prepared and accepted by all the contracting parties and that therefore must be valid and be interpreted for all in the same way. Inevitably, such effects need not be guaranteed when the court is an arbitrator. Rather, the relationship established between the arbitration boards and EC is the one that best guarantees the autonomy of the referees; the intervention of the executive is, in fact, of an assistance type in the sense that it helps the referee to qualify and define difficult questions "*compte tenu de leur complexité en droit et en fait*"<sup>324</sup>. Lastly, it should be noted that the admission of the EC intervention should be encouraged also because it mitigates the risk, on several occasions, of conflicts between different legal regimes that can be referred to in arbitration proceedings<sup>325</sup>. The investment law should, in fact, evolve and be interpreted in a manner consistent not only with the provisions of international law, including fundamental rights and environmental law, but also with EU law, obviously for those parties that protect interests higher or, more generally, of system<sup>326</sup>. For all these reasons it is believed that EC's participation as *amicus curiae* is the mechanism that, better than others, guarantees *ex ante*, compliance with EU law<sup>327</sup>.

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<sup>323</sup>M. BOTTA, Comment on "genentech". The arbitrability paradox in EU competition law, in *International Review of Intellectual Property and Competition Law*, 38 (2), 2017, pp. 237ss.

<sup>324</sup>C. BLANKE, G. NISSER, ICC draft best practice note on the European Commission acting as *amicus curiae* in international arbitration proceedings, in *European Business Law Review*, 19, 2008, par. 30.

<sup>325</sup>U. PETERSMANN, Justice as conflict resolution: Proliferation, fragmentation, and decentralization of dispute settlement in international trade, in *University of Pennsylvania Journal of International Law*, 27, 2006, pp. 274ss.

<sup>326</sup>A. VAN AAKEN, Fragmentation of international law: The case of international investment protection, University of St. Gallen Law School, Law and Economics Research Paper Series, Working Paper No. 2008-1, 2008.

<sup>327</sup>M. BURGSTALLER, Investor-State arbitration in EU international investment agreements with third States,



### 17.(Follows) The risk of abuse of appeals.

Two types of ex post control can be hypothesized: the first is carried out through the recognition and execution procedures, as well as with the beginning of a cancellation procedure; the second one is activated after, or independently from the first one, and coincides with the EC opening of an infringement procedure against the defaulting Member State. The first type of ex post supervision works as long as there are two competing conditions: the rules of arbitration procedure must allow the use of national courts for the recognition and execution of the awards; these proceedings must then be initiated before the courts of a Member State. In the presence of these conditions, this monitoring allows in fact a double check. In one sense, the national court, within the limits of the procedural rules of its legal system, can reject the request for recognition or enforcement if it detects the existence of one of the impeding conditions referred to in art. V of the New York Convention of 1958<sup>328</sup>, among which there is the opposition to public order in the country in which the award must be recognized or executed. The New York Convention aims at eliminating the need for judicial confirmation of the award preliminarily to the enforcement procedure (so-called "double exequatur"); at restricting the grounds for refusal of enforcement of awards; and at shifting to the resisting party the burden of proof of the validity of the award. With this respect the New York Convention is the principal standard for enforcement, replicated in other regional agreements, in the UNCITRAL Model Law and in domestic laws<sup>329</sup>.

The national court of a Member State can therefore assess the conformity of the award in the light of national and european public order<sup>330</sup>. In the other, the national courts have the right-

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in Legal Issues of Economic Integration, 39 (2), 2012, pp. 2078ss. A. DIMOPOULOS, The validity and applicability of international investment agreements between EU Member States under EU and international law, op. cit.

<sup>328</sup>R.P. ALFORD, The convergence of international trade and investment arbitration, in Santa Clara Journal of International Law, 12, 2014,

<sup>329</sup>See ex multis, A.J. VAN DEN BERG, Should the setting aside of the arbitral award be abolished?, in ICSID Review of Foreign Investment Law Journal, 29 (2), 2014, pp. 263ss. E. FRIEDMAN, Enforcement of international arbitration awards in New York: If you take them there, you can collect from anywhere, in Arbitration International, 27 (4), 2011, pp. 576ss. S.C. CHANG LENG SUN, T. WEIYI, Making arbitration effective: Expedited procedures, emergency arbitrators and interim relief, in Contemporary Asia Arbitration Journal, 6, 2013, pp. 350ss. S. WILSKE, Collective action in investment arbitration to enforce small claims-Justice to the deprived or death knell for the system of investor-State arbitration?, in Contemporary Asia Arbitration Journal, 5 (2), 2012, pp. 166ss. R.P. ALFORD, The convergence of international trade and investment arbitration, op. cit. C. LEVESQUE, "Correctness" as the proper standard of review applicable to "true" questions of jurisdiction in the set-aside of Treaty-based investor-State awards, 5(1) in Journal of International Disputes Settlement, 5 (1), 2014, pp. 70ss. L.A. MISTELIS, Award as an investment: The value of an arbitral award or the cost of non-enforcement, in ICSID Review of Foreign Investment Law Journal, 28 (1), 2013, pp. 64ss. B.C. ROSENBERG, The intersection of international trade and international arbitration: The use of trade Benefits to secure compliance with arbitral awards, in Georgetown Journal of International Law, 44 (2), 2013.

<sup>330</sup>CJEU, C-41/74, Van Duyn of 4 December 1974, ECLI:EU:C:1974:133, I-01337. In the Boucherau case, then, it was stated that: "the reference to the notion of public order can be invoked when in addition to the disturbance of the social order inherent in any infringement of the law, the existence of an actual and quite serious threat to one of the fundamental interests of the Community (...)", par. 35; C-30/77, Regina v. Boucherau of 27 October 1977, ECLI:EU:C:1977:172, I-01999. See, J.L. CLERGERIE, A. GRUBER, P. RAMBAUD, L'Union européenne, ed. Dalloz, Paris, 2014, pp. 543-545. M. DONY, Droit de l'Union européenne, Bruxelles, Editions de l'Université de Bruxelles, 2014. J.C. GAUTRON, Droit européen, Dalloz,

which becomes mandatory for those of last resort-to refer the matter back to the CJEU. In this circumstance, the foreclosure of the arbitrators to bring the CJEU when a question of interpretation or application of EU law arises, is superseded by the reference to the latter, made by the national courts.

The aforesaid ex post remedy is the one that most guarantees the uniform application and enforcement of EU law. Firstly, the remedy is ineffective if courts of a third country are appealed: in these cases there is a risk that the latter will not apply EU law-since they are not bound by it-or, noting the need to refer to the concept of order european public, apply it incorrectly, without mechanisms to correct the judgment. Secondly, there is a risk that the unsuccessful party of the arbitral judgment will abuse the appeal proceedings, trusting that the national proceedings will have a more favorable outcome. This recent type of "abuse" confirms the recent judgment incardinated by the Slovak Republic, unsuccessful in the *Eureka* ruling<sup>331</sup>, ahead of the Frankfurt am Main Court. In the judgment of 12 May 2012, the German national courts rejected the appellant's claims, seeking the annulment of the award, challenged for lack of jurisdiction of the arbitrators and the incompatibility of the arbitration clause with EU law. The latter, in fact, would have legitimized foreign jurisdictional bodies to apply and interpret EU law, an activity which, on the other hand, would compete exclusively with the CJEU. The judges in Frankfurt, on the other hand, reiterated the position of the arbitration panel on the legitimacy of the arbitration proceedings conducted within the Union<sup>332</sup>. They then confirmed the jurisdiction of the arbitrator by mentioning, among many reasons, that art. 344 TFEU<sup>333</sup> is not applicable to proceedings arising between Member States and investor. Likewise, they excluded the opposition to the european arbitration clause by confirming its validity. The CJEU sentence is now the subject of scrutiny by the German Federal Court which, on 19 September 2013, issued an order rejecting the claims of the plaintiff again<sup>334</sup>.

CJEU has not established the merits, highlighting, in essence, the absence of an interest in acting for the Slovak Republic. The partial award, issued on October 26, 2010, object of an appeal before the German national courts, has in fact been replaced by a definitive award. From this it follows that an eventual ruling on the proposed appeal would be useless given. In other words, even if the Court upheld the appeal, the national judgment would be ineffective since the inter partes relationship has already been regulated by the definitive award, made on 7 December 2012. The ruling marks a point in favor of investors; however, it would like to point out that the appeal to the appeals could encourage Member States, unsuccessful in arbitration proceedings, to introduce actions for annulment to challenge the

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Paris, 2012, pp. 24ss

<sup>331</sup>Eureka B.V. v. The Slovak Republic, op. cit.

<sup>332</sup>Tribunal of Frankfurt am Main, 26 SchH 11/10, 10 May 2012.

<sup>333</sup>In case C-459/03, European Commission v. Ireland (Mox Plant) of 30 May 2006, ECLI:EU:C:2006:345, I-04635, parr. 123-132, the CJEU held that this provision covers Member State-Member State disputes that concern the interpretation and application of EU while in opinion 2/13 the Court argued that the possibility of the European Court of Human Rights to hear disputes between EU Member States undermines the requirement set out in Art. 344 TFEU. The IST in *Achmea v. Slovakia*, the Higher Regional Court of Frankfurt, and the BGH all held that Art. 344 TFEU did not cover investor-Member State disputes. And in opinion 1/09 on the European Patent Court, the Court held that Art. 344 TFEU did not cover disputes between private parties, since the prohibition is aimed at Member States. In argument see: Ø. JOHANSEN, The reinterpretation of TFEU Article 344 in Opinion 2/13 and its potential consequences, in *German Law Journal*, 16, 2015, pp. 169ss.

<sup>334</sup>ICSID, Decision of ad hoc Committee on the cancellation proceedings, in case ARB/07/22, *AES v. Hungary*, op. cit.

lack of jurisdiction of the arbitrators outside the arbitral tribunals. From this arises the risk that the national courts involved-if not the CJEU-can come to conclusions opposite those of the referees, denying, perhaps, the jurisdiction of the latter. Given that the action for annulment is a right, in so far as the conditions that legitimize it exist, CJEU could, at least, highlight the abuse by the appellant, having established a judgment aimed exclusively at evading an award opposed to it, in fact re-proposing the same exceptions raised in the arbitration proceedings and in that office already exhausted. CJEU itself has established that the invalidity of an arbitration clause for contrasting with EU law must be pronounced by the said Board of Auditors or by the national court only if the EU violation is qualified as a rule of public order.

It should be noted, then, that if such a trend began, then if appeal proceedings were developed, arbitration awards would risk losing the characteristic of finality and constraint, which should instead be their own. As for the second type of appeal *ex post*, this is presented as a garrison for the praise that can not be challenged before national courts. In this regard, it is noted that the praise issued following ICSID proceedings is precluded by the recognition and enforcement proceedings; in fact, the principle of automatic recognition between States party to the Washington Convention of 1965 is in effect and, in such hypotheses, the execution is carried out according to the rules of procedure of the State in which it is requested. Likewise, the appeal in annulment-if there is one of the conditions set forth in art. 52 of the aforementioned Convention-an *ad hoc* Committee is resolved, which obviously is precluded by the deferral referred to in art. 267 TFEU<sup>335</sup> but that, nevertheless, it can refer to EU law. From these considerations derives another reason why the national courts have, in fact, few opportunities to resolve a conflict between european and international obligations. In the appeal judgment of the AES award-introduced following an arbitral judgment instituted before an ICSID tribunal-the appellant claimed that "the question of legality under the law of the United Kingdom has been raised at the hearing and having received substantial attention in their written submissions. According to *AES*, the evidential weight that would be found in the outcome-determinative issue"<sup>336</sup>. The *ad hoc* Committee did not accept the appellant's objection and denied the reference to EU law, specifying that, even if it had been applied, the outcome of the negative dispute for the actress-company would not have changed. More specifically, the *ad hoc* Committee has argued that "Hungary has been motivated to reintroduce price regulation with a view to addressing the EC's state of aid concerns, there is no doubt that this would have constituted a rational public policy measure"<sup>337</sup>.

In these hypotheses, in order to guarantee the correct application and interpretation of EU law also for these praises, the establishment of an internal control of the Union on the initiative of the EC is assumed. The european executive, in exercising its supervisory powers, is in fact entitled to start infringement procedures-regulated by articles 258-260 TFEU<sup>338</sup>-against states that make an ICSID award-hence not challenged before a national

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<sup>335</sup>J. USHERWOOD, S. PINDER, *The EU. A very short introduction*, op. cit.

<sup>336</sup>M. BURGSTALLER, *Investor-State arbitration in EU international investment agreements with third States*, op. cit.,

<sup>337</sup>According to Burgstaller "because even ICSID award may end up before the ECJ, arbitral Tribunals concerned about the enforceability of their awards are well advised to take EU law into account (...)". M. BURGSTALLER, *Investor-State arbitration in EU international investment agreements with third States*, op. cit., pp. 474ss.

<sup>338</sup>P. JAN KUIJPER, J. WOUFERS, F. HOFFMEISTER, *The law of EU external relations: Cases, materials and commentary on the EU as an international legal actor*, op. cit., M. DERLÉN, J. LINDOLM, *The Court of*

court-contrary to EU law. Regardless of the appeal before a national court, with the possibility of referral to the CJEU, this procedure can also ensure the correct and uniform application of EU law<sup>339</sup>. In practical terms, it is assumed that if and when the decision of the ad hoc committee in the *AES* case is presented before a national court to obtain its execution, the EC may commence the above proceedings if it finds that the requested enforcement state has performed an award contrary to EU law<sup>340</sup>.

According to our opinion, the fears of incorrect application and interpretation of EU law by arbitrators' parties are unfounded. The ex ante and ex post controls can, as illustrated, guarantee Union law even in cases where the latter is the object of application by arbitrators, therefore by foreign jurisdictional bodies. Among all those that can be experienced, it is believed that EC participation, wherever possible, represents the desirable solution since, unlike ex post remedies, it allows to solve the question of the correct and uniform application of EU law within the arbitration phase. Therefore, the intervention of the executive in the arbitration proceedings increases the chances that an award will be reached in all its parts in conformity with the law of the Union and, at the same time, reduces the need to activate judgments of cancellation or to find obstacles for recognition and the execution of the award. This ensures greater certainty and stability of the lodi-rectius the definitiveness of the relationship between the parties-that vice versa can not be had when the conditions and conditions exist for activating appeal procedures or for hindering recognition and execution of the praises.

## 18. Concluding remarks and outlook.

The main problems that may arise from the arbitration proceedings concerning an intra-EU and non-EU BIT, as well as those relating to an agreement stipulating the EU have been identified-without claiming to be exhaustive. Therefore, it was a matter of purely procedural issues-with regard to the party that has the right to be judged and on which the financial and system-responsibility lies with regard to the compliance of the arbitration clause with EU law and its validity. As for the applicable law, on the other hand, it has been attempted to show that the multifaceted essence of EU law allows the referees to refer to more than one title, then as part of national, international or even, finally, autonomous legal corpus. The correct application and uniform interpretation of this right are guaranteed-we have seen it-both during the arbitration proceedings-with the participation of the EC as amicus curiae-and by activating the subsequent control of national forums and also, if necessary, of the CJEU, realizing in this way the dialogue between the Courts, external and internal to the EU. The starting point of the reflections carried out is found in the need not to give up arbitration proceedings as a way of resolving disputes governed by European investment agreements. The recognition of the Union's competence in the field of investments can not, in fact, de-legitimize recourse to arbitration courts by devolving jurisdiction on the matter to

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Justice of the EU: Multidisciplinary perspectives, op. cit.,

<sup>339</sup>Tribunal ICSID, Decision of ad hoc Committee on the cancellation proceedings, in case ARB/07/22, *AES v. Hungary*, op. cit., par. 172.

<sup>340</sup>“ (...) if the fallacious application of EC law by the arbitral tribunal, or its failure to apply EC law at all, however, results in EC law being rendered ineffective in a given case, again nothing prevents the Commission from initiating proceedings against a Member State which, in execution of the award, would be acting in violation of EC law (e.g. by paying out an illegal subsidy promised to the investor) (...)”. T. EILMANSBERGER, *Bilateral investment treaties and EU Law*, in *Stockholm International Arbitration Review*, 2008, pp. 49.

the CJEU. The competence of the latter includes "the internal and external delimitation of the Union's legislative power, the verification of its correct implementation by the European Institutions, that of the respect of the relative *acquis* by Member States"<sup>341</sup>. It does not impose itself, however, in those reports that the parties, in accordance with their recognized freedom, have decided to devolve to foreign courts, such as arbitration, and even in relations involving a Member States and a foreign investor. In fact, in this sector there is no monopoly of the CJEU. With regard to the antinomies that may arise between the rules of different legal systems referred to in the arbitration proceedings, it has been seen that the arbitrator has the hermeneutic-interpretative tools to resolve them, favoring a conciliatory interpretation or mediating between conflicting forecasts. , through a restrictive interpretation. If conciliation is not possible, however, the judging panel is forced to make one source prevail over the other. In this case, it must hypothesize a hierarchy of sources and apply the one that is superior by protecting, however, the autonomy of the systems of belonging, so as to avoid transferring principles from one to the other.

The CJEU has supported the EC's view that the EU competition law has extraterritorial effect<sup>342</sup>. The adjudicator has to determine which of the involved overlapping competition law disciplines should be applied to solve the case. What makes this issue especially important is the fact that the competition law regime that results from the solution of the conflict of law question will substantially determine whether or not there is a breach of competition law, namely it will determine who wins the dispute. For instance, if the arbitrators apply the US antitrust law there will be no breach of law, while if the law applicable is the EU competition law the conduct could be considered anticompetitive. The CJEU needs to guarantee the uniform application of EU law also when it is applied by arbitral tribunals. The EU legal system allows the antitrust arbitrability counting on the fact that the involved public policy interests can be safeguarded by national courts during the second-look review of the award. This *ex post* control tool is employed to validate the conduct of arbitrators as emerging from the arbitral award. If arbitrators cannot refer cases to the CJEU for preliminary ruling, it may be difficult for them to meet the requirements of the extended second-look review. when arbitrators are facing a legal issue that requires a CJEU preliminary ruling, the effectiveness of their award may be limited and may be at risk the very essence of the arbitrability principle expressed above. Arbitrators have the power to decide whether mandatory norms are applicable or not and at the same time cannot assess whether a preliminary ruling is needed. Hence, during the second-look review of the award, a national court has to examine the arbitrators' application of EU Law. The review can be performed in the context of any method of recourse available under the relevant national legislation and most importantly it has to inquire whether a preliminary ruling is necessary

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<sup>341</sup>. M. BURGSTALLER, *Investor-State arbitration in EU international investment agreements with third States*, op. cit.,

<sup>342</sup>CJEU, 48/69, *Imperial Chemical Industries Ltd v. Commission (Dyestuffs)* of 14 July 1972, ECLI:EU:C:1972:70, ECR 619, which starts the single economic entity doctrine and considers three non-EU undertakings liable for price-fixing with effects in EU market through their subsidiaries; see also from the CJEU the case 89/85, *Ahlström Osakeyhtiö v. Commission (Wood Pulp)* of 27 September 1988, ECLI:EU:C:1988:447, I-05193 parr. 11-23. For details see: J. BASEDOW, S. FRANCO, L. IDOT, *International antitrust litigation: Conflict of laws and coordination*, Hart Publishing, Oxford & Oregon, Portland, 2012. W. VERLOREN VAN THEMAAT, B. REUDE, *European competition law. A case commentary*, Edward Elgar Publishers, 2018. M. LORENZ, *An introduction to EU competition law*, Cambridge University Press, Cambridge, 2013. A. ALBORS-LLORENS, *European competition law and policy*, ed. Routledge, London & New York, 2012, pp. 123ss.

to decide the case.

The recognition of the supremacy of a supranational source on the other can not, therefore, derive by applying an internal perspective to only one of the European or international legal systems. Hence the foreclosure to assert the principles of direct effect and the primacy of EU law that apply only to the internal EU system. In some circumstances, then, the prevalence of a source can be recognized by detecting the existence of impedimental reasons that have a general value and transnational applicability, such as to make one prevail over another. It has therefore been hypothesized that the violation of an international treaty source may be legitimate if, and in so far as, it is put in place to protect European public order. Moreover, the arbitrator, as a judicial body untied by any legal system, can be placed in charge of a supranational public order that is emphasized during the proceedings. In other words, it is proposed that the arbitrator can legitimize the conduct of a Member State that is in contrast with an international obligation, but to guard European public order. There is therefore no reason to deny that the arbitration courts exercise their jurisdiction even by operating a check on compliance with the principles of their European public order. Moreover, even if we want to deny the postponement - we do not know with what legal arguments-European public order, it must be emphasized that the national one is also supplemented by supranational principles and of European origin. Directly or indirectly, the reference to the principles of European public order is therefore legitimate by the referees. This is also assumed by noting that a control carried out by the *ex ante* referees, therefore pending the proceedings, avoids the annulment or the non-recognition of the award for violation of the public order. All the issues raised have a common assumption, identified in the relationship between the legal systems, whose rules are applied in the arbitration proceedings. Only by framing the relationship between legal systems has it been possible to hypothesize solutions to the problems dealt with.

In this regard, as is the case in the national legal systems, which have elaborated their theories-adopting a monist or dualist approach-to justify the opening of supranational legal systems, it is observed that the relationship between the international legal system and the European one can be inserted into theoretical-conceptual schemes<sup>343</sup>.

The relationship between two systems is framed by considering three aspects: the validity, the direct effect and the acknowledged supremacy of the rules that migrate from one system to another. The purpose of every conceptual scheme has always been to identify a last-the Grundnorm conflict rule-that can resolve the antinomies that arise between two or more legal systems. In the past the concepts of monism and dualism have been elaborated; both are now obsolete because, by implying the subordination of one system to another, they do not take into account the increasingly common overlap and interconnection of supranational legal systems, developing also new concepts within which the relationship between different legal systems can be subsumed: we speak of constitutionalism or pluralism<sup>344</sup>.

The legal systems are placed on a multilevel structure that rests on a common basis, which encompasses the fundamental principles and values, and the relationship between them is

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<sup>343</sup>According to Von Bogdandy: "(...) monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law (...) from a scholarly perspective they are intellectual zombies", A. VON BOGDANDY, *Pluralism, direct effect and the ultimate say: on the relationship between international and domestic constitutional law*, op. cit., pp. 400ss.

<sup>344</sup>Z. BURLEY, *The idea of arbitration*, in *Yearbook of Arbitration & Mediation*, 7, 2015, pp. 356ss. K. FACH GOMEZ, *Enforcing global law: International arbitration and informal regulatory instruments*, in *The Journal of Legal Pluralism and Unofficial Law*, 47, 2015. J. PALSSON, *Arbitration in three dimensions*, in *International & Comparative Law Quarterly*, 60 (2), 2011, pp. 292ss.

configured in terms of hierarchy, not of supremacy. The constitutional vision identifies the existence of a structure on three levels, in which it frames the relationship between EU law, international law and national rights "there exist a hierarchical superior value system across different regimes which can reduce the potential for inter-regime regulations conflict"<sup>345</sup>. This approach reconstructs a systemic unity around a complex of fundamental norms and principles, based on the relationship between the legal systems. Constitutive approach therefore recognizes a higher rank to some norms, because of the values they protect. This theory stems from the study of the constitutional Member States of the EU which, first, was opposed to the authority of the Constitutional Charts of individual Member States. Therefore, it is not the international, regional or national provenance-system of a standard that defines its level, but the values it bears. Rather, there is a hierarchically superior order of values that resolves conflicts between the predictions of two legal systems. In other words, "constitutional pluralism recognizes that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confine of the international law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of States (...)"<sup>346</sup>.

According to the pluralistic framework, however, the legal systems are integrated and placed all on a horizontal level: the strength and role of the rules depend on the system from which they derive. The pluralist approach shares with the dualist one a presupposition: the separation and distinction between legal systems, without this signifying that the two systems "pass by, ignoring themselves as ships in the night"<sup>347</sup>. Since the systems must be seen as autonomous and separate, the norms of one can not automatically access the other. Although it is difficult to get out of this hierarchy, it is important to note the tendency, proper to pluralism, to look at the substance of the rules and the level of protection they offer to the individual. Taking up again the jurisprudential practice of the CJEU, it is observed that in the *Intertanko*<sup>348</sup> and *Kadi* cases<sup>349</sup> the CJEU resolved the conflict by looking at the content of the norms rather than bringing down the prevalence of one over the other, by reason of the origin. In the first case, he resolved the issue considering the international nature of the WTO agreement<sup>350</sup>; in the second, reconstructing the presumed hierarchy among the United Nations-EU systems. In the event of an antinomy, the norm that offers

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<sup>345</sup>E. DE WET, The role of European Courts in the development of a hierarchy of norms within international law: Evidence of constitutionalisation?, in *European Constitutional Law Review*, 12, 2009, pp. 285ss.

<sup>346</sup>E. DE WET, The role of European Courts in the development of a hierarchy of norms within international law: Evidence of constitutionalisation?, op. cit.

<sup>347</sup>N. WALKER, The idea of constitutional pluralism, in *EUI Working Paper, LAW*, 2002, pp. 27.

<sup>348</sup>CJEU, C-308/06 of 3 June 2008, ECLI:EU:C:2008:312, I-04057. For details see: M. CREMONA, A. THIES, *The European Court of Justice and external relations law: Constitutional challenges*, Hart Publishing, Oxford & Oregon, Portland, 2014. M. CREMONA, H.W. MICKLITZ, *Private law in the external relations of the EU*, Oxford University Press, Oxford, 2016. D. PATTERSON, A. SÖDERSTEN, *A companion to EU law and international law*, Wiley Blackwell, New York, 2016, pp. 57ss.

<sup>349</sup>CJEU, joined cases: C-415/05 P, *Kadi & Al Barakaat Int'l Foundation v. Council* of 8 November 2008, op. cit.

<sup>350</sup>See in particular: S. LI, Convergence of WTO dispute settlement and investor-State arbitration: A closer look at umbrella clauses, in *Chicago Journal of International Law*, 19 (1), 2018, pp. 198ss. E. BROOKS, E. ALLENI, T. SOAVE, Jurisdictional overlap in WTO dispute settlement and investment arbitration, in *Arbitration International*, 30 (1), 2014, pp. 4ss. G. VIDIGAL, Re-assessing WTO remedies: The prospective and the retrospective, in *Journal of International Economics Law*, 16, 2013, pp. 506ss, "(...)although it would be beyond the current powers of WTO adjudicators to grant reparation, this does not exhaust, the possibilities of "retrospective" remedies (...)" L.E. SALLES, A deal is a deal: Party autonomy, the multiplication of PTAs, and WTO dispute settlement, 16 in *Questions of International Law*, 16, 2015, pp. 15ss.

greater protection prevails and is set up to protect higher values. The pluralistic view seems to be more persuasive. Pluralism focuses on the interaction between legal systems not by seeking the ultimate rule of conflict, but by balancing the values defended by conflicting norms.

The relationship between international and EU law can therefore be framed in the structure of the pluriversum which, by reformulating the concept of universum and the doctrine of direct effect<sup>351</sup>, advances as hypothesized, for a balancing of constitutional principles rather than a search for the hierarchy between legal orders. Therefore, the concept of direct effect is put aside, where it is not possible to interpret the rules in order to find a composition between the two supranational legal systems, it is necessary to balance the constitutional principles of the conflicting rules. Equilibrium, therefore, instead of hierarchy between legal systems.

The antinomy between norms becomes in this sense a conflict between the substantial rights that they defend. The task of the jurisdictional bodies is to balance the interests at stake, making prevail the provision placed to oversee higher interests.

Applying the theory to the practice one can expect that the arbitrators, called to resolve the antinomies between two legal systems, in case of non-modular conflict, apply the norm whose violation would prejudice higher values. The arbitrator can then decide now to apply the law that protects the investor, now to legitimize the conduct of the State as a defense of values that, even if not part of the public order, are still higher than the rights recognized in the investor. The arbitrator is entitled to argue in this sense and then to decide to apply one rule or the other in the light of the values that the same defends, despite being a court "without forum"<sup>352</sup>. Regardless of belonging to a forum, the arbitrator is in fact called to resolve conflicts by looking at the sources mentioned during the dispute. No source precludes the possibility of making the one that protects higher interests prevail. As noted, "in a period of interdependence of the various legal systems, the classification of sources of law should no longer be the main criterion of the disciplinary identity: "international public law", "Union law" or "national law"<sup>353</sup>. Therefore, direct foreign investment should therefore no longer be regulated as an autonomous part of the various legal sources, but as an interconnected part so as to favor compliance with the principles of public order that are found in each source.

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<sup>351</sup>A. BERSKI, Which doctrine has had the bigger impact on EU law, direct effect or supremacy? Report prepared for School of Languages, Law and Social Sciences, Dublin Institute of Technology, 2016. K. LENAERTS, Direct applicability and direct effect of international law in the EU legal order, in I. GOVAERE, E. LANON, P. VANELSUWEGE, S. ADAM, The EU in the world. Essays in honour of Marc Marescheu, ed. Brill, The Hague, 2013, pp. 48ss. *J. USHERWOOD, S. PINDER, The EU. A very short introduction, op. cit.*

<sup>352</sup>M. CREMONA, A. THIES, The European Court of Justice and external relations law: Constitutional challenges

<sup>353</sup>A. VON BOGDANDY, Pluralism, direct effect and the ultimate say: on the relationship between international and domestic constitutional law, *op. cit.*,